

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

**IN THE MATTER OF REVOCATION OF LETTERS OF ADMINISTRATION TO THE
ESTATE OF THE LATE SSEGUJJA PETER (DECEASED)**

MISCELLANEOUS APPLICATION NO. 234 OF 2013

ARISING OUT OF CIVIL SUIT NO. 151 OF 2013

ALL ARISING FROM AC 779 OF 2012

- 1. HILDA NAGUJJA**
- 2. NASANGA PRISCILLA (17 YEARS)**
- 3. NAKANDI JOY**
- 4. NASSOZI BERNA.....**
.....**APPLICANTS**
(2nd, 3rd & 4th applicants suing through a next friend Ssozi George William)

VERSUS

- 1. SSEGUJJA KIGONGO ANDREW**
- 2. BATTE HUMPHREY CLAIVE**
- 3. NASANGA EVE**
- 4. IBRAHIM HAMZA.....**
RESPONDENTS

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by chamber summons brought under section 98 of the Civil Procedure Act cap 71, and Order 41 rules 1, 9 & 39 of the Civil Procedure Rules (CPR). It seeks orders that a temporary injunction doth issue restraining the respondents, their agents, those acting under their instructions, servants and/or employees from evicting the applicants, transferring, alienating, disposing and any other dealings in and interfering with the quiet possession of the applicants and their caretaker Hadija Nakayenga at their residence at Ggaba pending the determination of the main suit; and that costs of the application be provided for.

The application is supported by the affidavit of **Hilda Nagujja** the 1st applicant. It was opposed by the respondent who filed two affidavits in reply sworn by the 1st and 2nd respondents. Counsel filed written submissions within time schedules set by court.

The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set out conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the applicant must show there is a *prima facie* case with probability of success, and that the applicant might otherwise suffer irreparable damage which would not easily be compensated in damages. If court is in doubt, it will decide the question on the balance of convenience. In addition, Order 41 of the CPR requires the existence of a pending suit. It provides that where it is proved to court that in a suit the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property. See **Kiyimba Kaggwa V Haji Katende [1985] HCB 43**.

The main suit in this case is civil suit no. 151 of 2013 filed by the plaintiffs/ applicants against the defendants/respondents. The existence of the suit is challenged by the 1st respondent whose affidavit in reply avers that the matter is *res judicata* since the status of the suit property was adjudicated upon and conclusively determined by a consent judgment before a Judge in Civil Suit No. 35 of 2012. The respondents' counsel accordingly submitted that the matter, being *res judicata*, cannot be raised in subsequent proceedings.

I have addressed the application and the submissions of counsel, including the law applicable to the application. I have also perused and analyzed the entire record of Civil Suit No. 35 of 2012, which was retrieved from the Family Division archives after the matter concerning it was raised. The case was filed by **Ssegujja Kigongo Andrew, Batte Humphrey Claive, Nasanga Eva and Ibrahim Hamza**. They

sought a declaration that the defendant is not a beneficiary of the estate of the deceased Ssegujja, an order for her eviction from the principal residence, and for the sale of the said house at Ggaba to pay for the deceased's debts and buy an alternative family house. The defendant filed a written statement of defence (WSD) to which the plaintiffs filed a reply and counterclaim.

The record shows that the parties eventually agreed before the trial Judge on 4/9/2013 to have the suit property at Ggaba valued and sold to purchase another family property where the defendant and the children under her care can settle, among other things. The correspondence on record shows that the file was sent to the execution division before the consent order was extracted. It was for that reason that it was later recalled by the Assistant Registrar of this court after the plaintiffs' counsel drew the matter to the said Registrar's attention. Indeed, copies of the extracted consent order are on record as having been filed in this court on 6/9/2013. The consent order is yet to be signed by the trial Judge, who, at the time of writing this ruling, has since retired (Lugayizi J).

Though the extracted consent order is yet to be signed by a Judge, the handwritten record of proceedings show that the trial Judge recorded the agreed position among the parties on the suit property as follows:-

“the suit property at Ggaba shall be valued for purposes of determining the portion proceeds to be applied to buy some alternative property for the children who are currently under the defendant’s custody.”

The proceedings were signed by the trial Judge on the day they were recorded, that is, 04/09/2013. The record does not reveal that the consent order was ever reviewed, neither does it show any pending application to review or set aside the consent order. All the issues in the dispute were resolved by the consent.

Civil Suit 151/2013 was filed by **Hilda Nagujja, Nasanga Priscilla, Nakandi Joy, and Nassozi Berna**, beneficiaries of the estate of the late Ssegujja Peter, against the administrators of the said estate. The said administrators were the plaintiffs in Civil Suit 35/2012, and are also the defendants/respondents in the instant suit and application. The plaintiffs/applicants are, in the main suit, praying this court for a revocation of letters of administration, a declaration that Joy Mutara Ssegujja and her biological children are the lawful owners of the house on Sikopa Road Ggaba, a permanent injunction restraining the defendants from interfering with quiet possession of the plaintiffs and their caretaker Hadija Nakayenga of their residence at Ggaba, an order against the defendants to file an inventory and true account of the estate, general damages, and costs.

Section 7 of the Civil Procedure Act provides as follows:-

*“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit **between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised, and has to be heard and finally decided by such court.**”* (emphasis mine).

Thus, *res judicata* not only affects the parties, but also their privies, as inferred from Section 7 of the Civil Procedure Act.

In **Onduri V Matoka [1977] HCB 128** it was held that a suit is *res judicata* where a fresh suit is brought in respect of the same piece of land in a dispute which had already been settled by court. In **Mukiibi Joseph V Elitek Technologies International & 4 Others Civil Suit No. 227/2010** it was held that the matter to be regarded *res judicata* must be directly and substantially in issue. The suit in the former court must have been heard and finally decided by that court on the merits, as was held in **Nakiridde Namwandu V Hotel International [1987] HCB 85**. Thus there is no *res judicata* where a suit is dismissed for want of jurisdiction, default of plaintiff’s appearance, or such other technicalities where the matter has not been heard on the merits and finally decided by court.

The record shows that Hadija Nakayenga who was the defendant in Civil Suit No.35/2012 entered into a consent judgment for the interests of the applicants who were under her care, and

who claim interest as beneficiaries of the estate of the late Ssegujja Peter. The pleadings show that the 2nd, 3rd and 4th plaintiffs/applicants in Civil Suit No. 151/2013 are still minors under the care of Hadija Nakayenga (defendant in Civil Suit No. 35/2012). In the plaint they refer to her as their caretaker. Hadija Nakayenga is recorded by the trial Judge as having consented with the plaintiffs on how the house at Ggaba was to be dealt with as part of the estate of the late Ssegujja. The issues were agreed on by all parties, and their individual responses were recorded by the trial Judge. The matter only awaits the formality of signing the consent order.

In this case, it is clear that the matter was not heard and determined on the merits. The judgment was obtained by consent of parties before a Judge. In my opinion, *res judicata* will not strictly apply. However, under our laws, it is not open to a party to deny what has been arrived at by consent. Section 114 of the Evidence Act provides as follows:-

“When one person, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.”

In **Huddersfield Banking Co Ltd V Henry Lister & Co Ltd (1985) 2 Ch. D 273** it was held that a consent order is a good estoppel to any other order.

In the premises, the head suit from which the instant application arises is not *res judicata*. Rather the doctrine of estoppel would apply against the plaintiffs filing a suit concerning the house at Ggaba when Hadija Nakayenga their caretaker, representing their interests, had consented before a Judge on how the house would be managed. In **Attorney General & Another V James Mark Kamoga & Another SCCA 8/2004, unreported, at page 13**, Mulenga JSC (RIP), in his lead judgement, stated as follows:-

“It is also significant to note that consent judgements are not always entered by the registrar. A trial judge may record a consent judgement where parties agree to settle the case before him/her....I think it cannot be right to hold that in reviewing or setting aside consent judgements the court would have different considerations regarding those entered by the registrar and those entered by a judge.”

I would thus, in principle, but for different reasons given above, agree with the applicants' counsel's submissions that the matter is not *res judicata*. However, on basis of the foregoing authorities and circumstances of this case as is apparent on the court record, I do not agree with counsel's submissions that there is no consent judgment ever entered into by the applicants.

It is thus my opinion that the plaintiffs/applicants are estopped from raising the issue regarding the house at Gabba, since their caretaker Hadija Nakayenga is recorded by the trial Judge in Civil Suit No. 35/2013 as having consented with the plaintiffs on how the house at Ggaba was to be

dealt with as part of the estate of the late Ssegujja. The plaintiffs are privy to this consent since Hadija Nakayenga entered into it to protect their interests as beneficiaries of the estate of Ssegujja their late father. This infers that there is no pending suit in as far as the house at Ggaba is concerned. The application for temporary injunction focuses on the Ggaba house. It cannot stand on its own without a pending suit.

The application is therefore dismissed. Civil Suit No. 151/2013, on which the application was based, in as far as it concerns the Ggaba house (suit property) is, for the same reasons, struck out. As prayed by the respondents' counsel, each party will bear their own costs.

Dated at Kampala this 10th day of July 2014.

Percy Night Tuhaise

Judge.