THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISC.APPLICATION NO.1448 OF 2018

(ARISING FROM CIVIL SUIT NO.182 OF 2013)

KEVINA NANTUME:: APPLICANT

VERSES

1. **ADMINISTRATOR GENERAL**
2. **ABEL NKOREKI:: RESPONDENTS**

AND

1. **FRANK TWINE**
2. **CHRISTINE ATWINE::::::::::::::::::::::::::::::::RESPONDENT/PLAINTIFFS**

RULING

The Applicant moved Court by way of Notice of Motion for orders that;-

a. The Administrator General and Abel Nkoreki be added as Defendant's to the Applicant's claim in Civil Suit No. 182 of 2013.

b. The pleadings in the counter-claim be amended to include the 1st and 2nd Respondents and any matter arising thereto.

c. Costs of the application be in the cause.

The grounds of the application are contained in the Notice of Motion and the supporting affidavit sworn by Kevina Nantume the Applicant herein and briefly;-

i. That the Applicant claims a legal and equitable interest in the suit land comprised and situate in **Kyadondo Block 232 Plot 1190 at Kireka Banda Wakiso district**.

ii. That the 1st Respondent as the administrator of the estate of the late Maria Namagembe of formerly Kireka Banda in Wakiso district, illegally, unlawfully, fraudulently and without the consent and or approval of the Applicant disposed of the suit land at Kireka to the 2nd Respondent.

iii. That the sale and disposal of the suit land between the 1st and 2nd Respondent was illegal, fraudulent and that it was intended to defeat the Applicant's beneficial interest in the land at Kireka.

iv. That the 1st Respondent as the administrator had no authority to dispose of the suit land without the consent of the Applicant as the heir, beneficiary and the sitting tenant or occupant of the suit land and premises.

v. That the presence of the 1st and 2nd Respondents as Defendants to the Applicant's counter-claim in Civil Suit No. 182 of 2013 is necessary for the effective and complete settlement of all issues before Court regarding the fraudulent sale and disposal of the suit land and also to avoid multiplicity of suits.

vi. That it is just and equitable that the pleadings in the counter-claim be amended as Defendants to the Applicant's counter-claim to enable Court settle all the disputes arising therefrom.

vii. That the orders sought by the Applicant in the counter-claim in Civil Suit No.182/2013 like a declaration that the sale and purchase of the suit land by the 1st

and 2nd Respondents and the subsequent sale to the 3rd and 4th Respondent was null and void and that cancelation of the said title will in vain if the 1st and 2nd Respondents are not added as parties to the Applicant's counter-claim.

The Applicant attached the following pieces of evidence to justify her application; - a copy of letters of Administration *as Annexures 'A1-A5',* a copy of the agreement of sale as *annexure 'B',* a copy of the decree *as annexure 'C'*.

In reply, Frank Twine the 1st Respondent/Defendant/a husband to the 2nd Respondent averred that he and the 2nd Respondent are the registered proprietors of the suit land.

He raised a preliminary objection to the effect that this application was filed on 19th September 2018, sealed by Curt on 12th October 2018, and fixed it for hearing on 24th January 2019, but it was only served on the Respondent's Advocates on the 21st January 2019, which he claims was outside service of Court pleadings and without leave of Court to serve outside time.

Secondly, that the issue of presentation of adding the Administrator General to the counter-claim is *res-judicata* as the Applicant already sued the administrator general in ***HCCS No. 362 of 2008; (Kevina Nantume versus Administrator General)*** and that the suit was dismissed and all the claims therein. That the Applicant never appealed against the decision and that by this application, she only seeks to resurrect a matter that was adjudicated upon and resolved.

Thirdly, that the administrator general sought and obtained orders of vacant possession on the suit land vide Nakawa High Court Civil Suit No. 241/2007 where the Applicant was a Defendant and that she/Applicant was evicted in execution of the decree in that suit, as such that the administrator General sold the property in 2004 and that the Applicant never sued to challenge the sale. It was the Respondent's evidence that for over 14 years, the Applicant is time barred to raise a counter-claim against the administrator general and Abel Nkoreki as Defendants to her counter-claim.

The 4th Respondent contends that the Applicant; through her lawyers applied to file witness statements out of time on 29th May 2018 after defiance of the previous orders. That the Court directed the Applicant and her lawyers to file and serve witness statements within 3 weeks from 29th May 2018 and that to date, the Respondents' lawyers have never been served with witness statements as ordered by Court.

Further that this act of not complying with orders of Court made by on 29th May 2018, the Applicant and her lawyers are in contempt of Court and that until they purge themselves of the contempt and they cannot be heard seeking any interlocutory and equitable reliefs.

Further, that matters as to what happened before Administrator General and selling to Abel Nkoreki, have been well presented in evidence as both Nkoreki and the State Attorney who concluded that transaction on behalf of Administrator General, have made witness statements which he claims were served on the Applicants lawyers and that if the Applicant wishes, through her lawyers, will cross examine the statements.

The deponent only attached a certified copy of a judgment vide HCCS No. 362 of 1998 Nantume Kevina versus the Administrator General as *annexure 'A'*.

In rejoinder, the Applicant partly admitted to the objection of serving summons to the Respondents on 21st January 2019 which were sealed by Court on the 12th 0ctober 2018. However, that despite the application being signed sealed on the dates so mentioned, the same was retrieved from Court on the 21st January 2019 after endless pursuit of getting a hearing date and that after receipt of the application, it was served on the 1st, 3rd and 4th Respondents with the 2nd Respondents yet to be served because his whereabouts are unknown to her.

She also admitted being given a directive to file witness statements in the main suit within two weeks from 29th May 2018. However, that by letter dated 25th September 2018, she sought permission of this Court to have her witness statements submitted after her present application;

which is seeking an addition of the 1st and 2nd Respondents as Defendants to her counterclaim and she denied being in contempt of any order of Court.

On the issue of *res-judicata*, it was the Applicant's evidence that the issues in her counter-claim are not *res-judicata* because that in CS No.362 of 1998 where she sued the 1st Respondent was challenging the legality of the will and the fact as to whether the 1st Respondent had mis-handled the estate. That they never dealt with issues to do with fraudulent disposition of the suit land comprised in Block 232 plot 1190 at Kireka and as such, that the issues raised in the counter-claim cannot therefore be *res-judicata* as they have never been handled by Court. That the Applicant has never been evicted off the suit land. That the Respondents' attempts to have the Applicant evicted were futile as the Applicant is in possession of the suit in Kireka.

Further, that the Applicant learnt of the disposal and sale of the suit land in 2008 when the 1st Respondent, 3rd and 4th Respondents tried to evict her off the suit land which was disposed of without her consent yet she had a beneficial claim on the suit land as she was one of the beneficiaries to the estate of the late Maria Namagembe and that she was also a sitting tenant on the suit land.

As such, that it was prudent that if anything she was to be informed of the decision to sale so that she was to be given an opportunity to seek alternative accommodation which she claims was never availed to her which she states that this leaves her claim within time. It was her evidence that the Administrator General and Abel Nkoreki be added on her counter-claim as Defendant as the fraud that led to the disposal of the suit land at Kireka without her knowledge and consent was committed by them.

The following issues need to be resolved before this Court can determine the merits of the application.

a. Whether the Notice of Motion was served outside time

b. Whether addition of the Administrator General to the Applicant's counterclaim in HCCS No. 183/2013 makes it a *res-judicata.*

c. Whether addition of the Administrator General makes the suit time barred.

d. Whether the Applicant is in contempt of Court.

RESOLUTIONS

a. Whether the Notice of Motion was served outside time

Counsel for the Respondents submit that the notice of motion was sealed by Court on 12th October 2018 and that it had to be served on all the parties within 21 days from the date of sealing by Court. That the application was served on 3rd and 4th Respondents on 21st January 2019 and that there is no proof that the notice of motion was ever served on the 1st and 2nd Respondents or that it was served within time.

Counsel relied on Order 52 r .2 of the Civil Procedure Rules for a mandatory requirement that no notice shall be made without notice to the parties affected by motion. And as such, that the instant application must be proved to have been served on all the parties and the said service must be in time allowed.

Counsel submits further that the law as to service of summons, hearing notices, applications and pleadings has been governed by Courts of law and that it has been applied to the effect that non-compliance to serve the application in 21 days from the date of sealing the application makes the application incompetent and that it has to be dismissed with costs. Counsel relied on the authority of ***Fredrick James Jjunju & Anor versus Madhvani Group Ltd & Anor M.A No.688/15*** where *Justice Bashaija K. Andrew* ruled;

> *"that applications whether by chamber summons, notice of motion and or hearing notices are by law to be served following after the manner of the procedure adopted for service of summons under Order 5 rule 1(2) Civil Procedure Rules and the only remedy*

available to the application where 21 days have lapsed, is to invoke the provision of Rule 1(2) of rule 5 to apply for extension of time within 15 days of the initial time stipulated for service. If the Applicant chooses not to exercise that option, then he/she inevitably locks himself/herself. Service of application outside time prescribed by law for such service without applying to Court for extension of time within which to serve the application renders the application incompetent before Court".

In rejoinder, Counsel for the Applicant admits the fact of service outside the time prescribed by law however, contends that it happened after fruitless efforts to retrieve the Notice of motion from Court on the 21st January 2019 and thereafter serve on the 1st, 3rd and 4th Respondents. That the dates of service upon the Respondents started to run the date the Applicant's application was retrieved from Court and that it was served immediately. Therefore, that it is wrong for the 3rd and 4th Respondents to allege otherwise when the application was served on the very date it was retrieved from Court.

In ***Grace Nakiyemba Nakate versus Ssemugenyi Godfrey & 4 Ors (CIVIL SUIT NO. 397 OF 2016)***, Justice *Henry I. Kawesa* had this to say;

"*The position of the law, according to Order 5 Rule (2) Civil Procedure Rules, is that summons must be served within 21 days of issuance except; that time may be extended on application made within 15 days after expiration of the 21 days*".

Further, the learned judge relied on the *Supreme Court* decision of ***Kanyabwera versus Tumwebaze (2005) 2 EA 86 at 93*****,** for the position that the provision is mandatory as non-compliance invalidates all summons which are not served within 21 days.

And in ***Uganda Revenue Authority Vs Uganda Consolidated Properties Ltd (1997 – 2001) UCL 149*****;** *Justice Twinomujuni J A* stated that:-

"Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with."

I do not agree with Counsel for the Applicant's contention that the delay to effect service upon the Respondents was caused by their fruitless efforts to retrieve the Notice of motion for service which were signed on the 12th October 2018 and fixed for hearing on the 24th January 2019.

I find that if at all the Applicant retrieved the notice of motion on the 21st January 2019 as alleged, they had already expired and the statute demands that the Applicant would have applied for extension of time within which to serve the Respondents. And on the authority of ***Kanyabwera versus Tumwebaze*** *(supra),* non-compliance has invalidated the proceedings as there is no law which allows serving of expired pleadings.

Counsel submits further in rejoinder that the dates for service started running from the date the Applicant's Notice of Motion was retrieved from Court and that in the Applicant's case it was served immediately that was 21st January 2019.

I disagree with this submission, as dates run from the time the summons are issued by Court not at the time they are retrieved from Court by a party. *See* ***Grace Nakiyemba Nakate versus Ssemugenyi Godfrey & 4 Ors*** *(Supra).* For Court cannot therefore proceed to determine an application whose service upon the Respondents is forbidden by law.

b. Whether addition of the Administrator General to the Applicant's counterclaim in HCCS No. 183/2013 makes it a *res-judicata*

It was the 3rd and 4th Respondents' submission on this issue that there are two high Court cases on the same subject matter which is the suit property and that they were both decided against the Applicant. Therefore, that the matters of bringing the Administrator General in Court by the Applicant is a *res-judicata* as she is *estopped* from resurrecting a case she lost in 2001,18 years ago.

In rejoinder, Counsel for the Applicant did not deny the fact that there was a former suit vide Civil Suit No. 362 of 1998 (*Kevina Nantume versus Administrator General*) and Civil Suit No 341 of 2007, he contends that the subject matter is the same as it is the land comprised in Kyadondo Block 232 Plot 1190 at Kireka Banda. It was his submission still that despite the

subject matter being the same that the issues that were determined in those two were substantially different from the claims raised by the Applicant in her counter-claim. That with Civil Suit No. 362 of 1998, two issues were dealt with to which,

a. **Whether the Administrator general mishandled the estate of the late Maria Namagembe.**

b. **Whether the will left by the late Namagembe was valid.**

That in the case of 2007, it was seeking for vacant possession of the suit and that none of the suits stated herein challenged the fraudulent sale of the suit-land, that no decision is present in any of the two stated cases, have decided the issues the Applicant puts forward in her claim challenging the sale and disposal of the Applicant's beneficiary interest in the suit land without her consent and that the same was fraudulent.

Section 7 of the Civil Procedure Act provides that;

> "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by the Court".

In ***Karia & Anor versus Attorney General & Anor, (2005) EA 83,*** *Tsekooko JSC* outlined the minimum conditions to be satisfied to rely on the doctrine of *res- judicata* namely;-

i. There must be a former suit or issue decided by a competent Court.

ii. The matter or dispute in the former suit should be between the parties and must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

iii. The parties in the former suit should be the same, or parties under whom they claim or any of them claim, litigating under the same title.

It was held further that, where *res-judicata* is pleaded as a defense, a trial Court should where the issue is contested, try that issue and receive some evidence to establish the subject matter of the dispute between the parties through whom they claim.

Further still, *in* ***Matco Stores Ltd & 2 Ors versus. Grace Muhwezi and Another, HCCS No. 90 & 91 of 2001***, it was noted that for the doctrine of *res-judicata* to be applicable, the following parameters must be satisfied;-

a. *The existence of a former suit that has been finally decided by a competent Court.*

b. *The parties in the former suit should have been the same as those in the latter suit, or parties from whom the parties in the latter suit, or any of them claim or derive interest.*

c. *The parties in the latter suit should be litigating under the same title as those in the former suit.*

d. *The matter in dispute in the former suit should be directly and substantially in dispute in the latter suit where res-judicata has been raised as a bar.*

It is not is dispute that there are two former suits ***Vide HCCS No. 341 of 2007*** and ***HCCS No.362/1998*** decided by a competent Court of jurisdiction.

Secondly, the parties in the former suit to be the same or the parties from whom the parties in the latter suit or any of them claim or derive an interest. From the record on the file, *Abel Nkoreki* the 2nd Respondent herein with whom the Applicant wishes to add as a Defendant to her counter-claim derives his interest from the administrator general (*Administrator of the estate of the late Namagembe Mary*) who was the vendor in a sale agreement dated 2nd January 2004 as well as a Defendant in Civil Suit No.362/1998. It can be therefore seen that the Defendant in this suit derives his interest from the judgment creditors of the above suit.

Thirdly, that the matter in dispute should be directly and substantially the same. According to a copy of a decree attached to the Applicant's affidavit in support vide Civil Suit No. 341/2007, wherein the Administrator General (*1st Respondent herein*) was the Plaintiff and Kevina Namagembe was the Defendant, it was ordered that the Defendant and any other occupants on the land comprised in Kibuga **Block 237 Plot 1190 at Kireka** (*suit land*), the property of the late Esther Namagembe give vacant possession of the said land immediately.

This order was directed to Kevina Namagembe any other occupant on the suit land. In paragraph 5 of the affidavit in support, the Applicant claims that the 1st Respondent in connivance with other beneficiaries of the estate of the late Maria Namagembe illegally, fraudulently and without her consent as a sitting tenant disposed of the suit land to the 2nd Respondent. She referred this Court *annexure 'B'*, which was a sale agreement dated 2nd January 2004 for the land comprised in **Block 232 plot 1190 land at Kireka** and **Banda**. As the decree mentions land at **Kibuga Block 237 Plot 1190 at Kireka** the sale agreement mentions land comprised of **Block 232 plot 1190 land at Kireka** and **Banda**, and this makes this two plots of land totally different, and therefore as between the sale agreement and a copy of a decree in Cs No. 341/2007 attached to the Applicant's affidavit in support, I find that the land is not the same. However, the Applicant admits to being a party in the two suits.

According to the *certified copy of a judgment in Civil Suit No. 362 of 1998 Kevina Nantume versus Administrator General* attached to the 3rd Respondent's affidavit in rely, Counsel for the Applicant agreed to this suit but states the issues are different as the Applicant/Plaintiff in that suit was challenging the legality of the will and the mishandling of the estate by the administrator general and that in her counter-claim, the Applicant is challenging the fraudulent disposal of the suit land without her consent.

In albeit to resolve those two issues, the Applicant/Plaintiff had prayed for various declarations which among others;-

a) that she was entitled as legal heir to the principal residence of the deceased (*Mary Namagembe*) as her share of the estate, and;

b) also that the Plaintiff/Applicant contributed to the property at Kireka and was co-owner.

In her judgment at page 5, the learned judge had this to say in relation to the Plaintiff/Applicant's claim in that suit;-

> "that all the following documents were in the names of the deceased, namely the sale agreement of 1967, the plan to the house at Kireka, the agreement of sale of Kireka land by Kisosonkole, the title to the land, etc.

I now revert to the question marks on the evidence of the Plaintiff. If the Plaintiff owned land which she alleges was sold to enable the deceased purchase the Kireka land, why did she allow the deceased to put everything in her names? And why was she as an interested party and co-owner fail to keep even a single copy of all the important documents which were allegedly signed on behalf of herself and the deceased in respect to all the alleged sales? And why did she wait for the deceased to die before she could raise all the above claims?....the law does not appear to support her claim as the owner…" at page 6, the learned judge held that;

> *"the Plaintiff failed to lead convincing evidence of her claims to the land at Kireka, she also failed to prove any fraud, let alone her case which would entitle me to interfere with the entrances on the title…".*

There is no sample of the intended amended counter-claim on record for perusal as required by procedure, however according to the counter-claim available which was received in this Court on the 12th June 2016, in paragraph b, the Applicant claims that in the late 1960's, she together with the late Namagembe Maria joined funds after disposing off their land in Mengo and together they bought the suit land at Kireka from the then owner Mr Kisosonkole. With the averments in the counter-claim on, the Applicant is in another way trying to resurrect a matter which had issues which were properly adjudicated upon by a Court of competent jurisdiction.

Given the above finding by Court, the 2nd Respondent herein (Nkoreki Abel) acquired interest from the 1st Respondent (the administrator General) after the Plaintiff/Applicant had failed to prove fraud against him to necessitate cancellation of the certificate of title.

I therefore find that adding the 2 (*two*) parties to the Applicant's claim is a *res-judicata* since the issues of fraud against the administrator general was discussed as a principle in that suit. The Applicant as such cannot add the 2nd Respondent over fraudulent disposition of the suit land yet he acquired his interest from the administrator general who sold the property after the above suit, there is no appeal against the judgment on record nor was an application to stay execution ever filed.

In ***Ponsiano Semakula versus Susan Magala (1979) HCB*** 89, in determining whether or not a suit is barred by *res-judicata,* the test is whether the Plaintiff in the second suit is trying to bring before the Court in another way in the form of a new cause of action a transaction which has already been presented before a Court of competent jurisdiction in earlier proceedings which have been adjudicated upon'.

The issue of *res-judicata* is therefore resolved in the affirmative, the counter-claim is also struck off as it introduces matters already handled by Court.

Court will not look into the remaining two issues as the resolved two preliminary objections dispose of both the application and the counter-claim.

This application is accordingly dismissed.

…….

Henry I. Kawesa

JUDGE

26/08/2019

Right of appeal explained. Leave to appeal granted.

…….

Henry I. Kawesa

JUDGE

26/08/2019

26/08/2019:

Court:

Ruling delivered to the parties above

…….

Henry I. Kawesa

JUDGE

26/08/2019