

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
LAND MISCELLANEOUS APPLICATION NO 52 OF 2019
(ARISING FROM CIVIL SUIT NO. 56 OF 2018)

MUGISA JOY:..... APPLICANT

Versus

1. KIIZA AGNES BIGOGO

2. DEO BYAGIRA :..... RESPONDENTS

RULING:

This is an application brought by chamber summons under O.7 r. 11(d) and O.7 r 19 of the Civil Procedure Rules (CPR) SI 71-1 and S. 98, 7 and 8 of the Civil Procedure Act (CPA) Cap 71 seeking for orders that civil suit No.56 of 2018 be struck out as res judicata and for costs of the application.

The application arose out of a suit brought by the respondents vide civil suit No. 56 of 2018 seeking for orders inter alia;

- (a) A declaration that the suit property is part of the estate of the late Yakobo Bigogo,
- (b) The suit property is not part of the estate of the Late Henry Mugisa,
- (c) The certificate of title in the names of the Applicant be cancelled,
- (d) An order directing the 2nd Respondent to register the Plaintiffs as proprietors,
- (e) A permanent injunction restraining the Defendants (Applicants) from evicting, claiming ownership, transacting or carrying out any transaction on the suit land damages and costs. The applicant filed this chamber summons seeking to strike out civil suit No. 56 of 2019.

The application was supported by the affidavit of the applicant **Joy Mugisa** on the grounds that:

- 1. That civil suit No. 56 of 2018 does not disclose a cause of action against the defendant
- 2. That civil suit No. 56 of 2018 is a nullity for being res judicata
- 3. That it is in the interest of justice for orders herein sought be granted.

The brief facts of this case are that the applicant is the registered proprietor of land comprised in FRV MAS 11 FOLIO 24 BLOCK (ROAD) 15 Plot 35 Old Toro Road at Mosque Cell, Kahoora Division, Hoima Municipality, Hoima District. That the property was acquired by the late Henry Mugisa by way of purchase and a semi-finished storeyed building constructed thereon. Further that the ownership of the suit property was subject of High Court Administration Case No. 596 of 1989 at Kampala which was listed among the properties of the late Mugisa Henry which was concluded by a consent settlement appointing the applicant herein and the Administrator General as Co-Administrators. The administrators filed final accounts and an inventory of the distribution of the estate giving the suit property herein to the applicant to which the 1st Respondent and her husband the late Yakobo Bigogo objected. The matter of objection was heard by the High court and a certificate of passing of final accounts of the estate of the late Mugisa Henry was issued giving inter alia the suit property to the applicant.

That the Respondents filed civil suit No. 56 of 2018 seeking for among others a declaration that the suit property is part of the estate of the Late Yakobo Bigogo, that the suit property is not part of the estate of the Late Henry Mugisa, an order for cancellation of the applicant's certificate of title a permanent injunction against the applicant among other orders. That the 1st Respondent deponed that in the 1940s she acquired the suit property together with her late husband Yakobo Bigogo as a 'Kibanja' holder comprised in FRV MAS 11 Folio 24 Block (Road) 15 Plot 35 Old Toro Road at Mosque cell, Hoima Municipality, Hoima District and the same was developed by the 2nd Respondent and his sibling the late Henry Mugisa as a family property for the purpose of setting up a commercial building for the benefit of the whole family and the upper part was designed to be a house where the late Henry Mugisa would stay if he visited the village (Hoima).

This application will be determined by resolving four issues

1. Whether the written statement of defence was filed out of time
2. Whether the suit is barred by limitation
3. Whether the suit is res judicata
4. What remedies are available?

Issue 1: Whether the written statement of defence was filed out of time

On this issue counsel stated that the respondent filed a suit on the 1st of October 2018 and served the defendant on 5th day of October 2018 and a copy of the affidavit 11th October 2018 is on court record. That on 11th October he appeared for hearing of interim application and made an oral application to proceed *ex parte* on grounds there was no defense filed and neither reply on the interlocutory application. That he followed up with the court registry and discovered that the applicant had not paid any court fees and also back dated the filing of a written statement of defence. Thus the defense was irregular or fraudulently filed by back dating to make it look like it was filed within 15 days.

Counsel for the Applicant submitted that he shall not respond to the issue as the record speaks for itself that let the same be addressed in the ruling.

secondly counsel submitted that on 11th March 2019 their firm was served with a written statement of defence dated 5th October 2019 together with an affidavit in reply to Misc. application No. 96 of 2018 which was coming up for hearing on the 30th May 2019 five months after service of summons and the interlocutory applications. That the applicant ought to have sought leave to file a defence out of time or ought to have sought leave to serve out of time.

Counsel for the respondent claimed that the defence was filed out of time and the same was back dated to bring it within time under O. 8 r. 2 Civil Procedure Rules SI 71-1. Counsel did not however, bring evidence to show that the written statement of defense was filed out of time and the same was back dated. Court therefore, finds no merit with his submissions and therefore finds the defense was filed in 5 days after the summons to file a defense was endorsed by the court which was within the prescribed time under O.8 r. 2 Civil Procedure Rules SI 71-1. Therefore the applicant has locus to raise the preliminary objection.

On the issue whether the suit or any part thereof is barred by limitation.

The counsel for the Applicant/1st defendant asserted that the suit is barred by limitation because the cause of action pleaded in the instant suit was previously raised, addressed and determined to conclusion by the High court of Uganda in Administration cause No. 596 of 1989 by issuing a certificate of passing of final accounts of the estate of the late Henry Mugisa giving the disputed

property to the Applicant on 25th of November 1993 which is over 12 years. Citing section 20 of the limitation Act counsel contended that the section is clear that any claimant under a will or intestacy is allowed 12 years to present their claim.

That looking at the facts as pleaded in the plaint any claim by the plaintiffs would accrue from the date the grant of letters of Administration was made to the 1st defendant and the Administrator General. Therefore the present suit is filed out of time and the provisions of section 19 would not apply in this case because they are restricted to claims with respect to trust property and not estates of deceased's persons as is in the instant case. Looking at the facts as related to the plaint HCCS No. 56 of 2018 was filed on 1. 10. 2018 which is more than 12 years. Thus the suit is time barred and prayed that the same be dismissed with costs to the Applicant.

Counsel further stated that according to O. 7 r. 6 of CPR disability is an exception from limitation must be specifically pleaded and the plaintiffs did not plead the same or attach to their pleadings evidence to show that they qualified to claim it and also show at what point the disability ceased. Counsel for the 1st applicant relied on the case of **Arua Motor Dealers V. AG HCCS NO. 1451/1980**. And concluded that the suit is time barred and court is mandated to strictly enforce that benefit in favour of the Applicant.

On the other hand counsel for the Respondent argued that the suit is not barred in law that the suit property has never been subject to any litigation and that there is Judgement/decision in respect to the suit property between the parties to the suit and no such evidence has been attached.

Section 20 of the Limitation Act states that “*subject to section 19(1), no action of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or intestacy shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due.*”

It is clear that this action is barred by limitation since the plaint was filed in court on the 1.10.2018 which is beyond the twelve years limitation period.

From the pleadings, the dispute is one between the plaintiffs and the 1st defendant who is the widow and Administrator of the estate of the Late Henry Mugisa and the plaintiffs are mother and brother in law to the Applicant. Therefore this court finds that since the suit property was listed among the properties of the estate of the late Henry Mugisa, and the 1st plaintiff being a party to the objection proceedings to the final account of the estate of the late Henry Mugisa ought to have appealed against the certificate of passing of account which she did not do therefore she is barred by limitation. The plaintiffs seek for cancellation of the certificate of title obtained by the Applicant and declaration the suit property is not part of the estate of the late Henry Mugisa but rather it is part of the estate of the late Yakobo Bigogo which is contrary to Section 20 of the Limitation Act.

In the case *Uganda Railways Corporation Vs Ekwere D.O 92008) HCB 61*, it was held that is a suit is brought after the expiration of the period of limitation and no ground of exemption from the law of limitation is pleaded in the plain, the plaint must be rejected.

In the present case, this court finds that the suit having been commenced after the limitation period of twelve years as against the 1st defendant and there is not exemption pleaded. The plaint is rejected by this court for being barred by limitation.

In this case, the property in issue upon which the plaintiff has filed this case was listed among the properties of the estate of the late Henry Mugisa to which a certificate of passing of account was issued on the 25th November 1993 giving the suit property to the applicant. The 1st Plaintiff who was a party to the objection to the final account proceeding did not appeal against the certificate of passing of final account. The property was not challenged the 1st Respondent had an opportunity to challenge but she did not do so. It is therefore observed in this case that the suit was brought after twelve years which is contrary to Section 20 of the Limitation Act. Owing to this, this suit is barred by limitation.

Issue 3: Whether the suit is res judicata

Counsel for the Applicant submitted that the case filed by the respondent was *res judicata*. Counsel submitted that 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 same

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 had been heard and finally decided by the court”

It was submitted further for the applicant that this court has power under section 33 of the Judicature Act to grant “.....*all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claimed brought before it.....*”

Counsel for the Applicant submitted that Black’s Law Dictionary 8th Edition at Page 1312 defines Res Judicata *to mean an affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transactions and that could have been-but was not raised in the first suit.*

He submitted that the cause of action must be the same in both actions and final judgement on merit must have been entered. Counsel for the Applicant cited the case of *Posiyano Semakula vs Susan Namagala CACA No. 2 of 1977* for the proposition that the suit must be between the same parties or under whom they or any of them claims and the parties must have been litigating under the same title in the same suit. See *Gokaldas lixilidas Tanna vs. Sister Rose Muyinza, HCCS No. 707 of 1987*

Counsel for the Applicant submitted further that the test applicable in determining whether a case is barred by the doctrine of res judicata was laid down in the case of *Posiyano Semakula vs Susan Namagala CACA No. 2 of 1977* and it was quoted with approved in *Kafeero Sentongo vs Shell (U) Ltd & Uganda Petroleum Co. Ltd CACA No.50 of 2003* that;

“in determining whether or not the 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 a form of a new cause of action, a transaction which he has already been presented before the court of competent jurisdiction in earlier proceedings which have been adjudicated upon.”

That it is now settled law that for a matter to be res judicata it ought to have been heard and determined on merit.

It was Counsel’s submission that the main issue in the case before court is whether the matters herein were directly and substantially in issue in the case vide Administration cause No. 596 of

1989 High Court (Kampala). Counsel for the Applicant argued that the issues and cause of action in the present civil suit No 56 of 2018 were previously raised and determined finally by the High Court in Administration cause No. 596 of 1989 that is ownership of the suit property as between the estate of the late Mugisa Henry and his parents (the late Yakobo Bigogo and the 1st Plaintiff or Respondent). That the suit property was listed among the property of the estate of the late Mugisa Henry and it was settled by consent dated 9th July 1990.

It is also asserted by counsel that the Administrators filed final accounts and an inventory of the distribution of the estate of the late Mugisa Henry giving the suit property to the Applicant to which the 1st respondent and her late husband (Bogogo Yakobo) objected. The matter was upon hearing determined by Justice CK Byamugisha upon which she issued a certificate of passing of final accounts of the estate of the late Henry Mugisa giving the disputed property to the Applicant and the estate closed.

Counsel for the applicant relied on section 278 of the succession Act which is to the effect “*on the completion of the administration of an estate, other than an estate administered under the administration of estates (small estates) (special provisions) Act, an executor or an administrator shall file in court the final accounts relating to the estate verified by an affidavit two copies of which shall be transmitted by the court to the administrator general.*” That in the final accounts the suit property herein was given to the Applicant and by the Respondents filing this suit they are reviving in another form a matter which court heard and finally adjudicated upon.

According to Counsel for the Applicant the issue of ownership of the suit property was concluded in the former suit High Court Administration case No. 596 of 1989 and it is now res judicata. He referred to the case of *Namadowa & 6 others vs. Kawaidhanko & 3 others HCCS NO. 100 of 2012 arising from Administration cause No. 12 of 1995* in which case counsel for the 3rd and 4th defendants raised preliminary points of law that the suit is res judicata because it raised issues already heard and determined in HCCS NO. 22/1994. The parties in the former suit were the same as suit before court and vice versa. Counsel successfully submitted that the matter in controversy in the former suit was the issue of distribution of the deceased’s estate which issue was fully settled in the consent judgement that the estate was distributed and therefore closed.

Further still, counsel contended that the current suit is time barred because the issue arising out of the suit and cause of action in the civil suit were previously raised and determined to conclusion in Administration cause No. 596 of 1989 and the certificate of passing of final account of the estate of the late Henry Mugisa giving the disputed property to the Applicant issued on 25th November 1993 which is over 12 years now. That section 20 of the succession Act provides that “***subject to section 19(1), no action of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or intestacy shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due.*** That the provisions of section 20 of the limitation Act are clear and in light of the above provision, any claimant under a will or intestacy is allowed 12 years only to present their claim. Looking at the facts as pleaded in the plaint in HCCS No. 56 of 2018 which was filed on 01. 10. 2018 would be nearly 13 years late. Therefore the suit is time barred and prayed the same be dismissed with costs to the Applicant.

On the other hand, counsel for the Respondents in his submission asserted that he would raise a preliminary point of law before responding to the Applicant’s Application in respect to illegality/irregularity/ fraud which was exhibited when filing a written statement of defence for the defendant on the 5th October 2018 from which the Applicant derives locus to file this application.

Counsel for the Respondents further stated that the issues to be determined on the point of law are

- i. Whether the written statement of defence was illegally or irregularly filed by the Applicant.
- ii. Whether the applicant served the written statement of defence out of time.

On the issue whether civil suit No. 56 of 2018 being time barred counsel submitted that the suit is not time barred in law. That the suit property has never been a subject to any litigation and there is no judgement or decision in respect to the suit property between the parties to the suit and no such evidence has been attached. Counsel stated that the doctrine of res judicata is set out in section 7 of the CPA as stated above. That in relation to the instant facts there has never been a former suit between the parties to the suit or the issue of the suit property has never been raised by any party

to the suit and no decision has ever been made in respect of the suit property and the above argument is supported by paragraph 6 of affidavit in reply therefore the suit cannot be res judicata since no such evidence has been adduced to prove the same.

Counsel relied on the case of **Mansukhal Ramji Karia & Another vs. A.G & 2 Others SCCA 20 of 2002** where court observed that the provisions indicates the following broad minimum conditions to be satisfied before res judicata is established namely that;

- a) There has to be a former suit or issue decided by a competent court
- b) The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
- c) The parties in the same suit should be the same parties, or parties under whom they or any of them claim, litigation under the same title.

That once such matter or issue between the parties has been litigated and decided, it cannot be raised again between the same parties but other parties are not so bound.”

Counsel stated that in the instant case facts referring to paragraph 7 of the respondent’s affidavit in support of chamber summons, the consent that was attached was between Joy Mugisa, Patrick Mugisa and Yakobo Bigogo and not the plaintiffs and that therefore the parties were different from the ones in the main suit. That the 1st respondent owns an interest in the suit property in a persona capacity and has never delegated or given powers of attorney to any person to represent her in any suit regarding he interest. That the objection filed in court did not include the suit property but mentioned

- a) Item no. 6 on page 27 names, 600 hectares at Nsangi be omitted from the estate
- b) Ushs. 25,000,00/= (twenty five million only) is omitted from the shares of mzee Yakobo and substituted as settlement in favour of Yakobo Bigogo’s children

Having carefully considered the submissions of both counsel, this court will go ahead to resolve this matter. As already mentioned by counsel for the Applicant/defendant, 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 same 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 had been heard and finally decided by the court”

Counsel for the Applicant/1st defendants have given an explanation which I will allude to, that the expression former suit shall denote a suit which has been decided prior to the suit in question whether or not was instituted prior to it.

The doctrine was well summarized in the case of **James Katabazi & 21 others** where the court stated that for the doctrine to apply;

- i) *The matter must be directly and substantially in issue in the two suits.*
- ii) *The parties must be the same or the same the parties under whom any of them claim, litigating under the same title.*
- iii) *The matter must have been finally decided in the previous suit.*

Further still, the case of **Kamunye & others v S the Pioneer General Assurance Society Ltdd (1971 E. A 263** gives the test to be applied by court to determine the question of res judicata. It state:

“The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another was and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply”.

According to the facts at hand, the 1st plaintiff’s late husband Yakobo Bigogo brought in issue before the high court on the ownership of the suit property in Administration Cause No. 596 of

1989. The suit presently before the High Court relates to the suit property as being part of the estate of the late Yakobo Bigogo, the late husband of the 1st Plaintiff and whose estate is administered by the 2nd Plaintiff and it sought to be declared as not part of the estate of the late Henry Mugisa. Basically the issue was whether the suit plot belonged to the estate of the late Henry Mugisa which is the same issue brought in a varied form for determination in the instant case.

To illustrate this matter further, one of the issues for determination was whether the suit property formed part of the estate of the late Henry Mugisa. This is the same declaration sought for in the current suit because the plaintiff seeks a declaration that the suit property is not part of the estate of the late Henry Mugisa. The High Court at Kampala resolved the matter by a consent granting the Applicant and the Administrator General letters of Administration where final accounts distributing the properties to the estate of the late Henry Mugisa was filed and the 1st Respondent and her late husband objected to the passing of final accounts stating in particular “*that Debtors and creditors of the estate, especially those who supplied materials to the construction of the House at Hoima are not mentioned in the Account.*” meaning the suit property was listed among the properties of the estate of the late Henry Mugisa and the 1st respondent and her late husband were well aware that the property belonged late Henry Mugisa. In the certificate of Passing of final Accounts the High Court stated that the said final accounts presented by the Applicant on 27th October 1993 were examined and found correct omitting item 6 on page 27, namely 600 hectares at Ngangi and Shs. 25,000,000/= from the shares of Mzee Yakoob Bigogo and substituted as settlement in favour of Yakobo Bigogo’s children. And in the distribution of the real property commercial premises at Hoima which is now the suit property in court was distributed to Mrs. Joy Mugisa the Applicant or 1st Defendant. Secondly in 2002 the 2nd Respondent or Plaintiff applied and obtained letters of Administration in respect of the estate of the late Yakobo Bigogo and the suit property was not inclusive in the list of properties declared as left by late Yakobo Bigogo. This is indicative that the ownership of the suit property was known by the 2nd Plaintiff as belonging to Joy Mugisa all along.

Clearly, the issue of the suit property was handled in the former suit where a certificate of passing of accounts were passed on the 25th November 1993. Therefore the matter concerning the suit property being part of the estate of the late Henry Mugisa or it is for the 1st Respondent and her late husband was directly and substantially in a former suit and it was heard and determined by a