

UGANDA / JUDGMENT

Nagadya v Namubiru (Civil Appeal 29 of 2024) [2025] UGHC 154 (21 March 2025)
[2025] UGHC 154

COURT
High Court of Uganda

BEFORE
Karemani Jamson K, J

CASE / FILE NUMBER
Civil Appeal 29 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT KIBOGA
LAND CIVIL APPEAL NO.0029 OF 2024 (FORMERLY MUBENDE CIVIL APPEAL NO.
002 OF 2022) (ARISING FROM CIVIL SUIT NO. 027 OF 2017)

| NAGADYA JOWERIA: | |-----| | VERSUS |
| NAMUBIRU IMELDA: |

BEFORE: HON. MR JUSTICE KAREMANI JAMSON. K

JUDGMENT

Introduction

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Nagadya Joweria (hereinafter referred to as the appellant) was the defendant in a suit before the lower court which was decided in favour of Namubiru Imelda (hereinafter referred to as the respondent). The appellant being dissatisfied with the judgement and orders of the Magistrate Grade One delivered on 10th November 2021, at the Chief Magistrate's Court of Kiboga at Kiboga brought this appeal seeking orders that the appeal be allowed, the decision in Civil Suit No. 027 of 2017 be set aside and costs of the appeal in this court and in the lower court be awarded to the appellant.

Background to the Appeal

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The trial Magistrate entered judgment in favor of the respondent and hence this appeal.

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Grounds of Appeal

- 1. The learned trial Magistrate erred in law and fact when he failed to evaluate evidence on res-judicata thereby coming to a wrong conclusion causing a miscarriage of justice.
- 2. The learned trial Magistrate erred in law and fact when he completely failed to properly evaluate the evidence on record hence coming to a wrong conclusion which caused a miscarriage of justice.
- 3. The learned trial Magistrate erred in law and fact in holding that the respondent paid "busuulu" hence coming to a wrong conclusion.
- 4. The learned trial Magistrate misapplied the law relating to res judicata thereby coming to a wrong conclusion.

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Duty of the Court on Appeal

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The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and make decision upon the evidence that was adduced in a lower court. See: Section 80 of the Civil Procedure Act Cap 71. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe V Orient Bank Ltd* CACA No. 4 of 2006; *Kifamunte Henry v Uqanda SC* CR. Appeal No. 10 of 1997; and *Baguma Fred v Uganda SC* Crim. App. No. 7 of 2004. In the latter case, Oder, JSC stated thus:

"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such reevaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".

Consideration of the Grounds of Appeal

The learned counsel for the appellant argued grounds 1 & 4 together; then grounds 2 & 3 together.

The learned counsel for the respondent followed the same order.

I will also adopt the same approach.

- 1. The learned trial Magistrate erred in law and fact when he failed to evaluate evidence on res judicata thereby coming to a wrong conclusion causing a miscarriage of justice.
- 4. The learned Trial Magistrate misapplied the law relating to res judicate thereby coming to a wrong conclusion.

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Submissions

It was submitted by learned counsel for the appellant that in arriving at the conclusion that the matter was not res judicata, the learned trial magistrate did not take into account the evidence on record and the law. That had the trial magistrate clearly perused the judgment in Civil Suit No. 017 of 2003, he would have found that the evidence of Kambugu Sulaiman - the defendant (husband to the respondent) in that suit was based on the fact that the kibanja in issue belonged to DW2 his wife and that DW2 had got the same from her late father Biyasaali Nsubuqa during their marriage. That it implied that both Kambugu Sulaiman in Civil Suit No. 017 of 2003 and Namubiru Melda in Civil Suit No. 027 of 2017 were claiming under the same title. Counsel cited the case of *Kamunye & Ors V The Pioneer General Assurance Society Ltd* (1971) EA 263 on the test on whether or not the suit is barred by res judicata. He further stated that the trial Magistrate's conclusion on this issue does not match the explanation in paragraph 6 of Section 7 of the Civil

Procedure Act.

The learned counsel for the respondent on the other hand submitted that there was no nexus between the parties in Civil Suit No. 17 of 2003 and Civil Suit No. 027 of 2017 though the subject matter is the same. That the respondent has never been a witness in Civil Suit No. 017 of 2003 and her rights as a beneficiary of her father's estate had never been determined until she filed Civil Suit No. 027 of 2017. That the trial Magistrate further reasoned that the plaintiff (now respondent) did not accrue title from her husband Kambuqu Sulaiman but rather claimed title as a gift inter vivos from her father the late Biyasaali Nsubuga. Therefore, the trial magistrate rightly held that the matter was not res judicata.

Determination by the Court.

The major contention under the combined grounds of appeal number one and four of the appeal is that the learned trial magistrate erred in law and fact in holding that civil suit no. 27 of 2017 was not res judicata.

The settled position of the law is that no court should 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 nor the suit in which the issue has been subsequently raised and has been heard and finally decided by that court. See: Section 7 of the Civil Procedure Act cap 282, *Lt. David Kabarebe V Major Prossy Nalweyiso* CACA No. 34 of 2003

This position of the law was further fortified by the Court of Appeal in *Ponsiano Semakula V Susane Magala & Others*, 1993 KALR 213 which was cited with approval in the latter case of *Maniraguha Gashumba V Sam Nkundiye*, CA Civil Appeal No. 23 of 2005. The Court had this to say:

"The doctrine of res judicata, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine (is) succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eada causa' (no one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res judicate appears to be that the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

From the foregoing legal position, therefore, the essential elements of the doctrine of res judicata are:

a) There was a former suit between the same parties or their privies;

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- b) The matter was heard and finally determined by the court on its merits;
- c) The matter was heard and determined by a court of competent jurisdiction; and;
- d) The new suit concerns the same subject as the previous suit.

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See: Hon. Maj. Gen (RTD) Kahinda Otafire V The New Vision Printing & Publishing Corporation and 2 Ors HCCS No. 505 of 2019.

In the instant case, the learned trial Magistrate on page 7 of his judgment stated that upon perusing the judgment in Civil Suit No. 017 of 2003 between the appellant and a one Kambugu Sulaiman, he came to a conclusion that the subject matter was the same in both suits but the parties were different and neither did the respondent (plaintiff) derive title from the said Kambugu Sulaiman the defendant in the former suit.

I have had the opportunity to peruse the judgment in Civil Suit No. 017 of 2003. I note the following:

- 1. The suit was between Nagadya Joweria as the plaintiff and Kambugu Sulaiman as the defendant.
- 2. The suit was heard and determined by a Magistrate Grade One of the Chief Magistrate's Court of Mubende sitting at Kiboga;
- 3. The subject matter was a land situate at Kyetume (kibanja at mile 73)
- 4. The cause of action was for declaration of ownership of land and trespass
- 5. Court found that Nagaddya Joweria (appellant) was the owner of the suit land and that Kambugu Sulaiman was a trespasser thereon.

I have also perused the judgment in Civil Suit No.027 of 2017, the subject in that suit was land Kyetume Mile 73. The suit was heard and determined by a magistrate grade one at Kiboga. That suit was between Namubiru Imelda as a plaintiff and Nagadya Joweria as the defendant.

It was imperative for the lower court to establish if the elements of res judicata were established in relation to the two suits.

It was not in dispute that the subject matter in the two suits was the same; that is land at Kyetume mile 73. This element was thus established.

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Further, it was not disputed that civil suit no. 17 of 2003 was heard and determined by a court of competent jurisdiction that is the Magistrate Grade one at Kiboga and the second one was also before a magistrate grade one at Kiboga.

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What remained in issue was the element of whether the parties in both suits were the same or their privies.

Counsel for the appellant submitted that had the trial magistrate read the findings of court in Civil Suit No. 17 of 2003, he would have realized that the defendant's defence was based on ownership of the land by his wife (DW2) who is the respondent in this appeal and was the plaintiff in the lower court.

I have perused the judgment in civil suit no. 017 of 2003, on page 4 paragraph 1 of the judgment, the trial magistrate stated that;

"the defence evidence was nothing more than an assertion of how the kibanja in contention belonged to the defendant's wife (DW2) having obtained it from her late father Biasali Nsubuga as early as 1977 when she was married to the defendant."

The trial magistrate in that case went ahead to find in favour of the appellant who was the plaintiff then. She was found to be the owner of the suit land and the said Kambugu Sulaiman the husband of the respondent to be a trespasser.

In trying to prove and affirm that the parties in the two suits are different, counsel for the respondent submitted that the rights of the respondent as a beneficiary of her father's estate were not determined in Civil Suit No. 017 of 2003 since she was not a party to the said suit and further that the respondent did not derive title from the said Kambugu Sulaiman.

It is important to note that the issue for determination in Civil Suit No. 017 of 2003 was ownership of land which is the current suit land. Parties to that suit were clearly different. In Civil Suit No. 017 of 2003 the parties were Nagaddya Joweria V Kambugu Sulaiman while in civil suit no. 027 of 2017, the parties were Namubiru Melda V Nagaddya Joweria.

However, in Civil Suit No.017 of 2003, the defendant Kambugu Sulaiman stated that he derived his rights or claim from his wife Namubiru Melda the respondent in this appeal who later became the plaintiff in the suit before the lower court.

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In Kambugu Sulaiman's defence in Civil Suit No. 017 of 2003 he stated that his wife now the respondent had inherited the land from her father Biyasaali Nsubuga. His wife Imelda Namubiru testified as a witness in that case and gave evidence to the extent that the land was hers having inherited the same from her late father Biyasaali Nsubuga.

In the Civil Suit No.027 of 2017, the said Namubiru Melda sued the appellant for the same suit land and her claim was that she inherited the land from her late father Biyasaali Nsubuqa.

Whereas the parties are indeed different in the two suits, the defendant in the previous suit derived his title from the plaintiff in the impugned suit. This makes the defendant in the former suit synonymous with the respondent herein and vice versa.

In the Explanation of Section 7 of the CPA, it is provided that;

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'Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating'

In Civil Suit No. 17 of 2003, the defendant Kambuqu sulaiman claimed interest or right in the suit land in common for himself and his wife the respondent herein. It therefore follows that the orders given by the court in that suit had a direct impact on the respondent in relation to her claims over the same suit land. The respondent's interests were raised and dealt with in that matter.

As already noted above in Ponsiano Semakula V Susane Magala & Others(supra), the test whether or not a suit is barred by res judicata is that the plaintiff in the second suit is trying to bring before the court the same suit in another way and in the form of a new cause of action, a transaction which has already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon.

At page 13 of the same case of Ponsiano Semakula v Susane Magala cited above it was explained that the doctrine of res judicata is embodied in S.7 of CPA is a fundamental

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doctrine of all courts that there must be an end to litigation. This is the spirit of the doctrine succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eadem causa' (No one should be vexed twice for the same cause)

Clearly, Civil Suit No.027 of 2017 was camouflaged by the respondent to look like a new cause of action by a different party yet the same had already been fully determined by a competent court vide Civil Suit No. 17 of 2003.

The trial Magistrate also ignored what should have been clear in his sight that the plaintiff who is now respondent was claiming the same land that her husband had been sued for before. The husband was deriving his rights from his wife the respondent. A competent court of a magistrate Grade one at Kiboga heard and disposed of a suit on the same subject matter. The issue for determination was the same, ownership of land at Kyetume 73 mile. The parties in the previous suit and the parties in the current suit were the same in as far as the defendant in the former suit was deriving his rights over the land in issue from the current respondent/plaintiff who was his

wife.

Civil Suit No. 27 of 2017 was therefore res judicate and ought to have been found so and struck off. Grounds 1 and 4 are upheld.

With the above finding, there is no need for me to proceed to determine other grounds of appeal as the finding in the above grounds disposes of the whole appeal.

Consequently, this appeal succeeds and it is allowed with the following orders:

- a) The judgment, decree and orders of the lower court are set aside
- b) Civil Suit No.027 of 2017 in the Chief Magistrates Court of Kiboga is struck out for being re judicata.
- c) The respondent shall meet the costs in this court and the lower court.

It is so ordered.

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KAREMANI JAMSON. K

JUDGE.

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\$21.03.2025\\\$

Court: Delivered by email on this \$21^{\text{st}}\$ day of March, 2025.

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JUDGE.

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