

UGANDA / JUDGMENT

Yemaneab v Raesu (Miscellaneous
Application 779 of 2024) [2024]
UGCommC 348 (31 December 2024)
[2024] UGCommC 348

COURT
Commercial Court of Uganda

BEFORE
Mutesi, J

CASE / FILE NUMBER
Miscellaneous Application 779 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 0779 OF 2024 ARISING FROM CIVIL SUIT NO.
0092 OF 2022

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ABRAHAM YEMANEAB :::::::::::::::::::::::::::::::

VERSUS

..... RAESU
HADISH :::::::::::::::::::::::

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The Applicant brought this application by notice of motion under Section 98 of the Civil Procedure Act and Order 6 Rules 28, 29 & 30, Order 7 Rules 11(a), (d) & (e), Order 44 Rules 2, 3 & 4 and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules seeking orders that:

- 1. Civil Suit No. 0092 of 2022 is barred by the res judicata doctrine.

- 2. Civil Suit No. 0092 of 2022 does not disclose a cause of action against the Applicant.
- 3. Civil Suit No. 0092 of 2022 is barred by limitation of time.
- 4. Civil Suit No. 0092 of 2022 is frivolous and vexatious and an abuse of the court process.
- 5. The Respondent filed a notice of appeal following the ruling in Civil Suit No. 0400 of 2020 and the same has not been followed up.
- 6. Costs of the application be provided for.

Briefly, the grounds of this application are that:

- 1. On 8th June 2020, the Respondent filed Civil Suit No. 0400 of 2020 in this Court against the Applicant.
- 2. The Applicant filed a written statement of defence in Civil Suit No. 400 of 2020 raising several preliminary objections.
- 3. The Applicant formally raised the said preliminary objections before the Court. On 25th November 2021, the Court dismissed Civil Suit No. 0400 of 2020 for not disclosing a cause of action against the Applicant.
- 4. The Respondent, having been aggrieved by the ruling dismissing Civil Suit No. 0400 of 2020, filed a notice of appeal in this Court and also served the same on the Applicant's lawyers.
- 5. The Respondent's lawyers have not proceeded with the appeal but they have instead filed a new suit in this Court vide Civil Suit No. 0092 of 2022 ("the main suit") on the same subject matter and the same parties.
- 6. On 2nd March 2022, the Applicant filed a written statement of defence in which he said that he would raise preliminary objections on points of law against the main suit.
- 7. The Respondent has no cause of action whatsoever against the Applicant as alleged or at all since the Respondent never contributed any money for the purchase of the land which is the subject matter of the main suit.
- 8. The Respondent's suit is time barred as the alleged facts/contract are said to have arisen in 2014.
- 9. The Respondent's suit is bad in law and a mere fabrication. Accordingly, it should be struck out with costs to the Applicant.
- 10. The Respondent's suit is misconceived and an abuse of the court process and it is intended to deny the Applicant the money that the Respondent owes him in the counterclaim in Civil Suit No. 0400 of 2020.

- 11. The Application has been made without undue delay.
- 12. It is in the interest of justice that this application is granted.

The application is supported by the affidavit of the Applicant. He told Court that, on 8th July 2020, the Respondent filed Civil Suit No. 0400 of 2020 against him for recovery of USD 52,750 being money had and received for the purchase of the land comprised in Kyadondo LRV KCCA 41 Plot 5370 Folio 14 situate at Kisugu, Kironde Road, Kampala ("the suit land") and / or the then market value of the Respondent's share of the suit land valued at USD 100,000, specific performance to parcel the land in equal shares between the parties, damages and costs of the suit. On 24th July 2020, the Applicant filed a written statement of defence and a counterclaim. In the written statement of defence, he intimated to Court that he intended to raise preliminary objections to the effect that the Plaintiff has no cause of action against the Defendant, among other objections.

The Applicant stated that the Court heard the preliminary objections he raised and, on 25th November 2021, it dismissed Civil Suit No. 0400 of 2020 with costs and ordered the counterclaim to be fixed for hearing. The costs in Civil Suit No. 0400 of 2020 were taxed and paid to the Applicant's lawyers. The Respondent filed a notice of appeal and revealing that he wished to appeal the ruling and orders of the Court but the same has never been followed up. On the contrary, and in total abuse of the process of the Court and the rules of res judicata, the Respondent, on 5th February 2022, filed the main suit against the Applicant. The Applicant stated that, in para. 3 of the plaint in the main suit, the Respondent claims exactly the same reliefs as in Civil Suit No. 0400 of 2020. On 2nd March 2022, the Applicant filed a defence to the main suit in which he stated that he would raise preliminary objections against the main suit, hence this application.

The Respondent swore and filed an affidavit in reply opposing the application. He stated that the affidavit in support of the Application is incurably defective for non-compliance with the Illiterates Protection Act since it does not contain a certificate of translation yet the Applicant is an Eritrean who is illiterate in the English language. He said that the law on res judicata applies where a previous suit was heard on its merits and a judgment was thereafter delivered.

The Respondent stated that, with regard to the 19th October 2018 document in which the Applicant's accountant, one Kiflom Khasay, conveyed the Applicant's admission that both parties were partners in the suit land, Court concluded that "the translated version does not either indicate the name of the author or the person it is addressed to" and resultantly dismissed his Civil Suit No. 0400 of 2020 against the Applicant without hearing the translator of the document from Tigrinya to English. That the said document entitled "some honest answers to your queries" containing the admission of partnership in the suit land, was authored by Kiflom Khasay in reply to Mr. Binyam's (the Respondent's accountant's) queries raised on the Respondent's behalf in a letter dated 20th September 2018. The said letter which was addressed to the Applicant was in respect to his very many business dealings with the Applicant consisting of transactions and money flows in various bank accounts in South Sudan and Uganda

which the Applicant had previously failed to explain satisfactorily to the Respondent as his business partner.

The Respondent clarified that this was the context in which the letter authored by Kiflom Khasay arose. Since he had put into issue the unexplained transactions in his mutual dealings with the Applicant, the 2 parties executed a Memorandum

of Understanding on 22nd September 2018 agreeing to conduct a comprehensive reconciliation. Any doubt as to the authorship of the said document was rested when the Makerere Institute of Languages subsequently confirmed its earlier translation and issued conspicuous clarity that indeed Kiflom Khasay was the author of the document, a fact which was further corroborated by the Police Handwriting Expert who concluded that the said Kiflom Khasay was the author. He concluded that res judicata does not apply to facts transpiring subsequently and upon which the challenged main suit is commenced.

Finally, the Respondent stated that, at some point in the said letter containing some honest answers, the author swore by the Ark of the Covenant which is a very powerful statement in their Eritrean Community since they live by absolute trust and honesty. As such, he was very shocked when the Applicant and his Accountant Kiflom Khasay denied the said letter of 19th October 2018 titled "some honest answers to your queries". He did not file the suit in the Land Division but in this Court because he observed that the dispute was just a strand of the very many commercial transactions he had with the Applicant and which Court had to exhaustively scrutinize before rendering judgment. In the end, he emphasised that the factual outline in the main suit is not exactly the same as that of Civil Suit No. 0400 of 2020 and the claim therein is, in part, supported by events that occurred after the dismissal of Civil Suit No. 0400 of 2020 which have not yet been litigated and determined by any court in any previous suit.

Issue arising

Whether Civil Suit No. 0092 of 2022 is competent.

Representation and hearing

At the hearing, the Applicant was represented by M/S Katende, Ssempebwa & Co. Advocates while the Respondent was represented by M/S Barenzi & Co. Advocates. I have carefully considered the submissions of counsel, the laws and authorities they cited and all the other materials on the record while deciding this application.

Determination of the issue

Whether Civil Suit No. 0092 of 2022 is competent.

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Before delving into the merits of this issue, I shall first dispose of the preliminary objection raised by the Respondent against the Applicant's affidavit in support of the application. It was contended by the Respondent in his affidavit in reply, and later argued by his counsel in submissions, that the Applicant is an illiterate person who cannot read and write. As such, they contended that the affidavit in support is incurably defective since it does not contain a certificate of translation contrary to Section 3 of the Illiterates Protection Act.

I am unable to see any merit in this objection for two reasons. First, apart from his own assertion in the affidavit in reply, the Respondent did not adduce any other evidence to corroborate the claim that the Applicant is illiterate. Despite pointing out in his affidavit in reply that he wanted the Applicant to appear for cross examination, the Respondent did not make a formal request to the Court before or during the hearing of the application to have the Applicant summoned for cross examination on any of the contents of his supporting affidavit pursuant to Order 19 Rule 3 of the Civil Procedure Rules.

Second, the Applicant's affidavit in support contains his signature. The affidavit is not thumb-printed as is typical of affidavits deposed by illiterate persons. In *Ojangole Wilson & Anor v Jerome Otim Oule*, HCMA No. 41 of 2013, this Court found it strange that a person who had read and understood an affidavit could have thumb-printed it instead of appending his signature to it. The Court went on to hold that thumb-printing an affidavit creates a presumption that the one swearing/affirming it is an illiterate person, and vice versa.

Additionally, in *Oonyu Lawrence v Okoodi Gereson*, HCCA No. 2 of 2009, this Court was called upon to decide if it was plausible for a teacher (and, as such, a literate person) to have sold his property under a written agreement to which he had only affixed his thumbprint and not his signature. This Court found that it was more probable than not that a teacher (a literate person) would not have executed such an agreement by affixing his thumb-print and that he would have instead appended his signature to it.

Similarly, in the absence of any compelling evidence corroborating the claim that the Applicant is illiterate, I am inclined to find that the fact that the affidavit in support was signed off by the Applicant makes it more probable than not that the Applicant understood the contents of the affidavit in support as written in the English language.

Furthermore, for argument's sake, I am convinced that even if the affidavit in support of this application was found to be incurably defective as claimed, that would not lead to a dismissal of this application. This is because this application largely raises points of law against the main suit. It is an application that need not be grounded in evidence per se. The points of law are raised on the basis of what is already on the Court record in the main suit and in Civil Suit No. 0400 of 2020 and, even without any affidavit evidence, the Court would still be able to revisit its record and analyse the relevant laws to ascertain the potency of the points of law raised by the Applicant.

Besides, it is trite that a court of law cannot sanction an illegality. An illegality, once brought to the attention of any court, cannot be overlooked. It overrides all other questions arising before that court. (See *Makula International Ltd v His Eminence Cardinal Emmanuel Nsubuga & Anor*,

CACA No. 4 of 1981). The Court has an enduring duty to manage its record. An illegality, once discovered on the record, cannot be allowed to stay thereon. For that reason, even if a party to the litigation files a formal application informing the Court of any such illegality but it later turns out that the affidavit supporting that formal application is incurably defective, that cannot stop the Court from investigating the allegations raised in the application. In respect of the instant case, the Court cannot keep a suit which is barred by law on its record simply because the allegations of illegality were brought to the Court's attention through an application which is accompanied by an incurably defective affidavit. The defect will be duly acknowledged but the overriding interest for the Court, in that context, will be to weed out illegalities on its record to ensure that court processes are not used to perpetrate illegalities.

Turning to the merits of the application, although the notice of motion and its supporting affidavit raise five different points of law against the main suit, the parties focused their submissions on the point of res judicata. For that reason, I will initially deal with the issue of res judicata, and will only traverse the other points of law raised if the Applicant's claim of res judicata fails.

The doctrine of res judicata is encapsulated in Section 7 of the Civil Procedure Act which 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 has been finally decided by that court."

In *Ponsiano Semakula v Susane Magala & Ors*, 1993 KALR 213 which was cited with approval in *Maniraguha Gashumba v Sam Nkundiye*, CACA No. 23 of 2005, the Court explained that:

"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 to **litigation**. The spirit of the doctrine (is) succinctly expressed in the known maxim: 'nemo debet bis vexari pro una et eadem 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 is whether or not a 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." Emphasis mine.

The essential elements for the doctrine of res judicata to apply are:

- (a) There was a former suit between the same parties or their privies.
- (b) The former suit was heard and finally determined by a court of competent iurisdiction on its merits.
- (c) The fresh suit concerns the same subject and same parties or their privies.

(See Bithum Charles v Adonge Sally, HCCS No. 20 of 2015).

In the instant suit, it is an undisputed fact that the parties in Civil Suit No. 0400 of 2020 and the main suit are the same. Both suits concerned the same subject matter, to wit, a claim for recovery of USD 52,750 which, the Respondent says, is what he contributed to the purchase of the suit land. The parties to both suits are the same.

It is also on the Court record that, on 25th November 2021, Civil Suit No. 0400 of 2020 was dismissed on the finding that the plaint did not disclose a cause of action. The ratio decidendi for that finding by the Court was that the Respondent (Plaintiff therein) had not adduced any document to prove that there was an agreement in writing in which he had advanced the claimed sum to the Applicant or in which the Applicant had agreed to purchase the suit land and have both parties registered as joint owners. The Court further stated that the certificate of title to the suit land did not reflect the Respondent as one of the owners of the suit land. Finally, in regard to the Respondent's claim that his partnership agreement/arrangement had been acknowledged by the Applicant, the Court found that that said acknowledgment did not indicate who had authored it or to whom it was addressed. Court concluded that the evidence of acknowledgment of the partnership arrangement was inconclusive.

The Respondent now claims that the main suit is not res judicata. In para. 11 of his affidavit in reply, the Respondent stated:

"That in reply to paragraphs 8 and 9 of the affidavit in support, the factual outline in Civil Suit No. 092 of 2022 is not exactly the same as that of Civil Suit No. 400 of 2020 and the claim therein is in part supported by events that occurred after the dismissal of Civil Suit No. 400 of 2020 as shown in paragraph 7 hereof which have not yet been litigated and determined by any court in a previous suit." Emphasis mine.

In the said para. 7 of the affidavit in reply, the Respondent alleged that there are some new facts which the main suit presents. He stated:

"That any doubt as to authorship of the said document containing 'some honest answers to your queries' was rested when the Makerere Institute of languages subsequently confirmed its earlier translation and issued conspicuous clarity that indeed Kiflom Khasay was the author of the document a fact that was further corroborated by the Police Handwriting Expert's conclusion that the said Kiflom Khasay was the author."

I am in agreement with the Applicant that the main suit presents the same claim and the same legal and factual issues as Civil Suit No. 0400 of 2020 did. The only new aspects which the main suit has introduced, according to the Respondent, are clarifications by Makerere Institute of Languages and the Police Handwriting

Expert on the authorship of the document entitled "Some honest answers to your queries" said to constitute the admission of partnership between the Applicant and the Respondent. This is simply additional evidence that the Respondent wishes to rely on at the trial of the main suit to clarify on his claim against the Applicant. Nonetheless, however compelling that additional evidence is, it does not alter the nature of the claim in the two suits in any way. The matters in issue in Civil Suit No. 0400 of 2020 are the same as those in issue in the main suit.

A scenario similar to the present one was considered in *Jalia Muwanga & 3 Ors v Mohan Musisi Kiwanuka*, HCMC No. 82 of 2023. This was an application for, inter alia, a finding that the respondent therein was a person suffering from a mental illness under the Mental Health Act. The applicants therein acknowledged that an earlier application had been filed by the respondent's son. That application had been dismissed prompting the respondent's son to appeal to the Court of Appeal. The applicants however, claimed that although that appeal in the Court of Appeal had not been disposed of at the time, their brother (the respondent) had unfortunately undergone further cognitive impairment. The applicants had relied on evidence of that further cognitive impairment to argue that they were justified to file a fresh application seeking for the same orders as sought in the earlier application. In reaching the finding that the new application was barred by *res judicata*, the Court had this to say:

"It was averred by the Applicants and argued later by their Counsel that this application has been necessitated by the fact that considerable time has passed since the litigation and decision in the previous suit and owing to the nature of mental health, possible degeneration has since occurred which require and would not bar fresh litigation of the matter. I am unable to appreciate this argument by Learned Counsel for the Applicants. Change of facts and/or circumstances cannot constitute a distinct cause of action as to extinguish the application of the doctrine of *res judicata*. Once a matter has been determined essentially on the same issues, passage of time cannot constitute a ground for re-litigation of the matter; more so where an appeal still lies from the decision in the previous suit. In such a situation, the better option would have been for the parties to seek for production of additional evidence on appeal; which option is available under the law. I am therefore satisfied that the present action concerns the same subject matter and issues as the previous suit." *Emphasis mine.*

I cite the above dictum with approval as I believe that it is relevant to this case.

In the present case, the Applicant alleged that there is a notice of appeal filed by the Respondent against the ruling dismissing Civil Suit No. 0400 of 2020, but he did not annex any such notice of appeal to his affidavit in support. I have also not seen the said notice of appeal on record.

Nonetheless, I still believe that if new evidence had come to the Respondent's knowledge and possession after the ruling dismissing Civil Suit No. 0400 of 2020, the correct course of action was for the Respondent to appeal against that ruling and to file an application to adduce that additional evidence on appeal. As this Court guided in *Jalia Muwanga & 3 Ors v Mohan Musisi Kiwanuka* (*supra*), the passage of time and the procurement of new evidence, however compelling that evidence may be, on an already litigated dispute does not necessarily alter the subject matter of that dispute. The subject matter would remain the same, only that new evidence of the claims therein would have emerged.

Be that as it may, the Court reiterates that the plea of *res judicata* applies 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 before the court at the time. (See *Maniraguha Gashumba v Sam Nkundiye* (*supra*)). I am convinced that all the Respondent's alleged new evidence could have been discovered and procured with reasonable diligence even before the filing of Civil Suit No. 0400 of 2020.

The alleged clarifications from Makerere Institute of Languages and the Police Handwriting Expert about the true authorship of the document entitled "Some *honest answers to your queries*" could easily have been applied for and obtained even before the filing of Civil Suit No. 0400 of 2020. Thus, but for the obvious strategic oversight by the Respondent and his lawyers at the time, in not seeing the value of procuring that evidence before filing Civil Suit No. 0400 of 2020, that said suit may not have been dismissed on grounds of lack of cause of action.

Contrary to the submissions of Counsel for the Respondent, the doctrine of *res judicata* does not only apply when the former suit went through a hearing and was finally decided through a judgment/decreed. Section 7 of the Civil Procedure Act bars the re-litigation of a suit or even, simply, an issue. As long as an issue is finally heard, considered and determined, the stage of the litigation process at which this is done is inconsequential.

In the instant case, there is no doubt that the issue of whether or not there was a partnership arrangement between the Applicant and the Respondent for the purchase, ownership, development and management of the suit land was finally decided. As I recounted earlier in this ruling, in dealing with that issue, the Court found that there is no evidence to support a finding that that alleged partnership exists. If the Respondent secured new and compelling evidence after that ruling on the matter proving that the partnership exists, he ought to have taken up the matter on appeal and sought leave to present that new additional evidence in that appeal.

In the premises, I find that there was a former suit between the same parties in the main suit which was finally determined by this Court. The main suit concerns the same subject matter and is between the same parties as that previous suit. Accordingly, I find that the main suit is barred by the doctrine of *res judicata* and it is not necessary for me to delve into any of the other points of law raised.

Consequently, this application succeeds and I make the following orders:

- $\mathbf{i}$. This application is allowed.
- ii. Civil Suit No. 0092 of 2022 is hereby dismissed for being barred by the doctrine of res judicata.
- iii. Costs of Civil Suit No. 0092 of 2022 and those of this application are awarded to the Applicant.

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Patricia Mutesi JUDGE (31/12/2024)

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Prepared on 12 October 2026 · Esheria