THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 08 OF 2016

1. OLANDO DIFASI
2. ODUNGU MOSES ::: **APPELLANTS**
3. OYAMBI JOHN
4. OWORA GEOFFREY

VERSUS

ZAKARIA ONO ::: **RESPONDENT**

(Arising from the judgment of the High Court of Uganda at Mbale in Civil Appeal No. 25 of 2013 dated 5th November 2015 delivered by the Honorable Justice Henry I. Kaweesa)

CORAM: **HON. MR. JUSTICE REMMY KASULE, JA**
HON. MR. JUSTICE GEOFFREY KIRYABWIRE , JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT

This is a second appeal arising from the judgment and orders of the High Court of Uganda delivered on 5th November 2013. The first appeal arose from the decision of the Chief Magistrate's Court of Tororo presided over by His Worship Charles Emuria in Civil case No 12 of 2012 delivered on 15th February 2013.

The facts are that the respondent filed Civil case No 12 of 2012 against the appellants in the Chief Magistrate's Court of Tororo claiming ownership over the suit land (customary land) measuring approximately 12 acres situate at Panjirenja village, Mulanda sub-county, Tororo district. The respondent claims to have inherited the same from his late

father, Alfred Ochieng who owned the same from his ancestors. He further claimed that the suit land was subject of court litigation in 1982 wherein the appellants' father Yekonia Owora filed Civil Suit MT. 32/82 against the respondent's father Alfred Ochieng and himself at the Grade II Magistrate's Court, Kisoko which suit the respondent's father won.

The appellants are siblings who contend that the suit land belonged to their father, Yekonia Owora who had been chased from the suit land by the respondent in 1982 when the respondent was a police officer.

The memorandum of appeal contained 6 grounds of appeal as follows:

1. **That the learned Judge erred in law and fact when he failed to properly re-evaluate the evidence as a whole hence arriving at a wrong decision.**

2. **That the learned Judge erred in law and fact when he wrongly applied the doctrine of res judicata hence arriving at a wrong decision.**

3. **That the learned appellate Judge erred in law and fact when he declared that the respondent was a party to Civil Suit No. MT32/82.**

4. **That the learned appellate Judge erred in law and fact by declaring the disputed land belongs to the respondents and the appellants are trespassers.**

5. **The Judge erred in law and fact when he held that the respondent is a bona fide holder of the suit land.**

6. **The learned Judge erred in fact and law when he held that the appeal to the High Court was not out of time.**

We observe that the appellants in their memorandum of appeal set out six grounds but chose to argue four grounds in their conferencing notes. There is no discussion of grounds 3 and 6 therein or in the oral submissions made before this court. We shall presume that those grounds were abandoned and we will not make orders regarding the same.

During the hearing of the appeal, counsel for the appellant argued grounds 1 and 4 on evaluation of evidence together while the second ground addressed the issue of res judicata.

Mr. Brian Otheino appeared for the appellants and Mr. Ssewankambo Hamzah and Mr. Sserunkuuma Bruno represented the respondent.

This being a second appeal, it is necessary at this point to remind ourselves of what the duty of this Court is on a second appeal. We refer to **Section 72 of the Civil Procedure Act, Cap 71 (CPA)** which provides:

> *" (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-*
>
> *a. The decision is contrary to law or to some usage having the force of law*
> *b. The decision has failed to determine some material issue of law or usage having the force of law*
> *c. A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits..."*

We also make reference to **Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10** (hereinafter referred to as the "Rules of this Court") which further provides:

"on any second appeal from the decision of the High Court acting in the exercise of its appellate jurisdiction, the Court shall have the power to appraise the inferences of fact drawn by the trial Court, but shall not have discretion to hear additional evidence..."

Ground 1 - on evaluation of evidence

Arguments of the appellants

Counsel for the appellants submitted that this ground of appeal is premised on the fact that the 1st appellate Court found many major inconsistencies and contradictions in the evidence of the appellants and yet there were none. Counsel faulted the appellate Judge for relying upon the evidence of the respondent that a Magistrate appeared at the locus and yet the evidence of the appellants was that there was no earlier suit in this matter in 1982 between the respondent's father and the appellants' father. Counsel further submitted that the Judge erred in concluding that this was the line of evidence that run through all the witnesses but one of them (i.e. the 3rd defense witness) who stated that a Magistrate had visited the locus.

Counsel argued that the record does not show whether it was the trial Magistrate or another Magistrate who visited the locus and the record does not show for what purpose the Magistrate visited the locus.

Counsel also argued that in order to prove the existence of an earlier suit, the judgment, decree and proceedings must be presented which was not done in this case, hence the appellate Judge erred in law in finding that there were major contradictions regarding existence of an earlier suit.

Counsel criticized the learned Judge for holding that the appellants' evidence was hearsay and failing to properly scrutinize the evidence before him on appeal. He pointed out that the record does not show how the appellant's evidence was hearsay evidence.

He prayed that this ground of appeal be allowed.

Arguments for the respondents

Counsel for the respondents submitted that the learned appellate Judge thoroughly evaluated the evidence of PW1 to PW4 together with the evidence of the appellants' witnesses and found inconsistencies in the appellant's case thus arriving at the conclusion that the respondent is the rightful owner of the suit land.

He further submitted that the appellate Judge properly evaluated evidence on record as a whole contrary to what counsel for the appellants submits. Relying on the authority of **Kifamunte Henry V Uganda, SC (Cr) Appeal No 10 of 2007**, Counsel for the respondents submitted that this being a second appeal, this Court has no automatic duty to re-evaluate the evidence on record that was before the first appellate Court. Therefore, that the court should disallow this ground.

Court's Resolution

We have considered all arguments of both counsel. The point of law to be resolved relates to evaluation of evidence on record and whether the learned Judge discharged this duty properly.

Counsel for the respondent, relied on the cases of **Kifamunte Henry V Uganda, SC (Cr) Appeal No 10 of 2007** and **Banco Arabe Espanol v Bank of Uganda, SCCA No. 8 of 1998** which are to the effect that on second

appeal the Court of Appeal (as a second appellate court) is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact; this being a question of law: **R V Hassan bin Said (1942) 9 EACA 62**.

Addressing the issue of adverse possession, counsel submitted that this never arose in the trial Court and was never even a ground of appeal. Interestingly, the appellants in this court did not also raise the issue of adverse possession as a ground of appeal. We shall therefore not consider it.

The contradictions in the appellants evidence which the Judge raises relate to the issue of *res judicata.* We have carefully perused the record and find that the law on contradictions was well considered by the appellate Judge while relying on the authority of ***Alfred Tajar v Uganda (EACA) No.* 167/1967** which is to the effect that major inconsistencies will lead to the evidence of a witness being rejected and minor inconsistencies will not have the same result unless they point to deliberate falsehood.

The law was properly considered and therefore we cannot reappraise only the facts without a point of law relevant to them. We find no error in law here.

Regarding hearsay evidence, the law according to Section 59 of the Evidence Act is that oral evidence must be direct. The appellate Judge

found that the appellants were simply told of their father's ownership of the suit land since they were minors which amounted to hearsay. The appellate Judge looked at the evidence of the appellants on record and came to that conclusion. We find that it was backed by evidence and thus we cannot disturb his finding.

Having appreciated the duty of this Court on second appeal, we believe this omnibus ground of re-evaluation of evidence would require that we delve into the question of whether the appellants are the rightful owners of the suit land or not. We are precluded from doing so provided there is no point of law relevant to the facts. We can only interfere where the court considers that there was no evidence to support the finding of fact; this being a question of law.

This ground accordingly fails.

Ground 2: on res judicata

Arguments for the appellants

Counsel for the appellants submitted that having found that the dispute between the parties was a determined matter, the learned Judge erred in law by wrongly applying the principles of res judicata. Counsel further submitted that the correct procedure would have been for the Judge to have dismissed the appeal rather than proceeding to determine it and make orders therein.

Counsel contended that by determining the appeal, the appellate Judge did not comply with Section 7 of the Civil Procedure Act which bars any

Court from trying any matter that has been directly and substantially dealt with in a former suit between the same parties.

Counsel also submitted that there is no judgment or proceedings which point to a predetermined matter and prayed that this ground and the appeal be allowed.

Arguments for the respondents

Counsel submitted that the learned Judge relied on exhibit 2 and letters between the trial Magistrate and the Court at Kisoko confirming that a certified copy of a Judgment in MT 32 of 1982 had been supplied to Court. He submitted that those two documents formed the basis for the finding that the suit was res judicata.

He then prayed that this ground and the appeal be dismissed for lack of merit.

Resolution

The Court of Appeal of Uganda in **Ponsiano Semakula versus Susane Magala & Others, 1993 KALR P.213** had this to say on the doctrine of *res-judicata*.

> *"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 succinctly expressed in the well-know maxim:* **'nemo debt 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-judicata** *appears to be that the plaintiff in the*

second suit trying to bring before the court in another way 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** *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".*

We agree and are bound by the above proposition of the law.

In this regard, the first appellate Judge in this matter held that:

"Thus in this case, since the same land had been the subject of litigation in 1982, the suit was barred by res judicata as the matter had already been dealt with by the court and the same was determined"

He went on to hold:

"He for example ignored the clear evidence that the appellant is a son of the late Alfred Ochieng who had a dispute on the same land with Yokonia Owora the father of the defendant. The same dispute on ownership could not have again been determined by the trial Magistrate who himself had noted in his judgment at page 6 of his judgment that; "I am persuaded though both parties do not want to say that there was however a suit between Yokonia Owora against Alfred Ochieng.

This suit was concerning this dispute and was hence a determined matter. The evidence of the existence of this civil suit was provided through PW1, PExh.2, PW2, PW3, PW4 and DW 1..."

Counsel for the appellants relied on the case of **Mansuklal Ramji Karia and Anor V Attorney General and Ors, SCCA No. 20 of 2002** in which the minimum conditions for a suit being *res judicata* were stated as follows;

1) There has to be a former suit or issue decided by a competent court

2) 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.

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

In the instant appeal, we find that the record of appeal does not contain a copy of the judgment in the suit between Yokonia Owora and Alfred Ochieng. This, counsel for the respondent correctly pointed out, is an important ingredient in determining whether the doctrine of Res Judicata should be applied.

Paragraph 4 (c), (e) and (d) of the Plaint at the Chief Magistrates Court in Tororo refer to a civil suit No. MT 32/82 in the Magistrate Grade II in Kisoko filed by the late Yokonia Owora (Father of the appellants) against the late Alfred Ochieng (father of the respondent) involving the suit land which the late Alfred Ochieng won. The judgment in that suit is not attached to the pleadings and indeed was not even produced and or adduced in evidence during the trial. What is attached to the pleadings are certified photocopy extracts from the Register of the said Grade II Court which shows that civil suit No. MT 32/82 was registered in the court and was concluded with judgment for the defendants (i.e. Alfred Ochieng). Section 7 of the Civil Procedure Act is quite clear and provides:

"...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 heard and finally decided by that court..." (Emphasis ours).

Without the detailed judgment in civil suit No. MT 32/82 it is impossible as a matter of law to determine exactly what was directly and or substantially in issue in that matter in which the defendant (Alfred Ochieng) was successful. We further do not have the pleadings in civil suit No. MT 32/82 nor the proceedings; so it would be presumptuous in absence of the above for any court to find that the issues in this dispute before us are directly and substantially the same as in the earlier said suit. All that we can definitively find is that civil suit No. MT 32/82 involved a land dispute between the late Yokonia Owora and the late Alfred Ochieng in which the late Alfred Ochieng was successful. We simply do not have any details of the judgment or orders of that decision on record to be able to apply the doctrine of res judicata. With the greatest of respect, the first appellate Judge erred when he found that the earlier suit determined this dispute as filed at the Chief Magistrates Court in Tororo. There is no evidence to support that finding on record.

We thus find, that in the absence of the detailed judgment in MT 32 of 1982, this suit cannot be said to be *res judicata* and this ground of appeal therefore is successful.

Final Result.

This appeal is partially successful. However the substantive result is that the orders of the Judge on appeal are set aside. The Judgment of the trial Magistrate is reinstated. The suit land is be divided as detailed by the Judgment of Chief Magistrate on the 15th February, 2013. We award

the appellants two thirds of the costs here on appeal and the full costs in the Courts below.

We so Order

Dated at Kampala, this 11th **day of** September **2017**

HON. JUSTICE REMMY KASULE

Justice of Appeal

HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

HON. JUSTICE CHEBORION BARISHAKI

Justice of Appeal

18/9/2017
Hamza Senyamboo & Brian Semukasa
for Respondents
Komakech holding brief for Brian
Othieno for Appellants
Ndahiraga
Cl: Judgments read in court