

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLANEOUS APPLICATION NO. 2438 OF 2016

(ARISING FROM EMA NO. 2221 OF 2016)

(ARISING FROM CIVIL SUIT NO. 115 OF 2012)

SSALI SAMUEL

(SUING THROUGH BYAMUKAMA WILSON & KATUMBA EDWARD)

10 DONEES OF POWER OF ATTORNEY APPLICANT/OBJECTOR

VS.

KATENDE GODFREY RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application made under 0.22 rr 52 (2) 56 and 57, 0.52 rr 1,2 and 3 C.P.R. S.64 and 98 CPA and S. 33 Judicature Act. It seeks order that the property at Namungona II Luby Parish, Rubaga Division, which was the subject of dispute in Civil Suit 115/2012 be unconditionally released from attachment and or execution.

Costs of the application were also applied for.

The grounds of the application are that:-

- 1) The kibanja, the subject of execution is not a property of the Judgment Debtor as he was just a caretaker of the same.
- 2) The Applicant/Objector is the lawful owner of the said kibanja, having bought the same from William Kumalirwa on the 20.10.72.
- 3) In 1975, the Applicant/Objector left one Kayombya George, a resident of the same area and also a neighbor as caretaker of the suit kibanja ad left the country.
- 4) Since 1975 to date, the said Kayombya has been in possession and occupation of the said suit land on behalf of the Applicant/Objector.
- 5) The Respondent sued the said Kayombya George the care taker of the land, Vide Civil Suit 115/2012 at Chief Magistrate's Court at Mengo claiming to be the owner of the suit kibanja and got judgment in his favor.
- 6) The said judgment is to be executed vide EMA No. 22/2016.

7) The Applicant also filed Civil Suit No. 311/2016 at High Court Land Division against the Respondent for trespass and fraud.

5 8) The Applicant will suffer irreparable damage if this application is not granted. And it is therefore only just and equitable that it be granted.

The application is supported by the affidavit of Byamukama Wilson the First Applicant herein.

10 There is an affidavit in reply of the Respondent where it is claimed that the application is misconceived, an abuse of court process and does not disclose a cause of action and it is Res Judicata.

15 When Civil Suit 115/2012 was filed against Kayombya George, the Defendant informed the trial court that he was caretaker/agent of the current Applicant.

Kayombya George is the father of Byamukama Wilson who defended the suit and alleged interest of the Applicant therein and they were witnesses in the suit.

20 The suit was therefore between the Applicant and the Respondent through his authorized agents and they were all declared trespassers on the suit land.

The Applicant appealed but the appeal was dismissed. – Annexure J. Despite the dismissal of the appeal, the Applicant filed Civil Suit 311/16 at the Land Division.

25 However that, the plaint ought to be struck out as the claim is frivolous and does not disclose a cause of action and is Res Judicata.

The issues raised in the plaint are the same as those raised in Mengo Civil Suit 115/2012.

30 That since the judgment at Mengo was given, the Respondent has put to use and possessed the disputed land.

If the application is allowed, it will prejudice the Respondent's rights over the suit property.

35 It is therefore just and equitable that the application be dismissed otherwise it will sanction an illegality.

40 There is an affidavit in rejoinder by Byamukama Wilson contending that the affidavit in reply is full of falsehoods.

That the Applicant was never a party to Civil Suit 115/2012 and yet the decision in Civil Suit 115/2012 has effect on his interest in the kibanja.

45 The Applicant has since filed for review of the judgment and orders in Civil Suit 115/2012 vide Miscellaneous Application 117/2016 - Exhibit SEK.

Further that the issues relating to Civil Suit 311/2016 against the Respondent by the Applicant have no connection to the present application and cannot be determined at this stage by this court.

50 The deponent also denies ever having been a witness in Civil Suit 115/2012 or taking part in the proceedings.

Earlier prayers were reiterated.

5 The application was heard on 15.12.16. Counsel for the Respondent raised preliminary points of law which he claimed would dispose of the whole application without going into merits of the application.

10 He submitted that the application was misconceived, frivolous and vexatious and does not disclose a cause of action against the Respondent. And that it is an abuse of court process for the following reasons:-

10 - Civil Suit 115/2012, the Chief Magistrates Court Mengo was conclusively determined. The Respondent now (Katende Godfrey) was the Plaintiff and Kayombya George the Defendant.

15 The Respondent/Plaintiff was declared owner of the disputed land and damages were awarded against the Defendant.

A permanent injunction was issued to restrain the Defendant from acts of trespass and costs were given to Plaintiff/Respondent.

20 The judgment has never been set aside and there is nothing to show that the land in dispute has been attached.

25 Counsel contended that the Judgment Debtor, the authorized agent of the Applicant appealed and the appeal was dismissed on 23.03.16.

That the Judgment Debtor in Civil Suit 115/12 and the judgment of court on 31.03.15 is a duly authorized agent of the Applicant now before court. – Referred to the letter by Applicant written on 03.10.12 instructing the Defendant to defend suit at Mengo.

30 The case of **Auto Garage and Others vs. Motokov (No3) [1991] EA 514 at page 519D Spry V.P** was cited for being instructive on what constitutes a cause of action in an application of this nature.

35 It was then asserted by Counsel that there is no cause of action in the current application because the Applicant, through his Power of Attorney was the Defendant in Civil Suit 115/12 at Mengo Chief Magistrate's Court. He deponed the suit through his agent.

Secondly that, the application is barred by Res Judicata - S.7 C.P.A is mandatory. Matters decided by the Chief Magistrates Court, Mengo are being brought again to court via this application.

40 Counsel insisted that the subject matter of this application was determined in Civil Suit 115/12 and the land was declared to belong to the Respondent.

45 That the issue of ownership was resolved against the Applicant through his authorized agent – Referred court to pages 3, 8-10 of the judgment.

The Applicant, Counsel argued is estopped from lodging any further claim in respect of the suit kibanja. He referred to **Blacks Law Dictionary 9th Edition** and **S.114 Evidence Act** for the definition of Estoppel.

50 And the case of **John Madangol Leo vs. Okanyanga Sam HCCS 143/_** for the issue of Res Judicata which cited with approval the case of **Maniraguha Gashumba vs. Sam Nkundye CACA 23/2005**.

It was then submitted that all the ingredients of Res Judicata exist in the current application before court, and it is therefore barred by law.

5 Since the Applicant admits the Defendant in the suit was a caretaker, he was privy to the decisions of the of the Chief Magistrate’s Court and therefore cannot turn around to bring a fresh suit before High Court Land Division.

Counsel then prayed for dismissal of the application.

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In reply, Counsel for the Applicant argued that the application is proper and the Applicant has demonstrated that he has a cause of action against the Respondent.

15 The Applicant, it was, pointed out, claims he owed the suit land which was declared to be that of the Respondent in Civil Suit 115/12.

20 However that, the Applicant has a distinct right from the one the Respondent refers to and he was never party to Civil Suit 115/12. The suit was not in the names of the Applicant as a party. And therefore the Respondent ought to have realized that he had sued a wrong party- **“judgment acts in person”**. – The suit was between the Plaintiff and the Defendant in Civil Suit 115/12.

It was the further submission of Counsel for the Applicant that Res Judicata was quoted out of context.

25 The Applicant before court was not a party to Civil Suit 115/12 Counsel emphasized. And therefore cannot be barred by Res Judicata to challenge the Respondent’s ownership of the property. The suit must be between the same parties. But in the present case, the parties are different.

30 In the notice of motion, the Applicant does not claim to derive his interest from George Kayombya, who was Defendant in Civil Suit 115/12. Therefore Res Judicata does not apply.

35 That the facts of the case of **John Mandangol Leo (Supra)** are distinguishable from the facts of the present application. In that case, Res Judicata was applied because the Appellant had admitted to have filed a suit against the Respondent over the same subject matter. But it is not the case here.

40 The case of **National Council for Higher Education vs. Kawooya Constitutional Appeal No. 04/2011 [2015] UG SC** was referred to for the definition of Res Judicata and what has to be satisfied in order for Res Judicata to be proved.

Counsel argued that since Counsel for the Respondent admits that an application has been filed in the Land Division seeking to dismiss the suit of the Applicant, the preliminary objection be ignored and application heard on merit.

45 In rejoinder, Counsel for the Respondent reiterated the earlier submissions, emphasizing that Civil Suit 115/12 at Mengo was between **Katende Godfrey and Kayombya George**. The Defendant then filed a written statement of defence and admitted trespass. He defended the suit on behalf of the Applicant. Therefore, that, the parties in court are the same the two cannot be divorced. Relying on the case of **National Council of Higher Education (Supra)**, Counsel asserted that the
50 Applicant in the present case is privy to the decision in Civil Suit 115/12 – where he permitted Defendant to defend the suit on his behalf. He prayed as before.

The issues for determination:-

1. Whether application discloses a cause of action against the Respondent.

5 **2. Whether the matter is Res Judicata.**

After careful consideration of the submissions of both Counsel going through the application and the affidavits for and against the application, this court finds that the preliminary objection cannot be sustained.

10

The issues raised by Counsel for the Respondent can only be properly determined in the Land Division where the Applicant has filed Civil Suit 311/2016.

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To determine whether a matter discloses a cause of action or not, the court has to look at the plaint and only at the plaint. The plaint referred to in the present case is not before this court, it is before the Land Division.

20

If this application is struck out or dismissed, the pending suit before the Land Division will be rendered nugatory. Yet in the current application, the Applicant raises issues of fraud.

Where a party raises issue of fraud, he/she should be given a chance to prove them.

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The Respondent will not be prejudiced in any way since he will be given a chance to defend the suit in the Land Division and will therefore get a chance to raise the issues raised in the preliminary objection.

30

The preliminary objection is overruled as being premature. And since eviction of the Defendant in Civil Suit No. 115/12 had not yet been done - (there is no order to that effect,) court finds that the balance of convenience demands that execution be stayed and the property, the subject matter of the suit be released from attachment pending determination of the Civil Suit before the Land Division.

Costs of the application will abide the outcome of the suit before the Land Division.

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40 **FLAVIA SENOGA ANGLIN**
JUDGE
05.06.17