

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO.2146 OF 2015

GETRUDE KALEMA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. PRINCESS NAKALEMA ANGEL

2. ALI NDIWALANA

3. REGISTRAR OF TITLES ::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING ON POINTS OF LAW.

Introduction

1. This is a ruling in respect of points of law raised by counsel for the plaintiff in this suit vide Civil Suit No.2146 of 2015 wherein counsel for the plaintiff intended to move court to decide whether Civil Suit No 2146 of 2015 can be disposed off on issues of law that were decided upon in Civil Suit No 445 of 2011 in the judgment of Hon Lady Justice Alexandra Nkonge Rugadya.



Background;

2. The plaintiff Gertrude Nakalema filed Civil Suit No 2146 of 2015 against Princess Nakalema, Ali Ndiwalana and the Registrar of titles. The plaintiff had also filed Civil Suit No. 445 of 2011 against Nakibuule Annet and The Registrar of Titles that was determined and judgment entered by Hon Justice Alexandra Nkonge Rugadya on the 21st day of March 2022 where she ruled in favour of the plaintiff that the subject matter in that suit to wit Kyadondo Block 206 Plot 2610 was matrimonial property among other orders.
3. Counsel for the plaintiff avers that issues in both suits are similar as they both relate to legality and validity of the transfer of the suit land from the Late Kalema to the defendants. In that spirit, the findings in Civil Suit 445 of 2011 dispose off the current suit without the need for a trial. It is against this background that this ruling ensues.

Representation;

4. The plaintiff was represented by Lubega Robert of M/S lunar Advocates whereas Kakona Joel Geoffrey of M/S Kakona & Kwotek Advocates for the 1st Defendant and Steven Ssozi of M/S Gelac Advocates for the 2nd defendant.

Parties filed submissions which I have considered in the determination of the points of law.

Issues for determination;

i) Whether the illegalities as highlighted in the judgment in Civil Suit No 445 of 2011 have an effect on the proceedings in the current suit?

ii) If so, whether they dispose off the issues in the current suit?

Submissions for the plaintiff;

5. Counsel submitted that is a well-established position of the law that illegality can be raised at any point before a court of law, and it shall be investigated. Counsel relied on ***Makula International Limited v Cardinal Wamala Nsubuga & Anor Civil Appeal 4 of 1981.***

6. He further submitted that it is not in dispute that the subject matter in both suits relates to land formerly comprised in Kyadondo Block 206 Plot 2610. He states that the 1st defendants in both suits claim that the land was a gift intervivos from their late Father Kalema and to back up their claims they exhibited a gift deed that purportedly gave them their respective interests and hence the sub

division of Plot 2610 into six plots of land whereof plot 3719 was transferred to Princess Nakibule Annet the 1st defendant in Civil Suit No 445 of 2011 and plot 3724 transferred to Princess Nakalema Angel the first defendant in the current suit.

7. The Hon Lady Justice Alexandra Nkonge ruled in favour of the plaintiff in Civil Suit 445 of 2011 that the purported Gift Inter vivos was illegal as the property was matrimonial property and did not meet the requirements in Section 92 of the Registration of titles Act.
8. Counsel also submitted that the court went on to hold that the transfer and by extension the mutation of Plot 2610 was illegal.
9. That the Judge also pointed out that upon the demise of the Late Kalema, her Estate was vested in the plaintiff as Administrator.
10. This meant that Princess Nakalema could not transfer property in the names of her late father in 2014 without the authority of the plaintiff as Administrator of the Estate of the late Kalema.
11. Counsel submitted that the above illegalities conclusively dispose of issues 1 and 2 in the current suit

as they relate to the transfer of the title from the Late Kalema to the 1st defendant.

12. Counsel also submitted that on the 3rd issue of whether the 2nd defendant in the current suit is a bonafide purchaser for value without notice he pointed out that even if court were to hold that the 2nd defendant was a bonafide purchaser, their only Remedy would be against the 1st defendant for the recovery of the consideration under Section 39 (4) of the Land Act.
13. Counsel also relied on Section 7 of the Civil Procedure Act Cap 71 that no court shall try a suit or issue in which the matter directly and substantially in issue in the 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.
14. Counsel concluded that the court having pronounced that the suit property was matrimonial property that was illegally dealt with, the current suit stands conclusively determined.
15. Counsel prayed that the orders of Hon Justice

Alexandra Nkonge Rugadya be upheld.

Submissions for the 1st defendant;

16. Counsel for the 1st defendant submitted that they strongly disagree with the plaintiff's submission that Order 15 rule 2 of the Civil Procedure rules applies to the instant case. The said rule only applies where the issues of both law and fact arise in the same suit and not in two or more different suits as it is in the instant case.

17. On the issue of res judicata, Counsel for the 1st defendant submitted does not meet the test to invoke res judicata.

18. Counsel relied on the Supreme Court decision in ***Mansukhlal Ramji Karia and Anor v Attorney General and Ors (Civil Appeal No 20 of 2002) UGSC 32*** for the proposition that for one to succeed under the principle of res judicata, there are three broad conditions that must be satisfied.

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

ii) The matter in dispute in the former suit between the parties must also be directly or substantially in

dispute between the parties in the suit where the doctrine is pleaded as a bar.

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

19. Counsel for the 1st defendant further submitted that the plaintiff's plea of res judicata must also fail on grounds that the issue of the fraudulent transfer of the suit land by the 1st and 3rd defendants into the names of the 2nd defendant and the issue of whether the 2nd defendant is a bonafide purchaser for value were not substantially in issue in Civil Suit No 445 of 2011 and hence were not determined or tried in the said suit.

20. The issue of matrimonial property that was resolved in Civil Suit No 445 of 2011 upon which the judgment was based is not in issue before this court and neither was it pleaded in the instant suit.

21. That also one of the parties in the current suit the 2nd defendant was not a party to Civil Suit No 455 of 2011.

22. That the presence of the 1st and 3rd defendant as parties to the instant suit is necessary for the determination of the question as to whether the 2nd

defendant had notice of the fraudulent conduct of the 1st and 3rd defendant for court to investigate whether the 2nd defendant is a bonafide purchaser for value without notice.

23. That the issue of fraudulent transfer of the suit land by the 1st and 3rd defendant into the names of the 2nd defendant did not exist at the time Civil Suit No 445 of 2011 was filed and litigated upon since the transfer took place on the 20th day of May 2014 and Civil Suit No 445 of 2011 was filed in 2011 hence creating a new cause of action which must be determined and judgment delivered independently and it was in fact the finding of the Judge in Civil suit 445 of 2011 that she could not consolidate Civil suit 445 and Civil Suit 2146 of 2015 since there was an issue of bonafide purchaser for value in the current suit.

24. Counsel also submitted that the when there is an issue as to illegality, the court should not pronounce itself on the same before the parties are heard. Counsel relied on ***Fangmin v Belex Tours and Travel Ltd Civil Appeal No 06 of 2013 consolidated with Crane Bank Ltd v Belex Tours and Travel Ltd Civil Appeal No 1 of 2014.***

25. Counsel also pointed out that the plaintiff pleaded res

judicata yet she filed her own case vide Civil Suit No.445 of 2011 well knowing the status of the parties to the case and that res judicata is available to the defendant.

Submissions for the 2nd defendant;

26. Counsel for the 2nd defendant submitted that the 2nd defendant bought the suit property to wit Block 206 Plot 3724 from the 1st defendant and maintained that the purchaser acquired the suit property after due diligence.
27. That the 2nd defendant pleads the defence of bonafide purchaser for value without notice and was not party to Civil Suit 445 of 2011 and to that end the said judgment does not affect him.
28. That the first point to be investigated by court is whether the 2nd defendant's Certificate of title can be cancelled because he purchased from the 1st defendant whose gift deed was declared void and fraud imputed on her in acquiring title to the suit land.
29. The second point to be investigated by court is whether the 2nd defendant committed any fraud as regards being registered on the Certificate of title of the suit land.
30. Counsel added that all the elements of a bonafide



purchaser for value without notice are evident in the 2nd defendant's Witness Statement and at trial, he will lead evidence to show that he is a bonafide purchaser for value without notice.

Plaintiff's submissions in rejoinder to the 1st and 2nd defendant's submission;

31. Counsel submitted that it is now judicial knowledge that Kyadondo Block 206 Plot 2610 was matrimonial property and as such it has statutory limitation to its dealings.

32. Counsel also pointed out that illegalities are points of law whether they were specifically pleaded, once brought to the attention of court they must be dealt with.

33. Counsel conceded that Counsel for the 1st and 2nd defendants rightly pointed out that the issue of bonafide purchaser for value without notice did not arise in Civil Suit 445 of 2011.

34. Counsel reiterated his earlier submissions and reaffirmed that court having pronounced that the suit property was matrimonial property that was illegally dealt with, the current suit stands conclusively determined.

Analysis of court:

35. I have carefully read the submissions of Counsel for all parties together with the pleadings and judgment of court in Civil Suit No 445 of 2011. I will proceed and determine this matter in light of the foregoing.

36. The overriding question in this matter at this stage is whether the findings on illegalities in Civil Suit 445 of 2011 dispose off the instant matter.

37. To begin with, Civil suit No 445 of 2011 was between Gertrude Kalema (The plaintiff in the instant case) against Princess Nakibule Annet and the Registrar of Titles. The plaintiff is the Administrator and Widow of the late Fredrick Kalema. The suit property was Kyadondo Block 206 Plot 2610.

38. The issues agreed on by the parties in that case were as follows;

- i)** Whether the suit land was Matrimonial property?
- ii)** Whether there was any fraud or illegality committed by the defendants in transferring the suit land to the 1st defendant?
- iii)** Whether there is a just cause for revocation or annulment of the letters of Administration granted to

the plaintiff?

iv) What are the remedies to the parties?

39. The suit was determined in favour of the plaintiff with the following orders among others;

i) All titles fraudulently created out of Kyadondo Block 206, Plot 2610 land at Mpererwe are hereby cancelled.

ii) The suit land shall revert back to its original Block 206, Plot 2610 (Land at Mpererwe) and into the names of Gertrude Kalema, as the administrator of the Estate of the Late Kalema Muwanga Fred.

40. The plaintiff now avers that the instant suit is res judicata for reasons that the Judgment in Civil Suit 445 of 2011 determined the property in Block 206, Plot 2610 to be matrimonial property thereby rendering all the transactions arising there from subject to the statutory restrictions in dealing with such property. As a result, the instant suit is concluded on the findings of court in Civil Suit No 445 of 2011.

41. In ***Boutique Shazam Limited vs Norratam Bhatia and Another CA Civil Appeal No 36 of 2007***, the test for determining the question of res judicata was set to be: Is the plaintiff in the second suit or subsequent suit trying to

bring before this court, in another way and in the form of a new cause of action which he or she already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon?

42. If the answer is in affirmative, the plea of res judicata applies not only to points which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward.

43. In addition, to invoke res judicata the matter directly and substantially in issue must have been heard and finally disposed of in the former suit. **(Lt David Kabarebe v Major Prossy Nalweyiso CA Civil Appeal No.34 of 2003).**

44. One of the most important facets of the plea of res judicata is that the parties in the former suit and the current suit should be the same or claiming under the parties or any of them in the former suit and under the same title. The wording of Section 7 of the Civil Procedure Act is very clear on this point. **(See Karia and Another v Attorney General and others [2005] 1 EA 83)**

45. I need to state the obvious that the parties in Civil Suit 445 of 2011 and the instant suit are different on the face of it. Now the question to be asked is whether any of them especially the defendants is claiming under the parties in the former suit to wit Civil Suit 445 of 2011?
46. It is clear that the plaintiff Gertrude Kalema is the same in both suits. And in the instant suit she still maintains the same position as plaintiff. In paragraph 6(b) of the plaint in the instant suit she maintains that she is the widow and Administrator of the Estate her late husband Kalema Fredrick Muwanga.
47. As for the 1st defendant, she avers under Paragraph 4(a) of her written statement of defence that on the 16th of November 2008, her sister (Nakibule Annet the defendant in Civil Suit No 455 of 2011) and her were gifted the suit property by their father Fredrick Kalema who handed over duly signed transfer forms to the suit land.
48. As for the 2nd defendant, under paragraph 4(a) and (d) that the 1st defendant approached the 2nd defendant to purchase land comprised in Block 206 Plot 3724 and purchased the same after search and due diligence.
49. From the foregoing, it appears that the 1st defendant

and 2nd defendant do not in any way claim under any of the parties Civil Suit 445 of 2011. This single factor precludes the invocation of res judicata.

50. Moreover, it seems that the effective assertion of res judicata precludes a subsequent trial, thus rendering the suit susceptible to dismissal upon encountering such a plea.

51. In the instant case, the plea has been raised by the plaintiff and I wonder whether the plaintiff sought for her case to be dismissed if the plea succeeded.

52. The plea of res judicata is used defensively and not offensively. I agree with Counsel for the 1st defendant that the defence of res judicata is often available to the defendant and the plaintiff's remedy ought to have been to discontinue or withdraw the current case if she deemed the judgment in the former case satisfied her claim in the current suit.

53. I have also taken cognisance of **Section 41 of the Evidence Act** which provides thereof that judgments, orders or decrees other than those mentioned in Sections 38 ,39 and 40 are irrelevant unless the existence of the judgment, order or decree is a fact in issue, or is relevant

under some provision of the law.

54. I have noted that the judgment in Civil Suit No 445 of 2011 does not fall under any of the categories mentioned in Section 38, 39 and 40 of the Evidence Act because it is not by court in exercise of probate jurisdiction, matrimonial jurisdiction, admiralty jurisdiction or insolvency jurisdiction thereby rendering it irrelevant in the suit between the plaintiff and the 1st and 2nd defendant (the instant suit).

55. In the premises, the point of law is determined in the negative. The suit should proceed for determination of other questions in controversy between the parties.

56. No orders as to costs.

I SO ORDER.



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NALUZZE AISHA BATALA

JUDGE

19 /04/2024