

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO, 220/95

ALLEN NSIBIRWA:..... PLAINTIFF

VERSUS

NATIONALWATER & SEWAGE COOP:.....DEFENDANT

BEFORE: THE HON. MR JUSTICE G.M. OKELLO

RULING:

When this case was called for hearing, Mr. Serwanga, Counsel for the defendant raised two preliminary objections on points of law pointing out that:-

- (1) this suit is Resjudicata
- (2) the suit is time barred.

Arguing his point, Mr. Serwanga contended that in so far as the Plaintiff was trying to bring a suit on a matter which was direct, substantially in issue in the High Court Civil Suit No. 811 of 1992 between the same parties and was adjudicated upon, the suit was resjudicata. He cited Ponsiano Semakula vs. Susan Magala and 2 others (1979) UCB 90 for authority. He pointed out that the parties in H.C.C.S. No. 811 of 1992 are the same as the parties in the instant case, that the matters that were in issue in H.C.C.S No. 811 of 1992 are substantially the same as the issues in the instant case. According to the learned counsel, in suit No. 811 of 1992, the court was called' upon to determine:-

- (1) whether the suit was time barred.

(2) If it was time barred whether the Plaintiff was entitled to invoke the provision of section 4 of Act 20 of 1969. Was she acting under disability.

Mr. Serwanga pointed out that in the instant cases court was being asked to determine the question of limitation in paragraphs 7-15 of the Plaintiff. In counsel's view the Judge in civil suit No. 811 of 1992 decided on both issues. He submitted therefore that this case is Resjudicata.

Mr. James Mukasa who appeared for the Plaintiff contended on his part that this suit is not resjudicata. He conceded however, that the main issue in suit No. 811 of 1992 like in the instant suit was Negligence but he submitted that this issue was not adjudicated upon on the merits in that court. According to Mukasa, Civil suit No. 811 of 1992 was filed after the expiration of the limitation period on ground of exemption but that the plaintiff did not contain grounds upon which exemption of the operation of the limitation law was claimed. For that failure the Plaintiff was rejected without the issue being board on the merits. In view this suit is therefore not resjudicata.

It is important to bear in mind at this stage the law governing the doctrine of Resjudicata. This is to be found in section 7 of the civil Procedure Act (Cap 65) of Laws of Uganda. For ease of reference it is reproduced here below:-

“7. No court shall try am 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 such' subsequent suit or the suit in which such issue has been subsequently raised and had been board and finally decided by such court”.

My understanding of the above section is that before that section can be called upon to play, it must be shown that:-

- (1) the issue in the suit must have been directly and substantially in a former suit before a court of competent jurisdiction.

- (2) The suit must be between the same parties or between parties under whom they or any of them claim as the previous suit.

The former suit must have been heard and finally decided upon by that court. In Semakula Vs. Magala and others (1979) HCB 90 to which counsel for the defendant referred me, the court of Appeal held that—

*“In determining whether or not a suit is barred by resjudicata, the test is whether the Plaintiff in the second suit is trying to bring before the court in another way in the form of a now cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of resjudicata will then not only apply to all issue upon which the first court was called upon to adjudicate but also to every issue which properly belong to the subject of litigation and which might have been raised at the time through the exercise of due diligence by the parties. **Kamunye & Others .Vs. The Pioneer General Assurance Society Ltd (1971) EA 263.**”*

Kamunye & Others Vs . The Pioneers Assurance Ltd above was a case concerning Mortgages. The land was owned by the appellant. It was let partly to non Africans and partly to Africans as tenants. The mortgagee collected rents from the non Africans but it could not be in possession of lands occupied by African.

The Appellant brought an action in the High Court claiming that the mortgage was time barred and that the mortgagee was never in possession of the mortgaged land. The High Court non suited him holding that the mortgage was not time barred. Appeal from that decision was dismissed. Then the Appellant filed a further suit claiming substantially the same relief and the Respondent pleaded Resjudicata. The appellant replied that the former suit concerned only lands occupied by non Africans. High court dismissed the suit. On appeal it was

held that the suit was resjudicata because the defences raised were substantially the same as in the earlier suit.

It is also relevant to note that it was held in **Koharehad .v. Jan Mogamod (1919-21) 8 EALR 64** that dismissal of a suit on a preliminary point not based on merits is no bar to a subsequent suit on the same facts and issues and between the same parties. In other words that a dismissal of a suit on preliminary point not based on merits does not give rise to application of the doctrine of resjudicata.

In the case before me, the facts and issues are substantially the same with those that were directly in the previous suit No. 811 of 1992. they were negligence, disability and limitation. The parties in the earlier suits were the same with the parties in the instant suit. Most importantly, the earlier suit was dismissed on a preliminary point not based on merits. On the principle in Koharehad above, this suit is therefore not resjudicata because the earlier suit was not finally decided on the merits.

As to whether this suit is time barred, it is important to note that the earlier suit was filed after the expiration of the limitation period prescribed by law. It was so filed on the allegation of exemption from the limitation but the grounds upon which that exemption was claimed were not pleaded in the plaint. Despite that failure however, counsel for the plaintiff verbally stated that the ground from the bar. The gist of the ground was the same as the summary of those now contained in paragraphs 13-15 of the plaint in the instant case. Paragraph 15 of the plaint summarized the grounds as follows:-

“Owing to the intended and calculated delays on the defendant’s part purporting to propose a settlement, the plaintiff lost time within which to ably file the suit and was under disability.”

The ground for the disability was therefore protracted negotiation of a settlement out of court. The learned judge in that case considered the ground and ruled that it did not amount to disability. Accordingly be found that the suit was time barred.

In my considered view, the instant case is not merely a case of failure to plead the grounds upon which exemption from limitation was claimed as Mr. Mukasa would like this court to believe. It is a case of whether the Plaintiff has advanced sufficient grounds to establish disability to constitute exemption from limitation. The learned judge found that protracted negotiation of a settlement out of court did not amount to disability. It could not prevent the plaintiff from filing and claim while such negotiation protracted. I share that view. Now that same ground is contained in paragraphs 13 - 15 of the instant plaint and court is being asked to adjudicate upon. No other ground is included. Following the reasoning in H.C.C.S No. 811 of 1992, I am inclined to agree with Mr. Serwanga that this suit is time barred because protracted negotiation of a settlement out of court does not constitute a disability to justify exemption from limitation. For that reason the objection is upheld and the plaint is rejected as being time barred. The Plaintiff is condemned to pay cost.

G.M. Okello

JUDGE

19/10/95.