

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISC. APPLICATION NO. 40 OF 2019  
ARISING OUT OF CIVIL SUIT NO. 843 OF 2018

SAM AKANKWATSA=====APPLICANT

VERSUS

UNITED BANK OF AFRICA (U) LIMITED =====RESPONDENT

BEFORE: THE HON. JUSTICE RICHARD WEJULI WABWIRE

RULING

The Applicant's application is brought under order 9 rules 2 and 3(1) a, b, d, g, 2, O.19, O.36 rule 3 and O.52 rule 1 and 3 of the Civil Procedure Rules and S.98 of the CPA. It is for orders that civil suit 843/2018 be dismissed for being Res Judicata and for an order declaring that summons were not properly served and for costs of the Application to be provided for.

The Application is supported by the Affidavit of Sam Akankwatsa the Applicant. The Respondent filed an Affidavit in reply deponed by Judy Wambaire, the Head of Legal



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Department of the Respondent. The Applicant also deponed an Affidavit in rejoinder.

25 Both the Applicant and the Respondent addressed the court in written submissions.

The Applicant was represented by Akampumuza and Co. Advocates while the Respondent was represented by OSH Advocates.

30 The background to the Application is that the Applicant was previously sued by the Respondent in CS 787 of 2016 which was dismissed for non-service on the Applicant. The Respondent instituted another suit, CS 391 of 2017 but again failed to serve the Applicant who successfully  
35 challenged the legality and substance of the suit in court. The suit was dismissed.

The Respondent filed yet another suit CS 843 of 2018, upon which the Applicant brought the instant application to challenge the suit for being incompetent, bad in law and  
40 barred on account of Res Judicata.

I have carefully considered the Application and Affidavits filed in support and opposition to the Application. I have also carefully analyzed the written submissions of both parties on this matter and addressed my mind to the law.

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I will start by dealing with issue of Res Judicata.

The Applicant's Counsel submitted that the Respondent's suit is incompetent on account of Res Judicata, it having been competently adjudicated upon on preliminary points of  
50 law before a Judge of this High Court.

Counsel submitted that the Applicant obtained a Judgment, Ruling and Orders against the Respondent concerning these matters which have never been appealed or set aside. That the Respondent ignored the dismissal orders and brought  
55 this suit. That Section 2 of the Civil Procedure Act defines a suit to mean all civil proceedings commenced in any manner prescribed. The word "prescribed" means prescribed by the rules. That consequently the Applicant's Application was a "suit" being commenced for the first time.

60 That where a procedure is provided for, the parties are obliged to follow it. That in the instant case since the Respondent did not seek extension of time within which to effect service, all subsequent action in respect of the Application are null and void.

65 In reply the Respondent's Counsel submitted that the proper interpretation of the law relating to Res Judicata in respect of section 7 of the Civil Procedure Act cap 71 is that in order to give effect to the plea of Res Judicata the matter directly



and substantially in issue must have been heard and finally  
70 disposed of in the former suit.

He cited the case of **Onzia Elizabeth vs Shaban Fadul Civil  
Appeal No. 0019 of 2013** where court stated that where an  
earlier suit had been dismissed on a preliminary point, such  
a dismissal was not found to be a bar to a subsequent suit  
75 between the same parties on the same subject matter.

Counsel submitted that the Applicant, by his own admission  
concedes that Civil Suit No. 787 of 2016 and Civil Suit No.  
391 of 2017 were dismissed for non-service.

That the substantial issue in the suit was not whether or not  
80 service was effected, but rather whether the Applicant is  
indebted to the Respondent. That as such the matter directly  
and substantially in issue was not heard and finally decided  
in the former suits and as such the Applicant's plea of Res  
Judicata be dismissed and Civil Suit No. 843 of 2018 be  
85 heard on its merits.

In rejoinder, the Applicant's Counsel submitted that the  
Respondent admits all the three tenets of Res Judicata set  
forth in the Applicants' submissions but only contests the  
forth tenet in S.7 of the CPA, which states that the issue in  
90 the subsequent suit must have been heard and finally  
decided. Counsel maintained that the Respondent's suit is





incompetent as it amounts to Res Judicata having been conclusively adjudicated upon on Preliminary points of law before the Judge of the High Court as such bringing Civil  
95 Suit No. 843 of 2018 between the same parties and with the same issues amounts to Res Judicata and is therefore a blatant abuse of court process.

### **Ruling**

100 The principle of Res Judicata is provided for under **S.7 of the Civil Procedure Act Cap.71** 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  
105 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.”*

110 The guidelines in applying the above principle are laid out in the case of **Maniraguha v Nkundiye, CA No. 23 of 2005**, where the court of Appeal relied on the decision in **Ponsiano**



**Semakula vs Sasare Magala & others, 1993 KALR 213**

which was to the effect that;

115 *“the court before which the issue of Res Judicata is raised  
must peruse the judgment of the court in the first suit and  
ascertain that the judgment exhaustively dealt with the  
issues raised in that case and if possible the court should  
peruse the whole court record so that it gets the opportunity  
120 to appraise itself of all matters raised in the earlier suit in  
order to decide whether the plea of Res Judicata succeeds or  
not.”*

I have perused the decisions in CS No. 787/2016 and MA  
1233 of 2017 arising from CS No. 391/2017 to ascertain  
125 whether the issue of Res Judicata can be raised in respect  
of CS No. 843/2018.

I have looked at attachments P1 and P2 to the Affidavit in  
support of the application. They include Annexure A which  
is a plaint in respect of CS No. 787/2016, UBA Vs  
130 Akankwatsa which was filed on 12/10/2016. Under  
paragraph 4 of the said Plaint, the plaintiff's suit is for  
recovery of Ugx. 126,120,898/ from the defendant.  
Annexure B dated 25/11/2016 thereto is a dismissal of CS  
No. 787/2016 for non-service of summons. Annexed to the





135 Affidavit in Support of the Application is the Ruling and  
Order respectively dated 17/08/2018 in which CS No.  
391/2017, UBA Vs Akankwatsa is dismissed for service of  
summons out of time.

140 According to the Ruling in CS 391/2017 the said suit was  
for recovery of Ugx. 126,120,898/ from the defendant.  
Paragraph 3 of the plaint in respect of the current suit CS  
No. 843/2018, UBA Vs Akankwatsa, shows that the  
plaintiff's claim is also for recovery of Ugx. 126,120,898/  
from the defendant.

145 The issue in CS No. 843/2018 has been directly and  
substantially in issue in the former suits between the same  
parties, that is CS No. 787/2016 and CS No. 391/2017.

The other factor to be considered under this provision of  
the law is that the issue must have been heard and finally  
150 decided by that Court.

In the former suits before this court CS No. 787/2016 and  
CS No. 391/2017 were dismissed for non-service of  
summons. The suits were dismissed on the basis of  
preliminary objections. The question therefore is whether a  
155 preliminary objection amounts to hearing an issue and  
finally deciding it.



A Preliminary Objection is used to challenge the sufficiency of a pleading. Hearing and determining a suit entails evaluation of evidence and arriving at a decision based on such evaluation as opposed to determine a suit premised on a preliminary objection.

In the case of **Onzia Elizabeth vs Shaban Fadul, CA No. 0019/2013**, Justice Mubiru held that;

*“... to give effect to the plea of Res Judicata, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit...For the doctrine to apply there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be Res Judicata...Therefore in Busuulwa Isaac Bob v. Kakinda Ibrahim [1979] HCB 179, where the earlier suit had been dismissed on a preliminary point, such a dismissal was found not to be a bar to a subsequent suit between the same parties on the same subject matter.”*

While dealing with the issue of Res Judicata in **Mansukhlal Ramji Karia & Another V AG Civil Appeal 20/2004 (UGSC)** Tsekoko JSC as he then was held that the proper practice is that when Res Judicata is pleaded as a defence,





180 a trial court should when the issue is contested, try the issue  
and receive some evidence so as to establish whether the  
subject matter of the dispute between the parties has been  
litigated upon.

185 I have had the benefit of perusing the Plaintiff in CS 391/2017  
and that in CS 843/2018. I have also perused the Ruling of  
my learned Judge Brother Justice David Wangutusi in CS  
391/2017 and based on that, my conclusion is that whereas  
he only rightly directly addressed himself to the issue of  
ineffective service of summons, which was the contest before  
him, this does not save the rest of the claim under the suit.

190 Dismissal of the suit on account of a failure to fulfil a  
statutory requirement as was the case in CS 391/2017  
determines the suit in its entirety.

In this position, which is a deviation from the decision in  
**Onzia Elizabeth vs Shaban Fadul, CA No. 0019/2013**, I  
195 am fortified by the decision of the Justices of the  
Constitutional Court in **Tukamuhebwa George & other V  
AG and UWA, Constitutional Petition No. 59 of 2011**,  
which was rightly cited by Counsel for the Applicant, in  
which they held that: *"In this petition, it appears to us that*  
200 *when a case is dismissed on a point of law then the dispute*



has not been adjudicated upon. It appears to us that the petitioners take the view that a dismissal of a case on a point of law is akin to a dismissal of the case on a technicality. Nothing can be further from the truth. A dismissal on a point of law is fundamental and in the eyes of the law resolves the dispute unless there is an appeal and the dismissal is set aside with or without further orders. The matter was therefore determined by the High Court and as a result we find it is res judicata in respect of enforcement and no further suit can be brought at the High court or any other court in this regard”

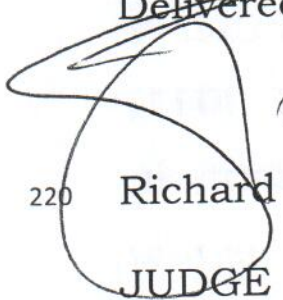
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When the learned Judge dismissed CS 329 of 2017 therefore, he resolved the entire suit and the Plaintiffs only remedy would lie in an appeal against his ruling. There is nothing to show that there is as appeal by the Plaintiffs from the decision that dismissed CS 329/2017.

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It is my finding therefore that CS 843 is res judicata and it is hereby dismissed with costs awarded to the Applicant.

Delivered this 4<sup>th</sup> day of October, 2019.

  
Richard Wejuli Wabwire  
JUDGE

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Present in Court:

1. Mr. Hukilaz  
Godfrey, 15 W  
Respondent.

2. Mr. M. M. M. M. M.  
Glenice, Legal  
Assistant to Br.

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3.  
*[Signature]*  
JUDGE/REGISTRAR

4. M. M. M. M. M.  
Jane B W  
Applicant.

4/10/19 - 10:30 am

cc - Mr Wapora Hume.



*[Handwritten signature]*

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