**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CIVIL APPEAL No. 0008 OF 2016**

**(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0009 of 2008)**

**AJUGA JOHN BOSCO ……….........………………..................… APPELLANT**

**VERSUS**

**MARIAM MUSA DOKA …………………....................…………. RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

In the court below, the respondent sued the appellant for recovery of land situate at Karoko village in Adjumani Town Council. She sought an order of vacant possession, a permanent injunction and costs. Her case was that her late father Doka Kazarani acquired the land in dispute from his father Otonda. Following the death of her husband during 1965, her father invited her back home and gave her the land in dispute as a gift *inter vivos*. He occupied it until sometime when she fled into exile from where she returned in 1986 and resumed her occupancy until around 1992 – 1993, the appellant occupied a house built by his sister on his brother’s land and from there began encroaching on the respondent’s land by constructing houses thereon. As a result, the respondent reported to the L.C.s in 1994 and to the police in June 2008.

In his written statement of defence, the appellant denied the appellant’s claim. He contended that the respondent’s father had never at any time lived on the disputed land. The respondent’s father is a Sudanese who came and settled far from the disputed land as a refugee until his death in 1983 whereupon he was buried in Sudan. Instead, the appellant’s ancestors of the Palanyua clan lived on the land in dispute from time immemorial and are buried on the land.

After hearing the evidence of both parties and their witnesses and having visited the *locus in quo*, the trial court delivered its judgment in favour of the appellant, holding that the land in dispute is held under customary tenure and originally belonged to the Palanyua clan but was later given to other people during the 1940s under the Government Resettlement Scheme and the beneficiaries included the respondent’s father. Later in 1965, the plaintiff’s father had given some of his land to the respondent when she returned from her marriage, she constructed a house on the land and began tilling the land until 1979 when she fled into Sudan because of the war from where she returned in 1986. The appellant’s version had many material contradictions. It also contained an admission that the respondent’s father was in possession of the land before he fled into exile in Sudan. Although the appellant had filed a case before the Chief Magistrate’s Court which was allegedly decided in his favour, he was only a bonafide or lawful occupant on land that belonged to a one Saidi. Since the evidence of the appellant was full of contradictions, which pointed to deliberate untruthfulness and was thus unbelievable, the respondent had proved her case on the balance of probabilities. The suit was therefore decided in her favour and court granted her an order of vacant possession, a permanent injunction against the appellant was issued and she was as well awarded general damages of shs. 4,000,000/= and the costs of the suit.

Being dissatisfied with the decision the appellant appealed to this court which on 3rd April 2013 delivered its judgment by which it faulted the trial court for not having framed and tried the issue of *res judicata* which arose during the trial. It therefore directed a re-trial by the magistrate’s court stating that;

With that kind of implication to the whole case, this case is remitted to the Magistrate’s Court for re-trial of the issue of *res judicata*. The re-trial should call for the record in Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others to decide the issue. The court should receive all the necessary evidence related to the relationship between the parties to both suits and the persons under whom they claim.

When the matter was called before the court below for re-trial, after hearing the submissions of counsel on the issue, the court found that the appellant had failed to prove the existence of Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others and from its own examination of the Civil Suit Register of that year, the last civil matter to have been filed was numbered 15 of 2007 between Ali Thomas and two defendants. Claim Application number 17 / 2007 did not exist. The court therefore found that the appellant had failed to prove that the suit was *res judicata* and as a result its original decision stood.

The appellant has appealed that decision on three grounds, namely;-

1. The learned trial magistrate erred in law and fact when he held that the case was not *res judicata* without hearing from the parties.
2. The learned trial magistrate erred in law and fact when he held that the numerous case citations referring to *res judicata* in the High Court were presented by either the appellant or his advocate without any evidence.
3. The learned trial magistrate erred in law and fact when he awarded the costs of the re-trial to the respondent without affording the parties a hearing.

In his submissions, counsel for the appellant Mr. Ben Ikilai argued that the trial magistrate erred when he conducted the re-trial and made a decision thereon without hearing any evidence from the parties. The court was supposed to try the question of the relationship between the parties in the current proceedings to those in the previous suit but it did not. The reference of the land claim as contained in the order of re-trial did not exist but it was rather Civil Suit No. 57 of 2005 between Saidi Doka and Ajuga John Bosco and four others a certified copy of which had been subsequently secured after the court below had delivered its ruling. The decision was rushed and the appellant was not given sufficient time to trace the true record, partly because of the wrong reference number indicated in the order of the High Court and by the time he found the true record, the court had already delivered its ruling. The order for costs should not have been made since the parties were not heard and therefore the appeal should be allowed, the findings of the court below be set aside, and a fresh re-trial be ordered.

In his response, counsel for the respondent Mr. Ondoma Samuel argued that the issue of *res judicata* was decided on basis of the records of court and there was no need to hear the parties. Having found that Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others did not exist, the court below was justified in concluding that the suit was not *res judicata*. The appellant was given ample time to produce the judgment and record of proceedings in the previous trial, which were supposedly to be retrieved from the same court that was to conduct the re-trial, but failed to do so. The appeal should therefore be dismissed with costs.

The issue raised in this appeal is a narrow one regarding whether or not the court below conducted the re-trial as directed by this court, in a manner that was consistent with the principles of a fair trial. From the reading of the order of this court, it would be quite clear that when the matter was remitted back to the court below, there was a direction for fresh consideration of the issue of *res judicata* based on evidence from the available records and upon hearing the parties. It is well settled that the court to which the case is remitted for re-trial has to comply with the order of re-trial and acting contrary to the order is contrary to law and further, the order of re-trial has to be followed in its true spirit. The direction to the court below required it to consider such evidence as the parties could offer regarding their relationship with the parties in the previous proceedings, alongside the available record, before arriving at a conclusion. The court does not appear to have done either, supposedly because the appellant failed to produce any record relating to Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others, which reference did not exist in the register of court for that year.

There is no doubt that the burden of proving *res judicata* was on the appellant. When a question of fact or a question of law has been decided on its merits between two parties in a suit or proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. For all practical purposes, this should have been conducted as trial *de novo*, restricted only to the issue as to whether the matter was 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. The court below was obliged to ensure that the exercise is undertaken effectively in order to achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse, inaction or inappropriate or perfunctory action, in this regard. The procedure envisaged required the parties calling witnesses and examining them, if they wished, alongside the court’s perusal of the relevant record from the previous trial. A finding on merits after consideration of the materials on record was imperative. It necessitated therefore the court having before it the relevant record of proceedings. It has turned out that the relevant record is contained in Civil Suit No. 57 of 2005 between Saidi Doka and Ajuga John Bosco and four others, rather than Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others, cited in the order of re-trial.

The plea of *res judicata* is a question of mixed law and fact; it is founded on proof of certain facts and then by applying the law to the facts so found. The basic method in deciding the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of the previous suit and then to find out as to what was decided by the judgment which is said to trigger the *res judicata* plea. The plea has to be substantiated by producing the copies of the pleadings and judgment in the previous suit. In some cases only a copy of the judgment in the previous suit is filed in proof of a plea of *res judicata* and if the judgment contains exhaustive or the requisite details of the material averments made in the pleadings and the issues which were taken at the previous trial, it may be sufficient proof. Otherwise, since the plea is basically founded on the identity of the cause of action in the two suits, it is necessary for the defendant who raises the bar, to establish the cause of action in the previous suit and if claiming under parties to the previous suit, the relationship with such a party. In such a case the record will be supported with extrinsic evidence of the parties. The plea is decidedly dependent upon proof or disproof of many facts. It cannot be determined by mere speculation or inferences by a process of deduction what the facts stated in the previous pleadings were. It cannot be determined without ascertaining what the matters in issue in the previous suit were and what was heard and decided. Needless to say these cannot be established only by looking into the pleadings, the issues and the judgment in the previous suit. Unless the court has before it the relevant record of proceedings and has heard extrinsic evidence in relation thereto where necessary, it would be handicapped in coming to a proper decision on this issue.

The order made by this court for retrial envisaged the latter procedure. The Court had to determine the elements that constitute *res judicata*, which means an investigation into the facts being upon several aspects contemplated by section 7 of *The Civil Procedure Act*. It is not a pure question of law which could be resolved on basis of the submissions of counsel alone. The court below was to determine the issue by consideration of the relevant record of proceedings and hearing extrinsic evidence in relation thereto. The court was unable to obtain the relevant record, partly because the reference contained in the order of this court, Land Claim Application No. 17 / 2007 between Saidi Doka and Ajuga John Bosco with 3 others, was non-existent. This not only incapacitated the court below but also the appellant who, to the desperation of the trial court, took longer than would ordinarily be anticipated in retrieving the record from the same court, if it existed at all. Without the appropriate record, hearing extrinsic evidence would be an exercise in futility.

The record of proceedings of the trial court reveals that the matter first came up for retrial on 9th December 2013 but counsel for the appellant was not in court. It was adjourned to the following day for scheduling. On that day both parties and their respective counsel were in court. Counsel for the appellant cited discrepancies, as to the reference number of the previous suit, as cited in the order of this court directing the retrial. The suit was adjourned to 6th January 2014 to enable counsel obtain clarification from this court and to avail the opposite counsel the appropriate record. On that day counsel for the appellant reported that he was yet to secure a certified copy of the previous record. He was given a last adjournment up to 4th February 2014. On that day only the respondent appeared in court. The matter was adjourned further to 21st February 2014. The court, in the presence of both parties but in absence of both their counsel delivered its ruling by which it decided that the appellant had failed to submit the required record despite the time accorded to him and since the reference numbers of civil suits of that year did not have Land Claim Application No. 17 / 2007 listed, there had not been any previous suit between the parties. Therefore the appellant had failed to prove that the matter was *res judicata* for which reason the original judgment of the court entered remains as ordered.

It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. In this case, the information provided both to the appellant and the court below contained a material inadvertent error that rendered retrieval of the relevant proceedings unfeasible within the time available for the re-trial. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Court cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: *Actus curiae neminem gravabit*.

In the instant case, it was the error of this Court in specifying the wrong case number of the previous record to be reconsidered which is largely to blame for the manner in which the Court below conducted the re-trial and it is this Court which must undo the error. The error cannot be undone by shifting the blame on the appellant or the court below, who were expected to rely upon this Court to act in accordance with its directions. For that reason the ruling of the court below is hereby set aside and the court below directed to conduct the re-trial of the issue of *res judicata* de novo, this time on basis of the record in Adjumani Civil Suit No. 57 of 2005 between Saidi Doka and Ajuga John Bosco and four others, alongside such evidence as the parties may offer regarding their relationship with the parties in the previous proceedings. The costs of this appeal will abide the results of the re-trial.

Dated at Arua this 10th day of March 2017. ………………………………

Stephen Mubiru

 Judge