THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

HIGH COURT CIVIL SUIT NO. 0040 OF 2016

JOHN BOSCO JAWOTHO ========== PLAINTIFF

VERSUS

UGANDA WILD LIFE AUTHORITY ==========DEFENDANT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

This ruling is in respect to a preliminary objection raised by the defendant that the suit is *res judicata* and therefore an abuse of court process. Mr. Chemonges, counsel for the defendant told court that the plaintiff initially filed HCCS 40 of 2013 which was dismissed by the court on 2nd March 2016 under Order 9 Rule 22 of the Civil Procedure Rules for none appearance of the plaintiffs and their counsel. That the same plaintiff again filed this present suit against the defendant based on the same cause of action and seeking for similar remedies. What was only different was that in the first suit, the plaintiff had sued with 1035 other plaintiffs but in this suit, he was suing the defendant alone. The defendants submitted that the current suit is res judicata because the issues between it and he plaintiff were conclusively determined on merit in HCCS 40 of 2013.

Mr. Rwakafuuzi, counsel for the plaintiff, on the other hand denied that the suit was *res judicata*. He explained that whereas it is true that HCCS 40 of 2013 was filed and dismissed by the court, the plaintiff never instructed his then counsel, Mr. Marshal Alenyo to file the suit. He presented an affidavit sworn by the plaintiff, which, was not rebutted in a substantive manner by Mr. Ali Luzinda, who swore an affidavit on behalf of the defendant.

The plaintiff's counsel further submitted that the present suit is not *res judicata* because matters between his client and the defendant have never been decided on merit. He also submitted that since the first suit was dismissed there was no bar for him to proceed with this suit.
In reply, the defendant insisted that the suit is barred by section 7 of the Civil Procedure Act for being *res judicata*.

From the arguments of the parties, the following issues stand out, namely that:
The plaintiff and others instructed Mr. Marshal Alenyo to help them get compensation from the defendant for the loss they suffered because of losing their relatives whom they claimed that the representatives of the defendant institution had killed. Mr. Alenyo wrote a letter to H.E The President asking for his indulgence to have the matter resolved. He also wrote and issued a statutory notice to the defendant asking for compensation. Later on he made a settlement proposal to the defendant asking it to pay compensation of 100 million shillings to each of the affected families.

Secondly, it is also true that Mr. Alenyo filed HCCS 40 of 2013 to seek civil compensation for the plaintiff and his colleagues. It is also true that this suit was dismissed on 2nd March 2016, when the plaintiffs failed to show up in court. The Judge who was hearing the matter dismissed the suit under Order 9 rule 22 of the Civil Procedure Rules.

Thirdly, it is not denied that there were two suits going on in this court as between the plaintiff and the defendant over the same cause of action and the reliefs. All factors remaining constant, such a scenario is prohibited by section 6 of the Civil Procedure Act, which bars a court from proceeding with a suit where similar matters are directly and substantially in issue in a previously instituted suit that is still pending in court. Therefore from the above analysis of facts, the real issues that have to be determined in the ruling are the following:

- Whether the plaintiff instructed Mr. Marshal Alenyo to file HCCS 040 of 2013, on their behalf;
- Whether, if the answer to issue number one is answered in the affirmative, whether HCCS 04 of 2016 that was filed after HCCS 040 of 2013 is barred by section 7 of the Civil Procedure Act or is *res judicata*?
- What remedies, if any, are available to the parties?

Issue number 1: Whether the plaintiff instructed Mr. Marshal Alenyo to file HCCS 040 of 2013, on their behalf

According to the affidavit of the plaintiff, he and his colleagues numbering over one thousand instructed Mr. Alenyo, to help them recover compensation following the loss of their relatives whom they claimed had been murdered by game rangers employed by the Defendant. He

deponed that despite engaging Mr. Alenyo, to handle the matter on their behalf, they never instructed him to file HCCS 040 of 2013. To drive his point home, the plaintiff deponed that it was for this very reason that they engaged Mr. Rwakafuuzi, to file HCCS 04 of 2016, after learning that the Law Council had disbarred Mr. Alenyo for professional misconduct.

The defendant in an affidavit sworn by Mr. Ali Luzinda disputed the facts as set out by the plaintiff. They said that the plaintiff instructed Alenyo to file HCCS 040 of 2013, on their behalf and that he knew that this suit was going on in court as the mediation thereof could not have taken place without the plaintiff's participation. He deponed that before the suit was filed, the plaintiff obtained a representative order vide MC 060 of 2013, which was advertised in the newspapers. Moreover, that after, filing the suit, the plaintiff through his lawyer made a settlement proposal to the defendant urging them to settle HCCS 040 of 2013. That in the course of this suit, Mr. Kwemara Kafuuzi told him that they intended to file a suit on behalf of the plaintiffs for unlawful death. That the he told Mr. Kwemara that the plaintiff had already sued them in an earlier suit and that he constantly told counsel for the plaintiffs during the mediation of the latter suit that the case was res judicata. This may well be true between Mr. Luzinda and Mr. Alenyo but this does not show the actual participation of the plaintiff in the mediation or settlement of the earlier suit.

What does the record of HCCS 040 of 2013 say? According to the record, the case first appeared in court on 2nd March 2016. The plaintiff and his counsel were absent. Mr. Ali Luzinda, who was appearing for the defendant told court that:

Ever since the matter was filed in 2013, they have never appeared in court. Counsel Alenyo filed pleadings. From the information of Asaph Ntengye, then Chief Registrar, counsel Alenyo was suspended from practice and has never been reinstated .Under Order 9 rule 22, I pray that the matter be dismissed since the claim is not admitted.

The Judge ruled:

This matter was filled in court on 30th October 2013. Since that time, neither the plaintiffs nor counsel for the plaintiffs has appeared.

Defendant filed WSD in which he denied the claim. Since that time, while the defendant's counsel has been appearing, the plaintiff and their counsel have persistently been absent. In the premises under Order 9 rule 22 of the CPR the suit is dismissed with costs to the defendant.

From this record, there is no evidence that the plaintiff ever appeared in court to follow up the matter. The plaintiff did not appear in court because he did not know that Mr. Alenyo had filed the case on their behalf. Indeed, as the plaintiff deponed in his affidavit, there is no way he would have failed to appear in court if he had known that Alenyo had filed a case since he and his colleagues were desirous of getting compensation from the defendant. I also believed the plaintiff when he deponed that he and his colleagues had to get new counsel, when they learnt that Mr. Alenyo had been disbarred from practice. Given the interest of the plaintiff in his matter, I am inclined to believe him that while he and his colleagues instructed Mr. Alenyo to handle the initial work of recovering compensation, they never instructed him to file the suit given his disbarment.

Consequently, the plaintiff is not responsible by the actions of his previous attorney, who filed the suit without his instructions. It is trite law that a suit filed by an advocate without authority of the client is incompetent as the advocate is only but an agent of the plaintiff, who can only bind him or her with their consent. HCCS 040 of 2013 was therefore filed without authority and amounts to no suit.

Issue number 2: Whether, if the answer to issue number one is answered in the affirmative, whether HCCS 04 of 2016 that was filed after HCCS 040 of 2013 is barred by section 7 of the Civil Procedure Act or is *res judicata*? or, What is the implications of sections 6 and 7 of the Civil Procedure Act on HCCS 040 of 2016?

Section 6 of the Civil Procedure Act bars a court from proceeding with a suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceedings between the same parties. Section 6 of the Civil Procedure Act, would have applied to HCCS 4 of 2016, if the earlier suit, that is to say, HCCS 40 of 2013, was still in court. In such circumstances, the court would have stayed the hearing of HCCS 4 of 2016 pending completion of HCCS 40 of 2013.

With regard to section 7 of the Civil Procedure Act, the law bars institution of a civil suit, which is based on the same facts, cause of action, and reliefs, which has been determined on merit by the court. Section 7 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 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.

The rationale behind res judicata is that there has to be an end to litigation where matters between the parties have been determined on merit. In *Samuel Kiiru Gitau vs John Kamau Gitau Nairobi High Court Civil Case Number 1249 of 1998*, Visram J, as he then was, held that:

For a matter to be res judicata it must be one on which the court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been heard and finally decided not withstanding that the former suit was disposed of by a decree on an award.

In *The Tee Gee Electric and Plastics Company Limited vs. Kenya Industrial Estate Limited Civil Appeal; 333 of 2001*, the Kenya Court of Appeal, held that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merit.

With regard to the instant case, the matter between the parties was dismissed under **Order 9 rule 22 of the Civil Procedure Rules** for want of prosecution. Ordinarily, this dismissal would not amount to deciding the suit on its merits. However, an exception is made to this position under Order 9 rule 23(1) of the Civil Procedure Rules. This rule provides that:

Where a suit is wholly or partly dismissed under rule 22 of this order , the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action ; but he or she may apply for an order to set the dismissal aside , and , if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called for hearing , the court shall make an order setting aside the dismissal , upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Therefore, a party whose suit is dismissed under **Order 9 rule 22 of the Civil Procedure Rules** for want of prosecution is therefore barred from bringing the same suit as a fresh suit, as a determination under the rule is deemed a determination on merit. An affected party, can however, apply to court to set aside the dismissal if they can show that they were prevented by sufficient cause from attending court on the day the case was dismissed.

Turning to the instant case, had I not found that **HCCS 40 of 2013**, was filed without consent of the plaintiff, I would have agreed with the defendant that **HCCS 4 of 2016** is *res judicata*,

HCCS 4 of 2016, having been dismissed under **Order 9 rule 22 of the Civil Procedure Rules**. HCCS 4 of 2016 is therefore not res judicata.

Issue number 3: What remedies are available to the parties?

I have not found merit in the preliminary objection of the defendant and as such, the only remedy available to the parties is to dismiss the objection with costs. The suit will henceforth proceed on merit.

Decision

In the result, the preliminary objection is dismissed with costs to the plaintiff.

Gadenya Paul Wolimbwa

JUDGE

12th June 2020

Gadenya Paul Wolimbwa
Judge

Court:

This decision will be emailed to the parties on 12th June 2020.

Gadenya Paul Wolimbwa

JUDGE

12th June 2020

Gadenya Paul Wolimbwa
Judge