THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 505 OF 2019

HON. MAJ.GEN. (RTD) KAHINDA OTAFIRE :::::::::::::::::::::::::: PLAINTIFF

VERSUS

1.THE NEW VISION PRINTING AND PUBILISHING CORPORATION
2. MERCY OKOROM
3. CHARLES ETUKURI :: DEFENDANTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING ON PRELIMINARY OBJECTIONS

Introduction

[1] The above named Plaintiff filed this suit against the Defendants upon a claim for defamation seeking a declaration and orders to wit; a declaration that the statements published by the Defendants against the person of the Plaintiff in Saturday Vision Newspaper dated 12th October, 2019 were false and defamatory against the Plaintiff; a permanent injunction to restrain the Defendants and their agents from uttering and publishing defamatory statements against the Plaintiff; exemplary and general damages for injury to his reputation, psychological torture, mental anguish and emotional distress suffered by the Plaintiff; an apology to the Plaintiff by the Defendants in respect of the Saturday Vison Newspaper articles published of the Plaintiff to run for one week on the front page of New Vision Newspaper from the date of judgment; costs of the suit and interest on the decretal sum from date of judgment until payment in full.

[2] The Plaintiff alleged that on the 12th day of October 2019, the Defendants and each of them printed and published or caused to be printed and published in the Saturday Vision Newspaper a headline/words that were libellous to him. The Defendants filed a written statement of defence (WSD) denying the

allegations in the plaint. When the case came up before the Court for the first time, Counsel for the Defendants indicated that they intended to raise a preliminary objection to the effect that the suit was res judicata. Counsel for the Plaintiff also indicated that they intended to raise an objection to the effect that the written statement of defence (WSD) filed by the Defendants had been filed out of time and the same should be struck out.

Representation and Hearing

[3] When the case came up, Mr. Suleman Kabugo represented the Plaintiff while Mr. Thomas Ocaya represented the Defendants. Counsel agreed to and duly filed written submissions on the objections. I have considered the submissions of Counsel in the course of determination of the objections.

Issues for determination by the Court

[4] Two issues arise from the preliminary objections, namely;

a) Whether the Defendants' written statement of defence was filed out of time?
b) Whether Civil Suit No. 505 of 2019 is Res Judicata?

Resolution by the Court

Issue 1: Whether the Defendants' written statement of defence was filed out of time?

Submissions

[5] It was submitted by Counsel for the Plaintiff that the Defendants filed their written statement of defence (WSD) outside the statutory 15 days from the date of service of the summons to file a defence which made the written statement of defence time barred. Counsel relied on the provisions under Order 8 rule 1(2) of the CPR. Counsel prayed that the WSD be struck out with costs. In reply by Counsel for the Defendants, which is contained in their submissions in rejoinder, Counsel for the Defendants relied on *Order 51 Rule 4 of the CPR* which makes provision for not reckoning time expiring between 24th December

and 15th January of the year following when computing time appointed or allowed by the Rules for delivering or filing of any pleading or for doing any act. Counsel submitted that taking the said provision into account, the WSD was filed within 12 days from the date of service of summons. Counsel prayed that the objection be overruled.

Determination by the Court

[6] It is settled that according to Order 8 rule 1(2) of the CPR, a WSD shall be filed within 15 days from the date of service of summons. On the case before me, evidence is that the summons in the suit was served on 16/12/2019 and the Defendants filed a WSD on 20/01/2020. It was submitted by Counsel for the Defendants that the Defendants were covered by the exemption provided for under Order 51 rule 4 of the CPR and, as such, the WSD was filed within time. Order 51 rule 4 provides –

> ***"Time expiring between 24th December and 15th January.***
> *Unless otherwise directed by the court, the period between the 24th day of December in any year and the 15th day of January in the year following, both days inclusive, shall not be reckoned in the computation of the time appointed or allowed by these Rules for amending, delivering or filing any pleading or for doing any other act; except that this rule shall not apply to any application for an interim injunction, or to any business classified by the registrar or by a magistrate's court as urgent."*

[7] The above rule is clear. As submitted by Counsel for the Defendants, if the above excepted days are deducted, the period between 16th and 23rd December 2019 is 07 days; while the period between 16th and 20th January is 05 days, making it 12 days. The summons in the present suit was therefore served within the required 15 days from the date of service of the summons. This point of objection is, therefore, overruled.

Issue 2: Whether Civil Suit No. 505 of 2019 is Res Judicata?

Submissions

[8] Counsel for the Defendants submitted that while the Plaintiff commenced the present suit on 27th November 2019, earlier on, on 27th February 2019, the Plaintiff had commenced **M.C No. 44 of 2019: Hon. Maj. Gen. (RTD) Kahinda Otafire vs The New Vision Printing & Publishing Company Limited**, the 1st Defendant herein. In the Miscellaneous Cause, the Applicant (now Plaintiff) sought for a declaration and orders that the Respondent (now 1st Defendant) was in contempt of Orders of the Court in HCCS No. 661 of 2003; that the Respondent be ordered to comply with the Orders of Court; for an apology to run in the Respondent's daily Newspapers for one week; general, exemplary and special damages for injured feelings and emotional distress; and costs of the application. Two articles were subject of the complaint in this proceeding; one dated 16th February 2019 and another dated 12th October 2019. The latter is the subject of the current suit.

[9] Counsel for the Defendants submitted that in the said MC No. 44 of 2019, the Court made a finding that the publications complained of were defamatory of the Applicant (now Plaintiff) and, in addition to awarding a fine for contempt of the earlier order of the Court, the Court also awarded general and exemplary damages. Counsel argued that the subject matter in this suit being the same as the one which was brought or ought to have been brought before the court in the former suit which was determined finally by this honourable court; and the parties being the same or in privy of one of the parties, this matter is barred by the doctrine of res judicata. Counsel relied on Section 7 of the Civil Procedure Act (CPA) and a number of decided cases, including ***Amamu Limited vs Barclays Bank Uganda Limited & Another, HCCS No. 21 of 2010; Kamunye & Others vs Pioneer General Insurance Society Ltd [1971] EA 263; Greenhalghvs Mallard [1947] 2 All ER 255***. Counsel prayed that the suit be dismissed with costs.

[10] In reply, it was submitted by Counsel for the Plaintiff that the cause of action in Miscellaneous Cause No. 44 of 2019 was against the 1st Defendant for contempt of the decree issued in HCCS No. 661 of 2003 and not in defamation. Counsel submitted that the claims herein are different and the plea of res judicata is not available to the 2nd and 3rd Defendants who were not a party to Miscellaneous Cause No. 44 of 2019. Counsel also argued that the 2nd and 3rd Defendants cannot be said to claim under the 1st Defendant since they were properly sued in their individual capacity, their job description notwithstanding. Counsel concluded that the substance of the claim for defamation envisaged in this suit is different from what was adjudicated upon in MC No. 44 of 2019. Counsel prayed to Court to find that the suit is not res judicata and reject the preliminary objection.

[11] Counsel for the Defendants made submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[12] The doctrine of *res judicata* is codified in the provision under *Section 7 of the Civil Procedure Act* which provides as follows:

> *"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 such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by that Court."*

[13] The position of the law on this matter has also been succinctly put by the Court of Appeal in ***Ponsiano Semakula Vs Susane Magala & Others, 1993 KALR 213*** which was cited with approval in the latter case of ***Maniraguha Gashumba Vs Sam Nkundiye, CA Civil Appeal No. 23 of 2005***. The Court had this to say:

"The doctrine of res judicata, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine (is) succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eada causa' (no one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res judicata appears to be that the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

[14] From the foregoing legal position, therefore, the essential elements of the doctrine of res judicata are:

a) There was a former suit between the same parties or their privies;
b) The matter was heard and finally determined by the court on its merits;
c) The matter was heard and determined by a court of competent jurisdiction; and
d) The fresh suit concerns the same subject as the previous suit.

(See: *Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015* which relied on ***Ganatra v. Ganatra [2007] 1 EA 76; Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93 -994;*** and ***Attorney General & Anor vs. Charles Mark Kamoga MA 1018 of 2015*****).**

[15] On the case before the Court, the facts on record indicate that by virtue of a court order dated 3rd April 2006 vide HCCS No. 661 of 2003, an order of a

permanent injunction was issued restraining the present 1st Defendant or its agents from "publishing any defamatory matter against the Plaintiff". Although the matters published and found defamatory in HCCS No. 661 of 2003 were different from the publications by the Respondent subject of M.C No. 44 of 2019, the Court in the latter case took the view that the order of a permanent injunction issued against the Defendant in HCCS No. 661 of 2003 covered the latter publications (of 16th February 2019 and 12th October 2019). The court reasoned that such was because the court issued a "permanent injunction against the Defendants restraining them from publishing any defamatory matter against the plaintiff". Upon the court's finding, the Order in HCCS No. 661 of 2003 captured the allegations concerning the publications of 16th February and 12th October 2019. The Court went on to evaluate the evidence adduced by three witnesses and found that these publications were defamatory of the Applicant (present Plaintiff) before making a finding that the publications were made in contempt of the earlier court order.

[16] In view of the above facts, I am in agreement with the argument by the Defence Counsel that the above consideration and finding by the Court in MC No. 44 of 2019 meant that, as far as the allegation of grabbing a government ranch by the Applicant/Plaintiff was concerned, the defamatory and injurious nature of the same had been proved and no further trial was necessary. Since the Order passed vide HCCS No. 661 of 2003 was not premised on the allegation of grabbing a government ranch, I agree that the only way the court could make a finding of contempt and proceed to assess and award damages to the Applicant/Plaintiff was by first determining whether the then current allegations were defamatory and injurious to the Applicant (now Plaintiff). From a reading of the decision in MC No. 44 of 2019, the court did just that.

[17] If the situation was otherwise, there was no way the court would have arrived at the same finding, assess and award damages. As above stated, it is noteworthy that the court first evaluated the evidence of three witnesses and

unequivocally arrived at the finding that the publication of 12th October, among others, was defamatory of the Plaintiff (then Applicant). In that regard, the Plaintiff having taken advantage of that procedure and receiving orders and awards in his favour, he is estopped from finding a fresh cause of action upon the same facts and same subject matter. The Plaintiff would also be caught by the principle that guards against approbation and reprobation. He cannot take advantage of a court process and then rebound from it. See: ***Male H. Mabirizi Kiwanuka vs Attorney General, HCMA No. 089 of 2022***; ***Republic versus Institute of Certified Public Secretaries of Kenya, HCMA No. 322 of 2008***, and ***Banque De Moscou V Kindersley (1950) 2 All ER 549***.

[18] The above circumstances, therefore, point to one conclusion; that is, that the subject matter in the present suit (HCCS No. 505 of 2019) is the same as in the previous suit (HCMC No. 44 of 2019). The fact that in this suit there are two other defendants does not change this position. By the averment in the plaint, the 2nd and 3rd Defendants are described as "journalists working with the 1st Defendant". In M.C 44 of 2019 (the previous suit), the 3rd Defendant (then a witness) stated that prior to the publications of 16th February 2019 and 12th October 2019 (which publications constituted the subject matter of M.C 44 of 2019), he was assigned by the Respondent (now 1st Defendant) to investigate and report on the subject matter in issue. It is apparent from the facts that whatever the 2nd and 3rd Defendants wrote on the subject matter; they were doing so as employees or agents of the 1st Defendant. As such, an independent cause of action cannot be founded against the 2nd and 3rd Defendants in absence of the publisher of the alleged materials, who is the 1st Defendant and was the only defendant in the previous suit.

[19] There is therefore no merit in the argument that the addition of the said two defendants, who were not parties in M.C 44 of 2019, occasions a different cause of action and makes the parties in the two suits different. It is clear that the 2nd and 3rd Defendants are privies of the 1st Defendant. According to

Section 7 of the CPA and on decided cases, a subsequent suit brought between the same parties or parties through whom any claim or their privies is res judicata. This is one such case.

[20] It may be argued for the Plaintiffs that the reliefs claimed and granted by the court in the previous suit were different and less than those claimed in the present suit. In my view, if a party brings an action against another, and the court makes a finding and award in favour of the claimant, the fact that the court awarded less or did not consider some category of reliefs, does not entitle such a claimant to bring another suit for more comprehensive reliefs. The option to such a claimant lies either in review or appeal against such finding and award by the court. It certainly cannot justify bringing a fresh suit. If brought, such a subsequent suit is definitely res judicata. The present suit falls in this category.

[21] It was argued by Counsel for the Plaintiff that the claim and awards made in MC No. 44 of 2019 were in regard to contempt of the court. Looking at the decision of the Court in the said former suit, it is not true that the claims and awards made were towards contempt of court only. The declaration and orders that were sought in the previous suit have been summarized herein above (see paragraph 8 above). At page 19 of the Ruling in MC No. 44 of 2019, the order of the court reads; *"… this court awards the Applicant general damages of UGX 100,000,000/= … to atone for the physiological torture, inconvenience and serious damage to his reputation. Court further awards the Applicant exemplary damages of UGX 50,000,000/= … to deter any further defamatory publication of him by the Respondent. In addition, the Respondent shall pay a fine of UGX 50,000,000/= … for being contemptuous of the court order"*.

[22] The above orders clearly indicate that the first two awards were towards defamation while the third was towards contempt of the court. It ought to be noted that the Applicant had sought for these orders and more. As such, the intention of both the Applicant and the court was to have the allegation of

defamation occasioned by the publication of 12th October 2019, among others, fully adjudicated upon and resolved. This is what the court did. This court cannot adjudicate over the same matter and make the same or different findings and awards. In other words, the Plaintiff cannot expect further award of damages for defamation in respect of allegations based on the same publication of 12th October 2019.

[23] In all, therefore, the Defendants have established before the Court that the former suit was between the same parties as the present suit. The 2nd and 3rd Defendants in the present suit are privies of the 1st Defendant and no cause of action can be sustained against them independent of the 1st Defendant who is the publisher of the alleged publication; and who is the same defendant in both suits. From the pleadings and the decision of the court, the matter was heard and finally determined by the court on its merits by a court of competent jurisdiction. The subject matter of both suits is the same; defamation based on the publication of 12th October 2019. The present suit is therefore res judicata.

[24] I accordingly uphold the preliminary objection raised by Counsel for the Defendants and I dismiss HCCS No. 505 of 2019 with costs to be paid to the Defendants. It is so ordered.

Dated, signed and delivered by email this 20th day of May 2022.

Boniface Wamala
JUDGE