THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO. 2184 OF 2023

[ARISING FROM CIVIL SUIT NO. 141 OF 2022]

RUTAGARAMA BOSCO BYOMA	**]**	**APPLICANT**
VERSUS		
MEERA INVESTMENTS LIMITED T/A BUKOTO HEIGHTS APARTMENTS	**]**	**RESPONDENT**

Before: Hon. Justice Ocaya Thomas O.R

RULING

Introduction

This application arises from Civil Suit 141 of 2022 which was filed by the Respondent herein seeking to recover about USD 17,000 as unpaid rent and other reliefs against the Applicant.

Consequent to the filing of the suit, the Applicant brought this application under Order 6 Rule 28 and 29 of the Civil Procedure Rules ["CPR"] and Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act seeking the following reliefs:

(a) Civil Suit No 141 of 2022 ["the main suit"] be dismissed for being Res Judicata.

(b) Costs of this application be provided for.

Background

The Respondent operates rental premises known as Bukoto Heights Apartments which it lets out to other persons. The Applicant is or was the Respondent's tenant at the above-described premises from August 2019. It is common ground that the Applicant defaulted on rent and accumulated rental arrears which compelled the Respondent to commence Miscellaneous Cause 147 of 2021 for leave to levy distress on the Applicant's property in order to recover the said rent.

The said application was granted and the Respondent levied distress on property named in the warrant of attachment. According to the Respondent, the Applicant accumulated arrears of USD 17,435 and only UGX 4,026,000 [USD 1,150.3] was recovered leaving the sum of USD 16,284.7 owing.

The Respondent contends that it commenced the main suit to recover the above outstanding sums, along with other reliefs, including damages, which in its view are appropriate in the circumstances.

For the Applicant, it is contended that the ruling in MC 147/2021 comprehensively dealt with the matters raised in the main suit and the court rendered a ruling in favour of the Respondent and accordingly, the main suit is an attempt to re-litigate matters which have already been determined.

Representation

The Applicant was represented by M/s Silicon Advocates while the Respondent was represented by M/s Walusimbi & Co. Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support and an affidavit in rejoinder deponed by him. The Respondent led evidence by way of an affidavit in reply deponed by Dr. Sudhiir Ruparelia, the director of the Respondent and Najjibu Mwase, a court bailiff attached to M/s Sparrow General Auctioneers & Court Bailiffs.

Both sides with leave of court made written submissions in support of their respective cases which I have read but I have not seen the need to reiterate the same below but will refer to them where appropriate in the decision.

Decision

The doctrine of Res Judicata, now codified in Section 7 of the Civil Procedure Act traces its roots from the latin maxim *nemo debt bis vexari pro una et eada causa* (No one should be vexed twice for the same cause). The position of the law, therefore, is that once a matter has been fairly and correctly tried once, it should be tried again. Litigation must come to an end.

In **Karia and another v. Attorney General and others [2005] 1 EA 83**, the court laid out a three item test to determine whether a matter was res judicata. The test is as below:

(a) there has to be a former suit or issue decided by a competent court

(b) the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar, and

(c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

In **Boutique Shazim Limited v. Norattam Bhatia & Anor CACA No.36 of 2007** court held that essentially the test to be applied by court to determine the question of res judicata is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he / she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time.

The burden of proving res judicata is on the Respondent who alleges it. See **Onzia Elizabeth v Shaban Fadul & Anor HCCA 19/2013**, **Cwezi Properties v Uganda Development Bank Limited HCMA 1315/2022.**

The rule of Res Judicata applies also to claims which ought to have been brought in the previous suit. [**Boutique Shazim Limited v. Norattam Bhatia & Anor CACA No.36 of 2007, Greenhalgh vs Mallard [1947] 2 All ER 255, Kamunye and others versus Pioneer General Insurance Society Ltd [1971] EA 263.**

Former Suit Decided by A Competent Court

Section 2(x) of the Civil Procedure Act defines a suit thus

""suit" means all civil proceedings commenced in any manner prescribed."

In my view, a Miscellaneous Cause commenced under the Distress for Rent (Bailiffs) Act is a suit as it is commenced in the manner prescribed under the said law. See **Matco**

Stores v Muhwezi CA 9/2012, Japan Auto World v Hajji Batte Magala HCCS 73/2016, DAPCB v Musa Balikowa & Anor HCMA 61/2023

In my view, the existence of HCMC 147/2021 qualifies as a suit and this ingredient is met.

Was the suit before a competent court?

I note that HCMC 147/2021 was filed before the enactment of the Land and Tenant Act 2022.

Also, I notice that the suit was brought under Distress for Rent (Bailiffs) Act [Cap 76] and the Distress for Rent (Bailiffs) Rules SI 76-1. It must be noted that

(a) Under the above stated laws, Landlords can distress for rent on the property of a tenant without a certificate issued under Distress for Rent (Bailiffs) Act [Cap 76]

(b) A holder of a general certificate issued under the Distress for Rent (Bailiffs) Act [Cap 76] can distress for rent in respect of any property in Uganda.

(c) A holder of a special certificate issued under the Distress for Rent (Bailiffs) Act [Cap 76] can distress for rent in respect of the property indicated in the same certificate. See **Diamond Trust Properties v Yoka Rubber Industries SCCA**

What is clear is that the Distress for Rent (Bailiffs) Act [Cap 76] does not provide for leave of court to levy distress. As I understand that law, it lays down a framework for who may levy distress and the process and procedure for certifying such a person to levy distress. The law is aimed at regulating the undertaking of rent distress services by providing that person, other than those excluded under Section 2, should be certified to do so, and indicating the character and process of such certification, fees for the same among other related matters.

Nowhere does that specific law provide for parties to seek and obtain leave from court before distressing. As far as I understand the law, once a person has a certificate issued under the act or is among the persons excluded from the application of the act by Section 2 of the same law, they can levy distress without recourse to court.

Distress for rent is a quick self help remedy available to the landlord, while the landlord tenancy relationship exists, allowing for a landlord to recover unpaid rent. See **Souza**

Figuerido & Co. Ltd v George & Ors [1959] EA 756, Joy Tumushabe v M/s Anglo Africa SCCA7/1999

The right for landlords to distrain for overdue rent arises automatically from the obligation to pay rent. It allows the landlord to enter the let premises as soon as rent is due and seize goods found there, and then either retain them until the rent is paid, or sell them and recover the rent from the proceeds. Leave of the court is required for distraint in the case of some but not all residential tenancies. See **Property Law: Commentary and Materials by Alison Clarke and Paul Kohler, Cambridge University Press, Pages 293-297, Sheldon Kurtz, Moynihan's Introduction to The Law of Real Property, 7th Edition, West Academic Publishing, Page 208.**

Jurisdiction is a creature of law and is specific. A court cannot arrogate itself of jurisdiction it does not have. Jurisdiction must flow from law. See **Pastoli v Kabale District Local Government Council and others [2008] 2 E.A 300, Kasibante Moses v. Katongole Singh Marwaha and another, HCEP. 23/2011.**

No provision of the Distress for Rent (Bailiffs) Act [Cap 76] empowers court to grant orders for distress. See **Male Mabirizi & Anor v Owere Franco HCMA 2763/2014**
I take note of the fact that it is the practice many advocates or parties to file applications for distress orders from court. Whereas this is a widely used practice, it doesn't make it law. **Sections 14 and 15** of the Judicature Act clearly provide for the sources of law in Uganda and practice is not one of them.

Moreover, even considered, the enactment of the Landlord and Tennant Act 2022 did not do away with the common law relief, available to the unpaid landlord, of distress. The act merely codifies some of the other reliefs available to an unpaid landlord as can be seen in Sections 29, 30, 38, 44 and so on.

I note that, if an application is presented premised on court's inherent powers under Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act seeking distress orders is presented, it is perhaps possible that such an application may be granted as the above provisions confer very wide powers on the courts. See **Vantage Mezzannine Fund II Partnership & Anor v Commissioner Land Registration & Ors HCMA 2428/2023,**

However, even in such circumstances, the Applicant would need to provide compelling reasons for the exercise of court's inherent powers such as where distress has been prevented by violence occasioned by the tenant or such cogent reasons such that distress cannot be levied ordinarily and without the coercive authority of an order of the court.

Even then, the said provisions were neither invoked by the Respondent in HCMC 147/2021 nor have I found any evidence that they formed the basis of the decision of the court and resultant order in the same proceedings.

Accordingly, Miscellaneous Cause 147 of 2021 does not satisfy this element as it is not a suit before a court with jurisdiction/a competent court.

This finding alone determines the entire application, but for completeness, I will assess the Applicant's application in the lenses of the two remaining ingredients.

The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

I have reviewed the documents supplied (including the ruling) from HCMC 147/2021 together with the pleadings in the main suit. What is clear is that whereas HCMC 147/2021 was for orders that the Respondent be given leave to levy distress (and therefore in that case the dispute was whether there were grounds for levying of the same) the main suit seeks recovery of rent (essentially it is a contractual claim) as well as related remedies such as damages.

An unpaid landlord has more than one option in respect of a defaulting tenant and, subject to law, they may pursue one or more options. They may distress on the tenant's property, they may re-enter the premises and determine the tenancy (which would make distress unavailable), they may sue to recover unpaid rent, they may levy late fees/penalties, they may retain the security deposit and apply it to the unpaid rent, they may take advantage of other agreed or contractual rights among others.

In my considered view, proceedings in pursuance of one relief will not, by that fact alone, typically cause the proceedings for the other reliefs to be Res Judicata unless (a) an issue in the consequent proceeding is determined in the earlier proceeding or (b) the issues relating to the other reliefs could have been raised in the prior proceedings.

In commencing HCMA 147/2021 (the competence of the action notwithstanding) the landlord was only taking advantage of one of the remedies available. Accordingly, the dispute justiciable was whether there were grounds for seeking to take advantage of the said remedy.

In my view, the two suits deal with two different causes of action, issues for determination and reliefs even though they arise from similar facts. This would not constitute res judicata because the issues presented for adjudication have not, in my view, been determined by the court.

The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title

Under this head, I agree with the submissions of counsel for Applicant that the parties are claiming the same title as HCMA 147/2021 as landlord and tenant and in respect of their current or pre-existing relationship that was originated in August 2019.

Conclusion

On the whole, I find that only one of three ingredients of the bar of Res Judicata is made out. I therefore find that the Res Judicata bar is not applicable in the present circumstances, and for that reason, I decline to grant the reliefs sought by the Applicant and dismiss his application with costs.

I so order.

Delivered electronically this 22nd day of March 2024 and uploaded on ECCMIS.

Ocaya Thomas J.R.

Judge

22nd March 2024