

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC. APPLICATION NO. 769 OF 2019 AND MISC. APPLICATION NO. 776
OF 2019 (CONSOLIDATED)
(ARISING FROM CIVIL SUIT NO. 418 OF 2019)

ENG. KYOGI BINTA ZACHARIA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ANTHONY NATIF ::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

AND

1. AIGP ERASMUS TWARUHUKWA

2. SSP RASHID AGERO ::::::::::::::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

ANTHONY NATIF ::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The two applications were consolidated by the Court with the consent of Counsel for both parties for hearing at once. Miscellaneous Application No. 769 of 2019 seeks to strike out HCCS No. 418 of 2019 against the Applicant for offending the *lis pendens* rule under Section 6 of the CPA and being an abuse of the court process. Miscellaneous Application No. 776 of 2019 seeks to strike out HCCS No. 418 of 2019 on account of failure to disclose a cause of action and being an abuse of the court process.

[2] Miscellaneous Application No. 769 of 2019 was brought by Notice of Motion supported by an affidavit deposed by **Eng. Kyogi Binta Zacharia**, the Applicant and 1st defendant in HCCS No. 418 of 2019 instituted by the Respondent. Briefly the grounds are that the Respondent instituted

Miscellaneous Cause No. 788 of 2019 for contempt of court and alleged interference with his business at Kibuga Block 38 Plot 210 which was dismissed. The Respondent then filed M.A No. 1192 of 2019 for reinstatement of the dismissed cause; which had not been determined by the time of filing the instant application. The deponent stated that the issues in HCCS No. 418 of 2019 and M.C No. 788 of 2019 are the same and arise out of the same facts and the parties are substantially the same save for a few added parties. He further averred that the Respondent has no maintainable cause of action against the Applicant since the right to possession of Kibuga Block 38 Plot 210 was decreed to Rita Health Care Services Ltd and the license to operate a retail pharmacy was issued to Allianz Pharmacy Ltd and not the Respondent. The Applicant stated that he instituted HCCS No. 431 of 2019 in the Land Division against the Respondent seeking, among others, a declaration that he is the rightful owner of the land comprised in Block 38 Plot 210. Arising out of that suit, he consequently filed M.A No. 750 of 2019 for an interim order; M.A No. 749 of 2019 for a temporary injunction; and M.A No. 1148 of 2019 plus M.A No. 1167 of 2019 for contempt of court. He concluded that granting the reliefs sought by the plaintiff in HCCS No. 418 of 2019 would in effect vacate, vary, review and overrule orders already granted by the Court.

[3] Miscellaneous Application No. 776 of 2019 was supported by an affidavit deposed by **AIGP Erasmus Twaruhukwa**, the Director of Legal Services and Human Rights Affairs in Uganda Police. Briefly, the grounds are that the plaint in HCCS No. 418 of 2019 does not name or state any action or omission done by him to justify any legal action against him personally. He stated that the only correspondence signed by him was for and on behalf of the IGP. He further stated that in the course of his duties, he has immunity against personal legal proceedings. He also stated that the property comprised in Kibuga Block 38 Plot 210 has been subject of many alleged crimes and Uganda Police has no interest in the disputed property except for maintenance of law and order. He concluded that the application disclosed no cause of action against him and

the plaint ought to be struck out and the suit as against the Applicants be dismissed.

[4] The Respondent opposed both applications through affidavits in reply deposed by himself. The deponent stated that in August 2017, he together with Transition Investments Limited rented from Rita Health Care Services Limited the ground floor of the building at Block 38 Plot 210 to be used for operating a retail pharmacy. He then entered an understanding to relocate Allianz Pharmacy to the suit premises that were inspected by the National Drug Authority (NDA) and a certificate of suitability of premises and license to operate were issued to the said pharmacy. In January 2019, he entered into an agreement to purchase the 49.5% interest in the premises from Dr. Fredrick Njuki and started repair works at the premises, installed shelves and stocked drugs to start operating the retail pharmacy. In June 2019, police officers locked up the premises and denied him access in a purported enforcement of a court order of which the Registrar clarified that it was not an eviction order. He regained access to the premises in July 2019 but the police officers in August 2019 again locked up the premises. He stated that the court order issued in M.A No. 750 of 2019 required maintenance of Rita Health Care Services Ltd on the premises and since he was a tenant of the said entity, he is entitled to be in possession. He further stated that in September 2019, he purchased 500 shares of Dr. Fredrick Njuki in Rita Health Care services making him a majority shareholder in the company. He averred that the facts and cause of action supporting the main suit are distinct from those in M.C No. 788 of 2019 and had arisen on different occasions.

[5] The Respondent further stated that the police officers who locked up the premises were under the knowledge, direction, command and advice of the applicants. He stated that the police officers that were made parties to the suit are not immune from proceedings in a matter involving enforcement of human rights. He also stated that the main suit arises out of locking up the premises

by the police force and theft of his drugs and furniture in the premises. He concluded that it is in the interest of justice that the applications are dismissed with costs.

Representation and Hearing

[6] At the hearing, the Applicants in M.A No. 769 of 2019 were represented by **Mr. Fabian Omara** of M/s Kyagaba & Otatiina Advocates; the Applicants in M.A No. 776 of 2019 were represented by **Mr. Barnabas Dyadi Kamy** of M/s Barnabas D. K Dyadi & Co. Advocates; while the Respondent was represented by **Mr. Brian Kalule** of M/s AF Mpanga Advocates. The Court directed that the hearing proceeds by way of written submissions which were duly filed and have been taken into consideration in the determination of the matter before Court.

Issues for Determination by the Court

[7] Three issues were raised for determination by the Court, namely;

- a) Whether HCCS No. 418 of 2019 offends the *lis pendens* rule?
- b) Whether HCCS No. 418 of 2019 discloses a cause of action against the Applicants in MA No. 776 of 2019?
- c) Whether HCCS No. 418 of 2019 is an abuse of the court process?

Resolution of the Issues

Issue 1: Whether HCCS No. 418 of 2019 offends the *lis pendens* rule?

Submissions by Counsel for the Applicants

[8] Counsel for the Applicants submitted that the *lis pendens* rule is based on the provision under Section 6 of the CPA. Counsel relied on the case of *Spring International Hotel Ltd v Hotel Diplomate Ltd & Anor HC Civil Suit No. 227 of 2011* to the effect that the rationale for *lis pendens* rule is to prevent two different courts from arriving at conflicting judgments on the same facts and further prevent throwing the doctrine of precedent in disarray and uncertainty. Counsel submitted that in this case, there are several pending suits, which are

quite similar in regards to the parties, the subject matter and reliefs sought. Counsel submitted that the Respondent is aware of the pendency of HCCS No. 431 of 2019, the miscellaneous applications that arise out of it and the resultant orders that have been granted in in the matters. Counsel submitted that the subject matter in issue in both HCCS No. 431 of 2019, that was instated earlier and is pending before the land division, and HCCS No. 418 of 2019 before this Court is the same largely on ownership and purchase of the suit land. Counsel further stated that the parties are substantially or directly the same, only with the difference of the the police officers who were sued for having enforced court orders issued as a result of applications arising from HCCS No. 431 of 2019. Counsel argued that the Land Division has jurisdiction to grant the compensatory reliefs claimed in HCCS No. 418 of 2019. Counsel concluded that the filing of HCCS No. 418 of 2019 was in contravention of the *lis pendens rule* and that the suit is expressly barred by law and ought to be dismissed with costs.

Submissions by Counsel for the Respondent

[9] In response, Counsel for the Respondent submitted that the main suit is substantially different from M.C No. 84 of 2018. Counsel stated that the cause of action in the main suit is unlawful interference with business and the remedy sought is compensation for stolen property and prospective loss of profits and business. Counsel further stated that the suit before this Court is founded on events leading to the theft of the Respondent's property and items at the premises and the subsequent locking up of the premises; which claim is not pending in any other suit. Counsel also argued that the parties are different since there are five defendants in the main suit which is not the case in the contempt of court application or the suit in the Land Division. Counsel concluded that the main suit does not offend the *lis pendens rule* under section 6 of the CPA. He prayed that the applications be dismissed with costs.

Determination by the Court

[10] The position of the law is that for a plea of *lis pendens* to be available, the party relying on it has to show that;

- a) The matter in issue in the present suit is also directly and substantially in issue in a previously instituted suit or proceeding;
- b) The previously instituted suit or proceeding is between the same parties or parties under whom they or any of them claim; and
- c) The suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

See: *Section 6 of the CPA* and the decisions in *Springs International Hotel Ltd v Hotel Diplomate Ltd & Anor, HC Civil Suit No. 227 of 2011; Equity Bank (U) Ltd v Buyinza John HC Miscellaneous Cause No. 33 of 2018* and *Krone Uganda Limited v Kerille Investments Ltd, HCMA No. 306 of 2019*.

[11] On the case before me, the facts on record indicate that the main suit herein vide HCCS No. 418 of 2019 was filed by the plaintiff (Respondent herein) on 7th October 2019 seeking, orders against unlawful interference with the plaintiff's business, for an order of a permanent injunction restraining any further interference, for compensation by way of special, general, aggravated and punitive damages, and for interest and costs. The suit is in respect of property comprised in Block 38 Plot 210 at Mulago Hill, Wandegeya, Kampala. It has been shown by the 1st Applicant that he, on 17th May 2019, had filed HCCS No. 431 of 2019 in the Land Division of the High Court in which he sought a declaration that he (as plaintiff) is the rightful owner of land comprised in Kibuga Block 38 Plot 210 at Wandegeya, for an order of a permanent injunction restraining the defendant or his agents from purporting to claim a similar interest and for general damages.

[12] It is clear from the facts that the subject matter in both suits is the same, that is, land comprised in Kibuga Block 38 Plot 210 at Mulago Hill, Wandegeya,

Kampala. While it is the argument by the Respondent that, in the suit before this Court, he is only seeking compensation for acts committed against his business, it is clear that the business is alleged to have been located on the said property. By the suit before this Court, the Respondent gives an impression that his ownership and possession of the said property is without dispute. That is totally incorrect; because the Respondent was aware that prior to his suit, HCCS No. 431 of 2019 had been instituted to investigate and determine the question of ownership of the subject property. Indeed, the said suit in the Land Division had been subject of numerous interlocutory injunction orders in which the Respondent's participation is well pronounced. In those circumstances, I do not find any way in which the Respondent would expect this Court to consider an action for compensation in his favour when the question of his ownership and lawful possession of the same property is subject of a dispute before another court of competent jurisdiction.

[13] Clearly, the Respondent can only sustain a cause of action in the present suit after establishing that he is the lawful owner of the suit premises and/or that he was in lawful possession at the time of the alleged occurrences. According to the Respondent, the questions of lawful ownership and possession are not before this Court for investigation and determination. This means that the Respondent expects this Court to decree compensation in his favour without investigating and determining those questions. I do not know whether the Respondent envisages what would happen if this Court proceeded and indeed granted him compensation on the one hand and, on the other hand, the Court in the Land Division found that he does not own the suit land and was not in lawful possession of the same. This kind of scenario is clear testimony to the fact that the subject matter in the two suits is directly and substantially the same.

[14] In my view, the option that was legally available to the Respondent was to defend the suit in the Land Division (which was filed prior to his) and include a

counterclaim; such that if the court finds that he had lawful ownership and possession of the property, he would be entitled to compensation for any injury he would have suffered. The argument by the Respondent gives the impression that the court determining the land suit would have no jurisdiction to award compensation for the damage and loss claimed by the Respondent in the suit herein. That is definitely a wrong impression. The fact that the present suit includes parties that are not party to the land suit does not change the equation. The Respondent could competently introduce those other parties into the suit by way of the counterclaim.

[15] In the circumstances, all the elements of the principle of *lis pendens* exist in the present matter. Civil Suit No. 418 of 2019 is accordingly *lis pendens* and is barred by law. The suit is accordingly struck out with costs to the Applicants/Defendants. In view of this finding, I do not need to traverse the other issues raised in the applications. The consolidated applications accordingly succeed and are allowed with costs against the Respondent.

It is so ordered.

Dated, signed and delivered by email this 2nd day of April, 2024.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala
JUDGE