THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 252 OF 2019

(Arising from Miscellaneous Application No. 320 of 2019)

(Arising out of Civil Suit No. 493 of 2017)

(Coram: Hon. Justice Alfonse Chagamoy Owiny-Dollo, DCJ, Hon. Justice Cheborion Barishaki JA, Hon Justice Stephen Musota, JA)

CRANE BANK LIMITED [IN RECEIVERSHIP]:::::::::::::::::::::: APPELLANT

VERSUS

1. **SUDHIR RUPARELIA**]
2. **MEERA INVESTMENTS LIMITED]:::::::::::::::::::::::::::::RESPONDENTS**

JUDGMENT

This is an appeal from the ruling and orders of Hon Mr. Justice David Wangutusi in High Court Miscellaneous Application No. 145 of 2010, an application filed by the respondents against the appellant seeking to have H.C.C.S No. 493 of 2017 dismissed on grounds which were enumerated in the application. Upon hearing the application, the learned trial judge made the following orders;

i) The Applicant's application is allowed

ii) H.C.C.S 493 of 2017 is dismissed for lack of cause of action and locus standi.

iii) H.C.C.S is also dismissed for being barred in law.

iv) Costs of the application and H.C.C.S 493 of 2017 shall be borne by Bank of Uganda.

Background

The facts giving rise to this appeal as accepted by the trial court are that the appellant was licensed by the Bank of Uganda to carry on the business of a financial institution. On 20th October 2016, the appellant was placed under statutory management by the Bank of Uganda pursuant to S.87 (3) and S.88 (1) (a), (b) of the Financial Institutions Act 2004. On 20th January 2017, the Bank of Uganda pursuant to S.94 of the Financial Institutions Act placed the appellant under receivership. On 30th June 2017, the appellant filed High Court Civil Suit 493 of 2017 against the respondents. The appellant sought recovery of money allegedly misappropriated by the 1st respondent as a director and shareholder of the appellant. The appellant also sought delivery of freehold certificates of titles to 48 properties, together with duly executed transfer deeds in favour of the appellant and a refund of money from the 2nd respondent for payment made for "void leases". On 3rd August 2017, the respondents filed their defence. In the written statement of defence, they denied the allegations against them and stated that they would raise preliminary objections against the appellant to the effect that the appellant had no *locus standi*, no cause of action and that the suit was

barred in law. On 29th August 2017, the appellant filed a rejoinder and maintained its allegations against the respondents. The appellant also maintained that it had a cause of action and locus standi against the respondents and that the suit was not barred by law.

On the 30th April 2019, the respondents filed Miscellaneous Application 320 of 2019 in the High Court in which they raised the following preliminary objections:

1. The Respondent/plaintiff has no locus standi to commence actions under HCCS No 493 of 2017 against the Applicants;
2. The Plaint in H.C.C.S 493 of 2017 does not disclose a cause of action against the Applicant;
3. The orders sough against the 2nd Applicant in H.C.C.S 493 of 2017 are barred in law;
4. H.C.C.S 493 of 2017 be dismissed with costs;
5. The costs of this application be provided for.

The appellant herein opposed the application. An affidavit in reply to the application, deponed by Ms. Margaret Kasule, the legal counsel of Bank of Uganda was filed on behalf of the appellant in which it maintained that it had a cause of action, locus standi against the respondents and that its suit was not barred by law.

On 29th August 2019, the Hon. Mr. Justice David Wangutusi delivered his ruling in which he upheld the grounds of the application. The Learned Judge dismissed

H.C.C.S 493 of 2017 for lack of cause of action, locus standi and for being barred in law. He ordered Bank of Uganda to pay the costs of the application.

Being dissatisfied with the decision and orders of the trial Court, the appellant filed this appeal. The grounds of the appeal as they appear in the Memorandum of Appeal are as follows;

1. *The learned Judge erred in law in holding that on being placed under receivership crane bank lost its legal capacity to institute legal proceedings.*
2. *The learned Judge erred in law in holding that the statutory time span for receivership of financial institutions under the FIA is limited to a period of twelve months.*
3. *The learned Judge erred in law in holding that the Appellant under receivership lacked locus standi and that its attempt at filing the suit was null ab inito.*
4. *The learned Judge erred in law and in fact in holding that by 30th June 2017 when it filed the suit, the Appellant had ceased to own property and its liabilities and assets had all been exhausted.*
5. *The learned Judge erred in law and fact in holding that the Receivership was exhausted with the transfer and conveyance of assets and liabilities to DFCU Bank Limited.*
6. *The learned trial Judge erred in law and in fact, in holding that when it filed the suit, the Appellant had no cause of action because there was nothing to sue for.*

7. *The learned Judge erred in law and fact in holding that the Respondent is a non-citizen for purposes of the Land Act and the Constitution and an attempt to confer freehold title on it would be an illegality.*

8. *The learned Judge erred in law and fact in holding that any orders awarding delivery of freehold titles to the Appellant would be illegal and barred by law.*

9. *The learned trial judge erred in law and fact in awarding costs of the suit as he did.*

Representation

At the hearing of the appeal, Dr. Joseph Byamugisha and Mr. Albert Byamugisha appeared for the appellant, while Mr. Peter Kabatsi, Mr. Joseph Matsiko, Mr. Ellison Karuhanga, Mr. Jet John Tumwebaze, Mr. Bruce Musinguzi, Ms. Barbara Musimenta, Mr. Rayner Mugyezi and Mr. Joakim Kunta Kinte represented the respondents.

Upon application by learned counsel for the parties, leave was granted to them to file written submissions. In their detailed submissions, counsel for the respective parties cited various authorities in support of their arguments, which we found to be very useful. We have considered the said submissions and authorities, without necessarily having to reproduce them in this judgment. We

applaud counsel for extensive and valuable research, which has assisted court in the determination of this appeal.

The duty of this Court as a first appellate Court is set out in Rule 30(1) (a) of the Court of Appeal Rules; is to re-appraise the evidence on record before the trial court, draw its own inferences of fact and come up with a conclusion. Rule 30(1) (a) provides as follows: -

> *"Power to reappraise evidence and to take additional evidence*
>
> *(1) On any appeal from a decision of the High Court acting in its original jurisdiction, the court may-*
>
> *a. Reappraise the evidence and draw inferences of fact."*

See: - ***Fr. Narcensio Begumisa & others vs Eric Tibegaga, Supreme Court Civil Appeal No.17 of 2002, Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No.10 of 1997 and Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.***

Before considering the merits of the grounds of appeal, we are inclined to first deal with, and dispose of what appears from the submissions of the appellant to be a preliminary objection. It was raised regarding the manner in which objections to the competence of the suit were raised and the procedure adopted by the Learned Trial Judge, in light of the law governing such preliminary objections.

Submissions for the Appellant.

Counsel submitted for the appellant that the preliminary objections raised by the respondents in the trial Court were raised under Order 7 Rule 11 and Order 6 Rule 29. Learned Counsel further submitted that the preliminary objections brought under the said provisions have to be read together with Order 6 Rule 28, which according to counsel requires that they can only be set for hearing as such with the consent of the parties or pursuant to an order of court. In support of the foregoing proposition, Counsel cited the decision in ***Express Electrical Engineers & Contractors V Uganda Posts and Telecommunications Corporation Civil Appeal No. 8 of 1980***. The Appellant faults the Learned Trial Judge for not following what they argued yet it is a mandatory procedure in Order 6 Rule 28 of the CPR.

Submissions for the Respondents.

In response to the preliminary point, learned counsel for the respondents submitted that appellant was put on notice of the points of law. This was set out in the respondents' Written Statement of Defence. Further, that before the trial court, the appellant never objected to the points of law raised. Relying on the decision in ***Mukisa Biscuits Manufacturing Co. Ltd West End Distributors Ltd (1996) 1 EA,*** counsel contended that a preliminary point of law can be raised at any time either orally or by application. It was their further submission that a point of law is concerned mainly with the law and the points raised, giving rise to the ruling and orders were pure points of law. Citing ***Eng. John Eric***

Mugyenzi v Uganda Electricity Generation Company Limited CACA 8/2008, the respondents contended that the application that was served on the appellant was one envisaged under Order 6 Rule 28.

Appellant's submissions in rejoinder.

In rejoinder, the appellant, relying on Order 15 Rule 1 of the Civil Procedure Rules SI 71-1 and the decision in ***Interfreight Forwarders (U) Ltd V East African Development Bank [1990-1994] EA 117*** advanced the proposition that a party is bound by its pleadings. The appellant argued that the respondents` assertions in the written statement of defence were mere assertions of law and gave no particulars. The appellant therefore, contended that the learned trial judge could not have framed any issues from the preliminary points disclosed in the written statement of defence. Further, that the preliminary points regarding locus standi and cause of action-required proof and the decision of the learned judge therefore, was an illegality, which according to appellant should not be condoned by this court.

We have carefully reviewed and considered the submissions of both counsel on this point. In our view, there are two issues meriting determination viz; whether, under the applicable rules of procedure, the respondent could legally move the trial judge to determine the preliminary objections or points of law by way of an application in the manner he did. Secondly, whether under the applicable rules, the learned judge acted illegally in proceeding to determine the points of law before the trial of the suit on its merits.

It is trite that a trial judge has discretion to dispose of a point of law to wit; a plaint does not disclose any cause of action at any time at or after the hearing of the suit. As far as the stage at which court is required to rule on the preliminary objection is concerned, the rules of procedure appear to leave the question to the discretion of the Court. This is the import of Order 6 Rules 27, 28 and 29 of the Civil Procedure Rules. While both counsel have cited a number of authorities and made extensive legal arguments, we think that the position of the law has been succinctly clarified and settled by the Supreme Court in ***Uganda Telecom Limited versus ZTE Corporation SCCA No. 03.2017.*** In that appeal, the Supreme Court was invited to determine whether a trial judge has discretion to defer a ruling on a preliminary objection including whether a plaint discloses a cause of action or not at or after the hearing.

In determining the issue, the Supreme Court reviewed the provisions of Order 7 Rule 11, and Order 6 Rules 27, 28 and 29 of the Civil Procedure Rules, in the context of the manner of raising preliminary objections and whether or not the judge has discretion to dispose of the objections at or after the hearing. These are the same rules upon which the appellant has premised his objection on the manner in which the learned trial judge determined the preliminary objections. We are inclined to reproduce the relevant parts of Order 6 Rules 28, 29 and 30;

28: ***Any Party shall be entitled to raise by his pleading any point of law, and the point of law so raised shall be disposed of by the Court <u>at or after</u> hearing provided that the consent of the parties or by order of court or***

application of either party, the same may be set down for hearing and disposed of any time.

29. Any party shall be entitled to raise any point of law, and any point of law so raised shall be disposed of by the court at or after the hearing; except by consent of the parties, or by order of court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

30. ***The court may, upon application, order any application or pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in any case, or in case of the suit or defence being shown to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.***

In summary, the Supreme Court held that pursuant to Order 6 rules 27-29, a defendant may raise a preliminary objection before or at the commencement of the hearing of the suit and after hearing the arguments (if any) from both sides, the court may make a ruling at that stage, upholding or rejecting the preliminary objection. The court may also defer the ruling until after the hearing of the suit, where such a deferment is necessary to hear some evidence to enable the court to decide whether the plaint discloses a cause of action or not. It is a matter for the discretion of the court as regards when to make a ruling on the objection. No hard and fast rule should be laid to fetter the Court's discretion. The exercise of such discretion depends on the facts and circumstances of each case. We agree

with the reasoning of the Supreme Court and adopt the same for purposes of disposing of the preliminary objection raised in this appeal by the appellant.

It is our finding that the respondents were entitled to raise the preliminary objections by way of an application for determination by the Court. We have looked at the Application filed by the respondents. The Notice of motion at page 464 of the Record of Appeal shows that the application was brought under Order 6 Rule 29 and Order 7 Rule 11 and not under Order 6 rule 28 as contended by learned for the appellant. We have further carefully reviewed the decision in; ***Express Electrical Engineers & Contractors V Uganda Posts and Telecommunications Corporation Civil Appeal No. 8 of 1980*** heavily relied on by counsel for the appellant. The decision appears to have restricted itself to objections raised under order 6 Rule 27 (now 28). The court in that matter was not invited to pronounce itself on objections made under Order 6 Rule 29 and Order 7 Rule 11 of the CPR.

We are unable to agree with the proposition of counsel for the appellant that the objections could only be raised, and could only be set for hearing with the consent of the parties or upon a specific order of the court. The respondents have argued and rightly, so in our view, that having raised the objections in their Written Statement of Defence, they subsequently filed an application by Notice of Motion, under Order 6 Rule 29 and Order 7 Rule 11 of the CPR seeking to have the suit summarily dismissed based on the preliminary objections. The court then issued an order summoning the parties to be heard on the objections.

We have no doubt in our minds that the notice of motion constituted an order of court made on application of the respondents within the meaning of Order 6 Rule 29.

The appellant filed a reply and the application was heard on its merits. In our view, a party who desires to raise a preliminary point of law like the respondents herein either has the option of invoking order 6 rules 27 and 28, or order 6 rule 29 and order 7 rule 11.Our view is fortified by the decision in ***Ismail Serugo V Kampala City Council and Anor S.C Const. Appeal 2 of 1998***, the court held that there was a distinction between Order 6 Rule 27 and 28 and Order 6 Rule 29 and Order 7 Rule 11. The Court held that:

> *The other rules of the Civil Procedure Rules, which could apply to the preliminary objections in the instant case, are O.6r.29 or O.7r11 (a). The procedures under these rules are quite different from those under O.6.r.27 and 28 and 13 r2.*

In the instant appeal, the respondents opted to raise their objection under Order 6 Rule 29 and Order 7 Rule 11 by way of a notice of motion. With respect to learned counsel for the appellant, we do not see anything illegal or irregular about the procedure that the applicants used to move court to dispose of the objections.

Further, as to whether the learned judge acted illegally when he opted to dispose of the preliminary objections before the hearing of the suit, We are unable to fault the learned trial judge for opting to dispose of the preliminary objections in

the manner he did. The record of appeal indicates that the appellant filed an affidavit in reply which constituted its response to the respondents` averments on the points so raised. The application was fixed for hearing and both parties made legal arguments in support of their respective propositions. The learned judge in the exercise of his unfettered discretion made a ruling upholding the objections in the manner he did. It is our finding that the learned judge was within the parameters of Order 6 rules 27, 28 & 29 of the CPR, when he exercised the jurisdiction to dispose of the preliminary objection raised by the Respondents before the hearing of the suit.

A preliminary objection by its nature is based on points of law. In making a determination on a preliminary objection, the court is supposed to look at the plaint and assume that the averments therein are true. If in the opinion of the trial court, the preliminary objection cannot be disposed of without calling additional evidence, the Court cannot determine the matter on a preliminary point of law but should set the case down for hearing and calling additional evidence. This is the import of the decisions in; ***Attorney General Versus Oluoch [1972] EA 392***, ***Express Electrical Engineers & Contractors V Uganda Posts and Telecommunications Corporation Civil Appeal No. 8 of 1980.***

In determining a similar issue, the learned Justice Madrama held in the case of ***Rahim Nagita and Ors V Richard Bukenya and Ors H.C.C.S 389 of 2010,*** that:

Unless the facts are so clear as to require no evidence, is when order 7 rule 11 can be invoked. In assessing this, the court retains a discretionary power as to whether the point of law is of a nature, which can be handled preliminarily or should await adducing of evidence.

We are therefore of the opinion that where the point of law is based on the pleadings and there is no need for additional facts, the parties can proceed under order 6 rule 29 and order 7 rule 11. In this case, the points of law are that the plaint discloses no cause of action, there is no locus standi, and the plaint is barred in law. Such points of law would only be argued on the basis that the facts pleaded by either side are true and there is no need for further evidence. In ***Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1996] 1 E.A. 696,*** it was held that:

"A preliminary objection is in the nature of what used to be called a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

In rejoinder, the Appellant states that the Learned Judge should have confined himself to the plaint and no other more. The points of law in this case are ones that are based on the plaint. The affidavit in support of the motion, page 468 of the record, refers to the plaint as a basis of the evidence. In light of the decision in ***Mukisa Biscuits Manufacturing Co. Ltd***, it is our holding that the points of law raised were based on Order 7 Rule 11 and Order 6 Rule 29 and therefore

there was no need for an order of court or for consent of the other party. The points of law were raised on the presumption that the facts in the plaint were true and therefore, there was no need to adduce additional evidence and as such, it could be raised under Order 7 Rule 11. We therefore find no merit in the point of law and dismiss the same.

We find that in the peculiar circumstances of this matter, the learned judge was satisfied that the objections were such that, if upheld, they would conclude the case. This we say so guardedly, without in any way pre-determining the grounds of appeal, whose merits, we shall consider later in this judgment. That being a matter of exercise of discretion, and in the absence of any reasons to show that the learned judge acted outside the confines of the rules or applied wrong principles, we are unable to interfere with the decision of the judge to dispose of the preliminary points at the stage he did.

The Appellant also raised the issue of illegality, which we felt we should consider at this stage as we address the preliminary objections.

Illegality

The Appellant relies on the case of ***Makula International Limited V His Eminence Cardinal Nsubuga and Anor Civil Appeal No. 4 of 1981*** for the point that once an illegality is brought to the attention of court it overrides all manner of pleadings. The Appellant argued that the plaint stated that the Respondents had engaged in serious offences to wit; breach of duty, and theft of large sums of money and land. The said illegalities caused the Appellant to be placed under statutory

management. The Appellant relied on the case of ***Wycliff Kiggundu V Attorney General SCCA 22 of 2008*** for the proposition that the Court of Appeal can remit a case back for retrial if there were serious issues that needed investigation.

The Respondents submitted that based on the ***Makula case***, the illegalities it raised are what caused the HCCS 493 of 2017 to be dismissed with costs. The Respondents submitted that the various preliminary objections raised showed a number of illegalities that warranted the dismissal of the plaint and would override the preliminary objections raised by the Appellant.

The Appellant raises an issue that the Court ought to have overlooked the preliminary objections and instead looked at the matter on its merits. Without conclusively addressing whether the grounds of the appeal are successful or not, we respectfully disagree with the Appellant that if a pleading does not disclose a cause of action or locus standi, the courts should still inquire into the merits of the main case. This would be an action in futility. The courts are not meant to award moot judgments. If a person has no locus standi, or cause of action, then the merits of the case cannot be inquired into lest the court might end up condemning a party who should not have been condemned.

We therefore find no merit in the objection raised by the Appellant. We also dismiss the ground on illegality. We shall now proceed to the merits of the appeal.

Ground 1

The gravamen of the Appellant's contention under this ground is that the prohibition on proceedings against a financial institution in receivership in Section 96 of the Financial Institutions Act (herein after referred to as FIA) did not inhibit the Appellant, as a financial institution in receivership from instituting HCCS 493/2017. The Appellant faults the learned trial judge on his conclusion that pursuant to the said section, if a financial institution in receivership is insulated from suits, by necessary implication it is incapable of suing.

Section 96 of the FIA provides;

> *"Where a Financial Institution is placed under receivership:*
>
> *i) no steps shall be taken by any person to enforce any security over the property of the financial institution;*
>
> ii) *no other proceedings and no execution or other legal process may be commenced or continued against the financial institution."*

It was submitted for the Appellant that the freeze of any proceedings for a financial institution in receivership provided for under Section 96 (ii) was normal in insolvency legislation. Learned counsel referred us to Section 97 (c) of the Insolvency Act, which also provides for a freeze for companies under liquidation. Further, reference was made to Corporate Insolvency Law Page 20 and 460 by counsel in support of the proposition that companies undergoing insolvency process have a moratorium from any litigation. The Appellant faulted the

Learned Judge for holding that, while the statutory manager and liquidator had the power to sue and be sued, no such power is expressly conferred upon the Receiver of a financial institution in receivership. The Appellant contended that the law did not state anywhere that the receiver could not sue. Relying on Halsbury's laws of England and the case of ***Gahan (inspector of taxes) v Chloride Batteries Ltd (1995) Vol. 1. All ER 633***, counsel advanced the proposition that if the legislature did not want any litigation by the receiver, it should have stated so specifically. The Appellant maintained that the proposition of the legislature was clear and it was to prohibit any litigation against the financial institution in receivership.

Learned counsel for the Respondents argued that the wording of section 96 of the FIA does not envisage any action to be filed by the Financial Institution in receivership or even the receiver. In support of their argument, the Respondents relied on; ***Gordon Sentiba and Ors vs. Inspectorate of Government SCCA No 6 of 2013*** for the proposition that an entity that is a creature of statute can only rely on the powers granted to it under the statute and this cannot be inferred by the Courts. In the context of the appeal before us, the Respondents` contention is that section 96 of the FIA bars actions against the Financial Institution in Receivership but does not provide for any powers by such a financial institution or the receiver to sue. It is the respondents' submission that any contrary conclusion would tantamount to courts legislating under the guise of interpretation in a manner that would usurp the functions of the legislature. The Respondents cited; ***Inspectorate of Government v UVETSO Association***

Limited and Others HCMA 536 of 2014, Hon Gerald Kafureka Karuhanga and Ors V The Attorney General and Ors HCMA 60 of 2015 and Smart Protus Magara and 138 Others v Financial Intelligence Authority HCMA 215 of 2018 for the proposition that courts cannot legislate under the guise of interpretation to usurp the functions of the legislature.

Further, the Respondents submitted that section 89(2) (e) and 100(1) (a) of the Financial Institutions Act expressly confer upon the statutory manager and liquidator respectively, the power to sue. However, that no such equivalent provision exists in the FIA for the Financial Institution in receivership or the receiver. The Respondents relied on the cases of ***Haj. Kaala Ibrahim V The Attorney General and Anor HCMA 23 of 2017, Thugitho Festo vs. Nebbi Municipal Council HCMA 15 of 2017, Geraldine Ssali Busulwa v National Social Security Fund HCMC 32 of 2006, Amuron Dorothy V The Law Development Center HCMC 42 of 2016 and Smart Protus Magara and 138 Ors v Financial Intelligence Authority HCMA 215 of 2018*** for its submission that when power is not vested in a decision maker, any acts by the decision maker outside the powers are ultra vires. The Respondents invited us to find that based on their legal arguments, the receiver can only do that which the FIA expressly allows him to do and the power to sue was not one of the powers the receiver was conferred upon under section 96 of the FIA, thereof or any other provision in the Act.

Regarding the Appellant's alternative argument that the suit could still be sustained by the Appellant under provisions of the Companies Act, since receivership did not deprive it of its corporate capacity to sue, learned counsel for the Respondents submitted that, generally, as a rule of thumb, if the company were to sue, the directors of the company are the ones that make the decision on whether to sue or not. Counsel relied on the decision in ***M/S Tatu Nayiga and Co Emporium v Verjee Brothers LTD SCCA 8 of 2000*** for their aforementioned proposition. Counsel further argued that, once a financial institution is placed under statutory management, the directors are suspended and their functions are taken over by the statutory manager. However, that unlike a receiver, the statutory manager is given express power by section 89(2) (e) of the FIA to sue. In the instant case, it was counsel's submission that the powers of the statutory manager to sue could no longer be exercised as the Appellant had done.

We have had the benefit of reading the submissions and the authorities relied upon by learned counsel for the parties. In our view, the determination of the contentions by the parties necessarily requires us to review the pleadings and consider the pertinent facts, which are not disputed by the parties. It is apparent from the pleadings that on the 20th October, 2016, Bank of Uganda took over management of the Crane Bank Limited in accordance with Section 87(3) and 88(1) (a) and (b) of the Financial Institutions Act 2004. On 20th January 2017, Bank of Uganda progressed Crane Bank Limited from statutory management and placed it under Receivership, pursuant to section 94 of the Financial

Institutions Act. It is quite evident from the plaint that at the time of filing H.C.C.S No. 493/2017 against the Respondents, the Appellant was under receivership. While the Appellant contends that it could sue and indeed sued the Respondents, the Respondents' contend that pursuant to the provisions of the FIA, the Appellant could not sue or sustain any action against them.

In determining this ground, it is pertinent to review the law applicable to a financial institution that has been taken over by the Bank of Uganda and the various stages and processes attendant thereto. We have no doubt in our minds that the principal source of law in the circumstances is the Financial Institutions Act.

Generally, under company law, the power of the management of the company is given to the directors. The directors also have the power to instruct counsel to institute a suit. The Supreme Court dealt with this issue in **United Assurance Co. Ltd V Attorney General SCCA 1 of 1986.**

The question now to be decided is what happens to the powers of the directors when a company is placed under statutory management. Under Section 89(8) of the Financial Institutions Act, it is provided:

> *"Upon appointment of a statutory manager, the board of directors shall stand suspended."*

Under Section 89(9), the Financial Institutions Act further states that:

"A statutory manager appointed under paragraph (g) of subsection (2) of this Section shall have the functions of the members of the board of directors collectively and individually, including the boards powers of delegation and use of the seal until such a time as the Central Bank shall appoint an advisory board."

Our reading of the above provisions of the Financial Institutions Act clearly shows that when a financial institution is placed under statutory management the board of directors stand suspended and the powers of management vests in the statutory manager. The power of management that the statutory manager obtains includes the power to sue. That power to sue is clearly provided under Section 89(2) (e). The Section provides that:

"The powers referred to in subsection (1) of this section shall include power to-

(e) initiate, defend and conduct in its name any action or proceeding to which the financial institution may be a party."

The plaint clearly states that on the 20th October 2016, the Appellant was placed under statutory management. The plaint also states that the statutory manager was appointed pursuant to Sections 87(3), and 88(1) (a) and (b).

The Financial Institutions Act then gives the power to sue to the liquidator under Section 100 (1) (a). The Section provides that:

The liquidator may, with the approval of the Central Bank-

(a) Bring or defend any action or other legal proceedings in the name and on behalf of the financial institution.

The Financial Institutions Act specifically then grants the liquidator the power to sue the shareholders under Section 100 (2) (h).

On the other hand, the powers of the receiver are specifically provided for under Section 95(1) of the Financial Institutions Act. The Section provides that:

> *The Central Bank shall, within twelve months from the date of taking over as a receiver, consider and implement any or all of the following options either singly or in combination-*
>
> *(a) Arrange a merger with another financial institution*
>
> *(b) Arrange for the purchase of assets and assumption of all or some of the liabilities by other financial institutions;*
>
> *(c) Arrange to sell the financial institution;*
>
> *(d) Liquidate the assets of the financial institution.*

A reading of Section 95 (1) clearly shows that the legislature did not give the receiver the power to sue. We are then faced with a question of whether we can infer this power from the Financial Institutions Act. In interpretation of the powers conferred by the Financial Institutions Act to the receiver, we are guided by the principle in **Gordon Sentiba and Ors V Inspectorate of Government S.C.C.A No.6 of 2013;** in that case it was held:

The Respondent is a creature of the Constitution and Statute and its functions and powers are clearly laid down in those legal instruments. It is not the function of the Courts to confer corporate status or legal capacity or similar powers on public institutions or bodies, which are not specified in the parent or enabling laws.

The statutory manager, liquidator, and receiver are all creatures of statute- Financial Institutions Act. A receiver being a creature of statute would mean that his powers must be derived from the statute. What the statute does not confer upon a person, the Courts are not empowered to impliedly confer the said power. For financial Institutions, the Financial Institutions Act clearly granted the statutory manager and liquidator the power to sue and be sued. For the case of the liquidator there is a specific power granted to it to sue the shareholders. The Appellant, as a receiver, is not granted these powers under the Financial Institutions Act. As a court, we are not empowered to grant the receiver powers that parliament thought it wise not to confer upon it. As a result, we find this ground in the negative.

Ground 2

The learned trial judge is accused of holding that the statutory time span for receivership of financial institutions under the FIA is limited to a period of twelve months. In doing so, the judge relied S.95 of the FIA which states;

"The Receiver shall within 12 months from the date of taking over as Receiver, consider and implement any or all of the following options either singly or in combination..."

The contention of the Appellant is that the statutory time frame was not pleaded and the Judge erred in considering it.He further argued that Section 95 did not state that the statutory period for the receivership was twelve months. That the provision of the law does not state that the implementation of the duties of the receivership should be completed within twelve months. He contended that the Learned Judge`s interpretation was speculative and that the activities in S.95 should be "considered and implemented within 12 months" and that the law did not require that this work be completed "within twelve months". The Appellant distinguished between "considering" and "implementing" on the one hand and "completing" on the other. He contended that the requirements of S. 95 are "processes" and not events.

The Respondents argued that under Section 95(1), the receivership is limited both in extent and in time. The Receivers powers are set out in law and law establishes the time within which he must carry out his statutory functions. The Respondents argued that the receiver could only conduct their work within 12 months. That in Merrian Webster Dictionary the word "implement" means "to carry out and accomplish." As such, the Receiver should have accomplished his task in 12 months.

The Financial Institutions Act provides in Section 95(1) (supra) that the receiver shall consider and implement any of the options mentioned thereunder within twelve months. Section 95(1) specifically provides that:

> *The Central Bank shall, within twelve months from the date of taking over as a receiver,* ***consider and implement*** *any or all of the following options either singly or in combination-*
>
> *(a) Arrange a merger with another financial institution*
>
> *(b) Arrange for the purchase of assets and assumption of all or some of the liabilities by other financial institutions;*
>
> *(c) Arrange to sell the financial institution;*
>
> *(d) Liquidate the assets of the financial institution. (Emphasis Ours)*

The Learned Judge held regarding the time frame that:

> *The reasons for doing so are easy to find. One of them is the time span of receivership. The twelve months provided is too short to finish a case.*

A receivership by its nature is not supposed to be for eternity, especially when dealing with depositor's funds. When a financial institution is placed under receivership, the financial institution is closed. The Receiver is then given a statutory and time bound assignment. This assignment is protected from court intervention. The transactions he enters into are unchallengeable. Further, since the institution is closed, creditors and depositors have no legal recourse. This period of immunity is limited. If the receivership were allowed to continue endlessly, it would be a great injustice for third parties. Therefore, the rationale

for limiting the receiver to implement any of the four options is easily understandable. It would be absurd to follow the reasoning of the Appellant that a financial institution placed under receivership can remain so indefinitely.

We therefore agree with the Learned Trial Judge that the receivership was meant to be considered and implemented within a period of twelve months. After the twelve months, the receiver was expected to have completed the options listed in Section 95 (1). In this case, the receivership ended on the 20th January 2018. The argument that the language of the statute allowed for an elastic receivership is not attractive in the slightest. The Appellant contends that the term "consider and implement within 12 months," means that the Receiver must commence his functions within twelve months and then continue without any limit. We do not agree with this contention in light of the injustice it would cause to the depositors. Parliament was clear and deliberate. The Receiver must not only consider his options; he must also implement them in twelve months. We accordingly dismiss this ground of appeal.

Grounds 3 and 6

The Appellant criticised the learned Judge's reliance on the case of **Gordon Sentiba v IGG SCCA No. 6 of 2013.** The judge stated that the authority to sue was a creature of statute and where no provision to sue was provided for, courts would not fill the gap by providing a non-existent right. The Appellant argued that the right of a financial institution as a corporate to sue is in no way affected by its being under Receivership. The Appellant acknowledged that S.96 of the

FIA stopped the Appellant from being sued but did not in any way take away the Appellant`s right to sue.

The Appellant criticised the learned Judge's use of the case of **The Commissioner General Uganda Revenue Authority vs Meera Investments Limited SCCA 22 of 2007.** The learned judge relied on that case as authority for the proposition that if a party is not empowered to sue then it cannot be sued. Similarly, if a party cannot be sued, that party cannot sue. The Appellant contended that this decision of the Supreme Court was over turned by the Supreme Court in **Rabo Enterprises (U) Ltd v Commissioner General URA** and is therefore not good law.

In reply, the Respondents argued that the learned judge correctly applied the law. They submitted that the powers of the Receiver are set out in the statute and he cannot assume authority not bestowed on him by law. The Respondents argue that the corporate status of the Appellant is not in issue. They argued that, even without receivership a company could only file a suit through the Directors of the Company. As authority for this point, they relied on the Supreme Court case of **M/S Tatu Naiga v Verjee Brothers SCCA 8 of 2000** where the Supreme Court held that only a director is authorised to act on behalf of the company in instructing counsel and filing suits. The Respondents argued that once the Bank went into Statutory Management, Parliament vested the power of the Board with the Manager under S. 89 (8), (9) and specifically the power to sue and be sued was vested in the Statutory manager under S. 89 (2) (e). The Respondent argued

that the power to sue is therefore expressly given to the statutory manager. A similar power is given to a liquidator under S.100 of the FIA. Parliament deliberately empowered the Liquidator and the Statutory Manager to sue or be sued and provided no such authority for the Receiver. The Respondents further argued that the powers of the Receiver, the purpose of those powers and the manner in which those powers are exercised are all set out in the Act. They do not include the power to sue.

Regarding the prohibition on being sued, the Respondents relied on **Commissioner General URA v Meera Investments Ltd** for the principle that if a party cannot be sued then it cannot sue. The Respondents contended that this principle was not overturned in the Rabo case and that in fact only a specific point of the judgment in Meera was found to be per incuriam. The Respondents further argued that Article 21 of the Constitution, which provides for equality under the law, buttresses this principle. Therefore, a party who cannot be sued cannot sue.

Under Section 96 of the Financial Institutions Act, it is provided that:

Where a financial institution is placed under receivership-

(i) No steps may be taken by any person to enforce any security over the property of the financial institution;

(ii) No other proceedings and no execution or other legal process may be commenced or continued against the financial institution or its property.

The Appellant has argued that the above moratorium is only there to protect an entity that is under receivership from litigation. Both parties have referred to the decisions in **Uganda Revenue Authority v Rabbo Enterprises Ltd SCCA No 12 of 2004**, and **Commissioner General, Uganda Revenue Authority v Meera Investments Ltd SCCA No. 22 of 2017**. We believe it is the duty of this court to state the record of the applicability of the two cases to the current facts.

In **Commissioner General, Uganda Revenue Authority v Meera Investments Ltd SCCA No. 22 of 2017,** the Appellant was seeking declarations that it was not liable to pay taxes and filed a suit. At the hearing, the Respondent raised preliminary objections that the suit was not filed with the mandatory statutory notice, the suit cannot be maintained against the commissioner general and the matter in dispute is one that had internal procedures that excluded the jurisdiction of the High court. The High court heard the objections and overruled them. The learned judges of appeal also found no merit in the appeal and dismissed it. The Supreme Court held on the issue of jurisdiction that the High court had jurisdiction to hear the case since it was involving a conflict of the income tax act and the value added tax act. The Learned Judge held:

> *"It is thus abundantly clear that the commissioner General is a competent party to a suit under these Acts. Certainly, if he or she can sue to recover tax, he or she can be sued by a party unhappy with the tax assessments made by the Commissioner General or officers under him or her.*

In my view, he or she who is empowered to sue is also made liable by necessary implication to be sued."

On the other hand, in **Uganda Revenue Authority v Rabbo Enterprises Ltd SCCA No 12 of 2004**, this was a second appeal from the court of appeal. The Respondents sued the commissioner general for trade goods and commercial trucks seized by the URA. The reason was the failure to pay taxes while the Respondent claimed that it had paid all taxes. The trial judge held that the dispute should have been commenced in the tax tribunal and not in the high court. The court of appeal found that under Article 139 of the Constitution and Section 16(1) of the judicature Act the High Court was conferred with unlimited jurisdiction. The Appellant dissatisfied with decision of the lower court appealed to the Supreme Court. The Supreme Court set aside the decision of the Court of Appeal and found that under the constitution tax disputes must be commenced in the tax appeals tribunal and not the High court. The Court in distinguishing Meera held:

It is possible that had the learned Justice come to the conclusion that the dispute was concerned with demand and fairness of assessment, he would have held that the matter had to be presented to the Tribunal. I am inclined to believe that it is because the dispute revolved around powers granted by two Acts of parliament to different entities that the learned Justice made a finding that it was the High Court to deal with what was in essence an issue of statutory interpretation. The holding of the learned Justice of the Supreme

Court that the Meera dispute properly belongs to the jurisdiction of the High Court and not of a tax tribunal, and that Article 139(1) of the Constitution which gives the High Court unlimited original jurisdiction in all matters remains superior and mandatory, must therefore be understood in the context of that case. ***Consequently, our conclusion is that to that extent, the decision in Meera Investments (supra) is distinguishable from the matter before us since we have already held that the matter in issue before us constituted a tax matter/dispute. (emphasis ours)***

I further take note of the fact that in Meera Investments, Kanyeihamba JSC did not discuss the meaning of the phrase "subject to the provisions of the constitution", found in Article 139(1) of the Constitution, a phrase which, as already discussed in the judgment above, places powers of the High Court within the wider context of the constitution as an entire document. Further still, the learned Justice did not address his mind to the cardinal rule of law that while adjudicating matters touching the constitution, a court must read the constitution as an integrated whole with no particular provision destroying the other. Article 139 deals with the power of the High Court to resolve disputes and so does Article 152 (3). The learned justice did not address his mind to the need to give effect to the purpose of the legislature in providing for the establishment of Tax Tribunals while aware of the "unlimited" original jurisdiction of the High Court. For the two identified lapses, I find that the Meera decision was made per incurium. ***To that extent, we are not bound to follow the Meera decision cited by***

Counsel for the respondent as authority or the proposition that Article 152(3) does not oust the unlimited original jurisdiction of the High Court in some taxation matters. (Emphasis Ours)

It is clear that the two decision only departed on the issue of jurisdiction. Whereas in Meera there was a conflict over two statutes and as such the High Court had jurisdiction to determine the case, in Rabbo the dispute arose out of an assessment that resulted in the attachment of the taxpayers' property and that clearly belonged to the Tax Appeals Tribunal. However, the Rabbo decision was clear that it only did not agree with the Meera decision to the extent of jurisdiction. The Rabbo decision however does not state that the entire Meera decision was departed from. We belaboured to explain the grounds in the Meera decision to show that in fact in Meera there were more grounds than the issue of jurisdiction. There was also the issue of whether the commissioner general could sue and be sued. In Meera the Supreme Court found that if a person has the power to sue, then they too can be sued. We are bound by the decision of the Supreme Court in light of the doctrine of stare decisis. In **Attorney General V Uganda Law Society Const Appeal No.1 of 2006,** it was held that:

Under the doctrine of stare decisis, which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at per incuriam without taking into account a law in force or a binding precedent. In the absence of

any such exceptional circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court.

We are therefore bound by the decision in Meera investments. Moreover, to the extent that it has not been set aside on the issue of the powers granted to a person to sue and be sued, we would follow the decision in Meera. Turning to the facts of this case, under Section 96 of the Financial Institutions Act, it is clear that there is a protection granted to the financial institution in receivership against being sued. In light of the Meera investment decision, it would be unfair to say that the financial institution can sue and on the other hand, it cannot be sued. What would happen in a situation where a financial institution sues and a person files a counter claim? Would the counter claim be dismissed and the main suit remains? If the financial institution lost the suit and costs are awarded against it, who would pay the costs? We find that this provision has to be read without parity. A person who is protected from suits under the law is also prohibited from suing. It is therefore our finding that this ground should be decided in the negative. The learned Judge was right to find that a person who cannot be sued cannot sue. We agree with counsel for the Respondents that an alternative interpretation would offend Article 21 of the Constitution, which provides;

"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."

The law that protects the Appellant from the process of court cannot then empower him against other court users. This would make the Appellant enjoy an unequal treatment before the law compared to the Respondents.

The Appellant had also argued that the learned Judge erred in law in finding that they had no cause of action against the Respondents. The Respondents submitted that having found that there was no locus, it would follow that there was no cause of action against the Respondents. We agree with the Respondents` arguments, having found that the Appellant had no locus against the Respondents; we further find that in turn it did not have a cause of action against the Respondents as well.

We accordingly dismiss these grounds of appeal as well.

Ground 4 & 5

The Appellant contends that no evidence was led to support the conclusion that the assets of the Appellant Bank were sold to DFCU Bank Limited and that the parties never pleaded this point. In any event, the Appellant contends that it has assets and liabilities hence the judge erred in law,

The Respondents contend that this assertion represents a misunderstanding of the decision of the learned judge. They contend that under S.95 of the FIA the Receiver is given a task and a timeline. If he accomplishes the task, the Receivership is determined.

We have carefully considered the arguments of counsel on this ground. We note the contention on this ground by the Respondents that it was never raised and never argued before the Trial Judge. However, we also note that the learned trial judge was stating an obvious position of the law; once the tasks set out in the Act have been accomplished then the Receivership ceases.

The Judge's contention that the Receivership had lapsed based on the Notice of the Governor Bank of Uganda is good law. Once the Central Bank has performed its statutory role as Receiver it cannot then continue in a purposeless receivership. We find merit in the Respondents` argument that the FIA gave the Central Bank a task and a timeline. If the task is completed the Receivership ceases.

Nevertheless, the learned judge could not have come to that conclusion without hearing evidence. It is a question of an evidential nature. While the judge may have legal basis for his conclusion, we respectfully hold that it was not the sort of conclusion that could be made in a preliminary point of law.

However, as a point of law it is our opinion that the Receivership had indeed ceased and further that there were no assets and no rights in the Receiver by the time the learned trial judge made his ruling. We come to this conclusion based on the fact, that by operation of law the Receivership had expired after 12 months. This particular point could easily be ascertained from the Plaint. Therefore, we come to the same conclusion as the learned judge, albeit for different reasons.

In any event, having concluded as we have on grounds 1-3, and found that the Appellant had no locus to institute HCCS 493 of 2017, we would still go ahead and dismiss the Appeal on that basis alone.

Ground 7

The Appellant submitted that the Learned Judge erred in holding that the Appellant is a non-citizen and therefore cannot own freehold or mailo land. The Appellant referred to the plaint and stated that the 1st Respondent was a beneficial owner of the shareholding in the Appellant. Since the 1st Respondent is a Ugandan citizen so was the Appellant. The Appellant relied on the case of **Sudhir Ruparellia V MMAKS Advocates, AF Mpanga Advocates (Bowmans Uganda)**, Crane Bank Limited (in Receivership) and Bank of Uganda HCMA 1063 of 2017 for the point that the 1st Respondent was the beneficial owner of 100% of the shares in the Appellant.

The Respondents argued that the facts stated in the plaint indicated that the Appellant was over 51% owned by persons who were not Ugandan citizens. The 2nd Respondent further argued that the Appellants claim was for delivery of the freehold titles, yet in the same plaint, the Appellant acknowledged that it was not a Ugandan citizen. The Respondents relied on Articles 237(1) of the Constitution, Section 40(1) (4) (7) and (8) (a) of the Land Act for the proposition that a non-citizen cannot own freehold or mailo land. The Respondents also used those Sections to show that a company owned 50% or more by non-citizens is a non-citizen for purposes of the Land Act and relied on the cases of **Lakeside City**

Ltd V Sam Engola and Ors HCCS 251 of 2010, and Formular Feeds and 3 ors v KCB Bank (U) Ltd CACA 76 of 2016 for the point that a non-citizen cannot hold freehold or mailo land but can only hold a lease. The 2nd Respondent concluded by stating that it would be illegal and fraudulent for the Court to transfer the mailo and freehold interests to the Appellant.

According to the plaint, the Appellant is a company incorporated in Uganda and carrying on the business of a financial institution. The Plaint in paragraph 8 then states that the shareholders of the Appellant were as follows:

(1) The 1st Respondent owning up to 28.83% shares

(2) White Sappphire owning up to 47.33%

(3) Jitendra Sanghani owned another 4%

(4) The wife and three children of the 1st Respondent owned 19.83%

The Plaint seeks the following orders:

> *"Delivery up of the Freehold Certificates of Title to 48 Properties comprising the Plaintiff's countrywide branch network, together with duly executed transfer deed in respect of each one of them in favour of the Plaintiff, or its nominee which properties, were purchases and/or developed using the Plaintiff's monies and were fraudulently transferred, under the 1st Defendants direction and/or with his knowledge and in breach of his fiduciary duty as a director of the Plaintiff, from the names of the Plaintiff into the names of the 2nd Defendant and then purportedly leased back to the Plaintiff."*

The 2nd Respondent contends that it is illegal for the Appellant to seek the above order since it is a non-citizen. The Appellant on the other hand argues that the beneficial ownership of the shares of the Appellant is the 1st Respondent. The 1st Respondent is a Ugandan citizen and as such the Appellant is a Ugandan citizen.

Article 237 (3) of The Constitution reorganises four types of land tenure systems applicable in Uganda; It provides;

Land in Uganda shall be owned in accordance with the following land tenure system;

(a) Customary;

(b) Freehold;

(c) Mailo land; and

(d) Leasehold

The Constitution then provides for restrictions on what non-citizens can own and cannot own in Uganda. Article 237(2) provides that:

Notwithstanding clause (1) of this article-

(c) non-citizens may acquire leases in land in accordance with the laws prescribed by Parliament, and law so prescribed shall define a noncitizen for the purposes of this paragraph.

The Constitution does not define who is a citizen for purposes of the Act. However, Section 40(1), (4), (7) (a) (d), and (8) (a) of the Land Act provides that:

Subject to article 237(2)(c) of the Constitution, a noncitizen may acquire a lease in land in accordance with the section.

(4) subject to the other provisions of this section, a noncitizen shall not acquire or hold mailo or freehold land.

The Land Act then defines a noncitizen to mean:

(7) for the purposes of this section, "noncitizen" means-

(a) a person who is not a citizen of Uganda as defined by the Constitution and the Uganda Citizenship Act;

(b) in the case of a corporate body, a corporate body in which the controlling interest lies with noncitizens;

(c)in the case of bodies where shares are not applicable, where the body's decision making lies with noncitizens;

(d) a company in which the shares are held in trust for noncitizens;

(e) a company incorporated in Uganda whose articles of association do not contain a provision restricting transfer or issue of shares to noncitizens

For purposes of Section 40(7) (b), the Land Act then defines what amounts to controlling interest in Section 40(8) to mean:

For purposes of subsection (7), "controlling interest" means-

(a) In the case of companies with shares, the majority shares are held by persons who are not citizens; and

The two therefore hold over 51% of the shares. It is not in dispute that White Sapphire was incorporated in Mauritius and therefore a Mauritian company. It is also not in dispute that Sanghanii is a British national. It follows therefore that the majority shares are held by noncitizens. This is a position that the Appellant/Respondent recognises and has made very clear in the plaint. In paragraph 8.3 for instance of the plaint the Respondent states that 4% shares registered are in the names of Jitendra Sanghani. Paragraph 27.6 states that the Appellant was classified as a noncitizen under section 40 of the Land Act and was therefore prohibited from owning freehold land in Uganda.

The majority shareholders being noncitizens renders the company likewise noncitizen.

A reading of the plaint clearly shows that White Sapphire and Jitendra Sanghani both own over 51% of the shares in the Appellant. The pleadings also clearly show that what is not disputed is that White Sapphire is a company incorporated in Mauritius while Jitendra Sanghani is a British national. The issue that we are faced to consider and determine is whether the shares are beneficially owned by the 1st Respondent in which case the Appellant would become a Ugandan citizen.

Under Section 40 of the Land Act, a person is a noncitizen if the controlling interest lies with noncitizens. The Land Act then defines controlling interest to mean that persons who are not citizens hold a majority of share. For instance,

in this case we have the Appellant with a shareholding of a company incorporated in Mauritius. A company incorporated in Mauritius is not a Ugandan company. More importantly, the other shareholder is a British citizen. This would make the Appellant a non-Ugandan citizen and therefore incapable of owning freehold and mailo land. We are persuaded by the decision in **Lakeside City Ltd V Sam Engola and Ors H.C.C.S 251 of 2010** in which it was held that:

> *The 2nd Defendant is comprised of majority shareholding of noncitizens, the 3rd and 5th Defendants, their Articles of Association do not contain a clause to restrict the transfer of shares to noncitizens; and to that extent they qualify to be noncitizens. Accordingly, therefore, the transfers by the 2nd Defendant to the 3rd Defendant and by the 3rd Defendant to the 5th Defendant and their registration on the suit certificates of titles which are freehold are prohibited under Article 237 of the Constitution of the Republic of Uganda and Section 40 of the Land Act as amended.*

Having determined that indeed the controlling interest of the Appellant was controlled by non-citizens, we conclude that the Appellant could not hold freehold land. Therefore, to request for the delivery of the freehold land was illegal. We accordingly dismiss this ground of appeal as well.

Ground 8

The Appellant submitted that if the Learned Judge had tried the issue relating to delivery of the freehold tittles to the appellant on its facts, then the Court would have found that there was nothing illegal or barred in law. In the

alternative, the learned judge would have found that the land title should be cancelled as freehold and returned as a lease.

The Respondents argued that the Appellant already had leases and therefore to pray for the same leases was erroneous.

We find that in part, this ground is related to the preliminary objection that the Appellant raised. Having found that the preliminary objections are points of law that could be raised without referring the matter for trial, we could have dismissed this ground on that basis alone.

Regarding the prayer that the court could have found and transferred the leases to the Appellant, the plaint in paragraph 27.6 is clear that the Appellant is currently holding leases. The Paragraph states:

> *The purported reason for the sale and leasebacks was that the Appellant which was classified as a non-citizen under S.40 of the Land Act was prohibited from holding freehold land in Uganda. In fact, there was no good reasons for such transactions.*
>
> *28 of the plots initially been acquired by the Appellant as leashold properties. The Appellant then spent time and money to convert the leaseholds into freeholds.*
>
> *The Appellant could have readily surrendered the erroneously converted freeholds to the original institutional lessors and been re-granted leases at*

an appropriate rent, alternatively appointed a nominee to hold the freeholds and grant 99 year leases on a nominal rent.

In any event, for the reasons set out in paragraphs 8 & 9 above, the 1st Respondent was the sole beneficial owner of the Appellant and therefore the sale and leasebacks were unnecessary because the Appellant was not a noncitizen."

We are alive to a recent decision made by this Court in the case of **Formular Feeds & 3 Ors Vs KCB Bank (U) Ltd (Civil Appeal No. 76 of 2016)** in which it was held that:

We agree with the finding of the trial Judge. The only challenge remains the mortgage which was illegal because the underlying Mailo land titles were held in the names of non-Ugandans which is prohibited by law. Such a non-Ugandan can only hold a lease under the said titles. So a lease and not mailo title should have been issued to the first Appellant since it paid valuable consideration for the land. This would avoid an absurdity in this transaction. This was clearly an error/illegality made at the time of registration. It would also have the effect of reviving the said mortgage which was the commercial and legal intention of the transaction.

We have already found that the Appellant was a non-Ugandan citizen and therefore incapable of owning the freehold land. We have also discovered from the plaint that the Appellant already has leasehold titles. We therefore find that

no court could order the delivery of the freeholds to the Appellant since that would be illegal. We accordingly dismiss this ground as well.

Ground 9

The Appellant argued that since no suit was heard, then costs would not have been given in respect of the suit. The Appellant relied on the case of **Komakech Geoffrey and Anor V Rose Akol Okullo and Others SCCA 21 of 2010** for the proposition that payment of costs should be limited to the motion and not the appeal.

The Respondents distinguished the **Komakech case** by stating that in that case the striking out of the notice of appeal would not have had an effect on the main case in the high court. However, in the instant case the striking out of the suit would have rendered HCCS 493 of 2017 dismissed. The Respondents relied on Section 27 of the Civil Procedure Act for the proposition that the Court has the power to award costs at its discretion and determine who to pay the costs. The Respondents relied on the case of **Kwizera v Attorney General (Constitution Appeal No. 1 of 2008) and Lyamulemye v AG (Civil Appeal No. 04 of 2013)** for the proposition that the court has the discretion to award costs. The Respondents argued that the dismissal of the suit under Order 7 Rule 11 amounted to a decree under Section 2 of the Civil Procedure Act. The Respondents relied on the case **in Hwan Sung Limited v M&D Timber Merchants and Transporters (Civil Appeal No 02 of 2018) and Stanbic Bank Uganda Ltd and 2 Ors V Western Highland Creameries Ltd and Anor**

(Taxation Appeal No 5 of 2013) for the point that a dismissal of a suit be an interlocutory order but a decision that resulted is a decree.

The Respondents contended that it was clear that Bank of Uganda placed the Appellant under receivership. The Affidavit in Reply to HCMA320 of 2019 clearly showed that the person that deponed that affidavit in reply was working as Legal Counsel Bank of Uganda. The Respondents argued that since the receivership ended 12 months ago and the law prohibited any actions against the receiver, it would only follow that the person that filed the suit should pay the costs. The Respondents relied on the cases of **Ontario Limited v Laval Tool 2017 ONCA 184, CPT Santo Okot Lapolo and 4 Ors Vs Opio and 14 Ors HCMA 145 of 2017, and Kyaninga Royal Cottages Ltd Vs Kyaninga Lodge Limited HCMA 551 of 2018**, for the point that the court had the power to make an order of costs against the person that actually filed the suit.

The Respondents prayed for the dismissal of HCCS 493 of 2017 and prayed for costs. In the lower court, the Learned Judge in determining the issue of costs found that:

> *From the foregoing, there is no doubt that the suit was filed by Bank of Uganda. Since section 96 of the Financial Institutions Act insulated Crane Bank under Receivership from court proceedings, execution or other legal processes the person that should pay costs should be the person who instituted the suit and that is Bank of Uganda. This is so because Crane*

Bank in Receivership had no capacity to foot the costs and much so the Bank of Uganda that instituted the suit was aware of this incapacity.

Under Section 27 of the Civil Procedure Act it is provided that:

> *Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purpose aforesaid.*

Our reading of Section 27 is that it grants the court discretion to determine who pays the costs. In this case, the court decided that it was Bank of Uganda. A reading of the affidavit in reply, the record of proceedings, the plaint and the appearances in court easily explains why the Learned judge placed the costs against Bank of Uganda. The affidavit in reply of Margaret K. Kasule states:

> *I am an adult female Uganda of sound mind and the Legal Counsel of Bank of Uganda which is the statutory receiver of Crane Bank Ltd in Receivership and I swear this affidavit in that capacity.*

During the hearing of this appeal, the same Margaret K. Kasule appeared for the Appellant. She is an employee with the Bank of Uganda. It is therefore clear that the Bank of Uganda was the one that instituted the suit, filed the reply to the applications and was always sending its legal counsel to represent it in Court. This has left us with no doubt that it was the Bank of Uganda behind the suit

and therefore it can only be the Bank of Uganda that pays the costs. The Learned Judge was right to make an order of costs against the Appellant.

We are also persuaded by the decision of Justice Mubiru in **CPT Santo Okot Lapolo & 4 Ors Vs Opio & 14 Ors (HCMA 145 of 2017),** where he held that;

> *However, in the instant case the respondents were not party to the terminated proceedings. Courts though have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process.*
>
> *The court has authority, derived from its inherent jurisdiction to prevent an abuse of process, to award costs against a non-party who has proved to be the real person controlling the litigation but has put forward another to avoid liability for costs or other reasons.*

We are also persuaded by the decision in **Kyaninga Royal Cottages Ltd V Kyaninga Lodge Limited HCMA No. 551 of 2018** where it was held that;

> *As for costs, Counsel for the Defendant submitted that they should be borne by the firm, lawyers who filed the plaint. I think this should only arise under circumstances where no one from the purported company exists. In my view, it is this Managing Director of the non-existent "company" who instructed the Advocates to file the suit. He must have been the one who paid the court fees. He was in my view the person who was behind the Plaint. He was in*

my view the person who was behind the Plaint. It is he therefore who should pay the costs. It is so ordered.

We agree with the reasoning in the above decision. People should not hide behind non-existent persons, file frivolous suits and seek that courts should make orders as to costs against the non-existent persons. Knowing too well that the successful party shall not be able to make a recovery even when the bill is taxed. Section 27 empowers the court to get out of the ambit of the parties and to order costs against a party that actually filed the suit.

The Appellant has also stated that in light of the decision in **Komakech Geoffrey and Anor V Rose Akol Okullo and Others SCCA 21 of 2010,** the costs should only have been for the application and not the main suit. We have read the authority of **Hwan Sung Industirs v M&D Timber Merchants and Transporters (Civil Appeal No 2 of 2008),** in which it was held that:

"The Trial judge in the instant case dismissed the suit on a preliminary point of law with costs. The Judge's decision wholly determined the controversy between the parties since nothing remained to be heard by the Court. I find that the High Court decision disposed of the suit conclusively and the decision was therefore a decree within the meaning of Section 2(c) of the Civil Procedure Act though it was worded as an order."

Unlike in the Komakech (Supra) case in which the dispute continued to exists even with the dismissal of the application. In the Hwan Sung Industries, the

dispute was deemed to have been entirely disposed off since it was dismissed on a preliminary objection.

The facts before this court are similar to the Hwan Sung Case (Supra). In both cases, there was a dismissal of the suit based on preliminary objections. We agree with the Learned Judge in dismissing the HCCS 493 of 2017 and awarding costs following the dismissal. The preliminary objection in this case wholly disposed off HCCS 493 of 2017. There was therefore nothing left to try following the dismissal. We for those reasons find this ground in the negative.

Costs

Under Section 27(1) of the Civil Procedure Act which confers upon a Judge the discretion and full power to determine by whom and out of what property and to what extent costs incident to all suits are to be paid, and to give all necessary directions for that purpose. Despite the wide discretion, as a general rule the successful party in contested proceedings is usually entitled to award of costs. Ordinarily, costs follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order **(see Ritter v Godfrey (1920) 2 KB 47)**.

In considering the exercise of discretion and whether to otherwise order, Devlin J in Anglo-**Cyprian Trade Agencies Ltd V Paphos Wine Industries Ltd, [1951] 1 All ER 873** formulated the following principle:

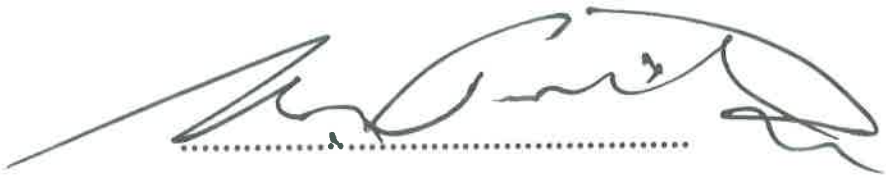
> *"No doubt, the outstanding rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or at any rate,*

made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. (emphasis ours)"

In the instant case, we find no such misconduct relating to litigation on the part of the respondents and as such, we find no reason to deny the respondents costs of the suit. We therefore uphold the trial Judge's order as to costs.

The appeal consequently fails. It is thus dismissed with costs here and the court below.

Dated this 23rd day of June 2020



HON. MR.JUSTICE ALFONSE CHAGAMOY OWINY-DOLLO

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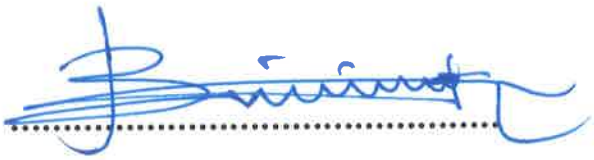

HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL