

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende & Musota, JJA and Kasule, Ag JA]

Civil Appeal No. 90 of 2016

(Arising from High Court Miscellaneous Application No. 1081 of 2015)

BETWEEN

Nakasero Market Sitting Tenants (NAMASITE) Limited=====Appellant

AND

Nakasero Market Sitting Vendors & Traders Limited=====Respondent

*(On appeal from the ruling of the High Court of Uganda (Land Division),
Bashaija, J., delivered on 31st March 2016)*

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

- [1] The appellant filed High Court Civil Suit No. 501 of 2015 against the respondent and Kampala Capital City Authority seeking declarations that Kampala Capital City Authority (1st defendant) had fraudulently and or illegally awarded a sublease to the respondent (2nd defendant) to redevelop Nakasero market, that is land comprised in LRV 2808 Folios 22 and 24 plots 7B and 4B Market street, Kampala. The appellant sought for an order to set aside the award of the sublease to the respondent, an order for the grant of the sublease to the appellant or an order to form a new joint venture company incorporating the appellant and the respondent. The appellant also sought

general and exemplary damages, an injunction to stop the execution of the sublease agreement or evicting members of the appellant company from the market. The appellant also prayed for interest and costs of the suit.

- [2] The appellant filed High Court Miscellaneous Application No. 916 of 2015 seeking a temporary injunction to stop the respondents from executing or implementing the terms of the sublease and to maintain the status quo of the subject property. The appellant also filed High Court Miscellaneous Application No. 917 of 2015 seeking an interim order to the same effect. High Court Miscellaneous Application No. 917 of 2015 was heard *inter partes* and the orders sought were granted. Before the hearing of High Court Miscellaneous Application No. 916 of 2015, the respondent filed High Court Miscellaneous Application No. 1081 of 2015 seeking orders to strike out High Court Civil Suit No. 501 of 2015 and High Court Miscellaneous Application No. 916 of 2015 on the ground that both suits were *res judicata* and that High Court Civil Suit No. 501 of 2015 did not disclose a cause of action.
- [3] Upon determination of High Court Miscellaneous Application No. 1081 of 2015, the learned judge dismissed both High Court Miscellaneous Application No. 916 of 2015 and High Court Civil Suit No. 501 of 2015 on the ground that they were both *res judicata*, and that consequently, the plaint in High Court Civil Suit No. 501 of 2015 did not disclose a cause of action. Being dissatisfied with the ruling, the appellant has appealed on the following grounds:

*1. THAT the learned trial judge erred in law and fact when he found and ruled that HCCS No. 501 of 2015 was *res judicata* in that the matters of law and fact and/ or issues the plaintiff required the High Court to determine in the said HCCS No. 501 of 2015 had subsequently been determined in a former suit in High Court Misc. Cause No. 32 of 2012: Nakasero Market Siting Vendors & Traders Limited-**versus**- Kampala Capital City Authority.

2. THAT the learned trial judge erred in law and fact when he found and ruled that having determined that HCCS No. 501 of 2015 was *res judicata* it followed logically that the plaint in the said suit

discloses no cause of action against the defendants and he struck it out with costs.

3. THAT the learned trial judge erred in law and fact when he found and ruled that Misc. Application No. 916 of 2015 for a temporary injunction arising from the main suit HCCS No. 501 of 2015 is *res judicata* could not stand and he dismissed it with costs.

4. THAT the learned trial judge erred in law and fact when he found and ruled that a consent judgment is a judgment in *rem* i.e it is a judgment against the whole world and is binding upon all persons and authorities yet the Appellant was not a party to High Court Misc. Cause No. 32 of 2012: Nakasero Market Siting Vendors & Traders Limited – versus- Kampala Capital City Authority.

5. THAT the learned trial judge erred in law and fact when he struck out the entire HCCS No. 916 of 2015 and Misc. Application No. 916 of 2015 with costs at the preliminary stage on preliminary objections without hearing them on merits and giving the Appellant a chance to adduce its evidence.'

[4] The respondent opposed the appeal. The appellant filed a cross appeal on the sole ground that:

'a) The Learned Trial Judge erred in Law and Fact when he declined to determine whether the plaintiff's suit contravenes O.1 R.8 of the Civil Procedure Rules.'

Submissions of Counsel

[5] At the hearing, the appellant was represented by Mr. Majerani Kazibwe and the respondent was represented by Mr. Mudoola Dennis and Ms. Abaho Specioza. The parties opted to adopt their conferencing notes and written submission on the record as their submissions.

[6] Under ground 1, counsel for the appellant referred to section 7 of the Civil Procedure Act. He also cited Karia & another v Attorney General & others [2005] 1 EA 83, Kamunye & others v The Pioneer General Assurance Society

Limited [1971] EA 263 and Boutique Shazim Ltd V Norattam Bhatia & Anor [2009] UGCA 45 to set out the conditions under which a plea of *res judicata* may succeed.

- [7] Counsel for the appellant submitted that High Court Miscellaneous Cause No.32 of 2012, an application for judicial review instituted by the respondent against Kampala Capital City Authority was not heard on its merits but merely concluded by a consent order. During the hearing of High Court Miscellaneous Application No. 1081 of 2015, the record of proceedings or court file for High Court Miscellaneous Cause No.32 of 2012 was not furnished by the respondent to the trial judge. Counsel for the appellant was of the view that due to this omission, the trial judge could not have been able to establish the true nature of the claim in High Court Miscellaneous Cause No.32 of 2012.
- [8] Further, counsel for the appellant contended that the decision in High Court Miscellaneous Cause No.32 of 2012 does not affect the rights of the appellant in High Court Civil Suit No. 501 of 2015 since the matter in dispute is different from that in High Court Miscellaneous Cause No.32 of 2012. Counsel for the appellant submitted that High Court Miscellaneous Cause No.32 of 2012 was an application for judicial review whereas High Court Civil Suit No. 501 of 2015 was an ordinary suit instituted by way of a plaint. Counsel further argued that High Court Miscellaneous Cause No.32 of 2012 was based on affidavit evidence yet High Court Civil Suit No. 501 of 2015 was based on documentary evidence that had to be tested in court during a full hearing. Counsel for the appellant averred that the cause of action in both cases was different. In High Court Miscellaneous Cause No.32 of 2012, the respondent essentially wanted Kampala Capital City Authority to honour the terms and conditions of the impugned sublease award while in High Court Civil Suit No. 501 of 2015 the appellant was challenging the legality of the process that led to the award of the sublease to the respondent.
- [9] Counsel for the appellant further argued that the parties in High Court Miscellaneous Cause No.32 of 2012 were different from the parties in High Court Civil Suit No. 501 of 2015. In High Court Miscellaneous Cause No.32

of 2012, the respondent sued Kampala Capital City Authority and the appellant was not a party to the application whereas in High Court Civil Suit No. 501 of 2015, the appellant sued both the respondent and Kampala Capital City Authority. It was counsel for the appellant's submission that the respondent in High Court Miscellaneous Cause No.32 of 2012 was not claiming or litigating under the same title with the appellant or in the name of the appellant. Counsel for the appellant relied on Chittaley & Rao- The Code of Civil Procedure 1908, Vol 7th Ed at page 336 where the authors stated that the general principle of *res judicata* is that a decision in a litigation between "A" and "B" will be binding on them and their privies but will not operate as *res judicata* in a subsequent litigation between "A" and "C". Counsel for the appellant submitted that the appellant is not privy or a subsidiary of the respondent and that the two companies are independent of each other. Counsel concluded that the conditions for *res judicata* were not satisfied.

[10] Under ground 2, counsel for the appellant submitted that High Court Civil Suit No. 501 of 2015 was not determined by the learned judge so as to arrive to the conclusion that the plaint did not disclose a cause of action. Counsel relied on Attorney General v Major General David Tinyefuza [1998] KALR 185, Auto Garage v Motokov [1971] E.A 514, Tororo Cement Co. Limited v Frokina International Limited [2001] KALR 182 for the submissions on what amounts to a cause of action. Counsel for the appellant was of the view that in order for a cause of action to be established, the plaint must show that the plaintiff enjoyed a right, the right was violated and that the defendant is allegedly liable. Counsel for the appellant also relied on Teraj Sharif & Co. v Chotai Fancy Stores [1960] EA 374 and Boutique Shazim Ltd V Norattam Bhatia & Anor (supra) for the submission that the question as to whether the plaint discloses a cause of action must be determined upon perusal of the plaint and the allegations made therein.

[11] Counsel for the appellant further submitted that the appellant is a body of legitimate and genuine tenants and vendors of Nakasero market who according to the government policy on redevelopment of city markets was entitled to apply for and be granted a sublease to redevelop their market. Counsel argued

that the appellant's right to apply and be granted the opportunity to redevelop the market was infringed upon, denied and violated by Kampala Capital City Authority in collusion with the respondent when the former stealthily, fraudulently and or illegally manipulated the bidding process and granted the sublease award to the respondent which comprises members who are not legitimate vendors or tenants of the market. Counsel argued that had the learned judge critically analysed the plaint, he should have concluded that the plaint disclosed a cause of action.

[12] In relation to ground 3, counsel for the appellant reiterated the submissions made under ground 1. Counsel contended that the matters raised in the application for a temporary injunction in High Court Miscellaneous Application no. 916 of 2015 were not similar to the matters raised in the application for judicial review or substantially similar to the prayers sought in High Court Miscellaneous Cause No.32 of 2012.

[13] On ground 4, counsel for the appellant submitted that the parties in High Court Miscellaneous Cause No. 32 of 2012 only executed a consent order and that there was no consent judgment in the matter because the suit was not heard on its merits. Counsel for the appellant referred to the Black's law dictionary, 10th edition where a consent judgment is defined as a settlement that becomes a court judgment when the judge sanctions it and that it is merely a contract which binds the parties thereto. Counsel argued that even if the consent order was to be construed as a consent judgment, the same cannot be regarded as a judgment *in rem*. Counsel for the appellant submitted that the consent order did not determine the rights of the appellant's members who were not party to the suit. It was counsel for the appellant's submission that the consent order did not offer the reliefs that the appellant was seeking for in High Court Civil Suit No. 501 of 2015 nor did it in anyway address or settle the appellant's grievances or offer to the appellant the sublease to redevelop their market. Counsel for the appellant contended that the consent order was *in personam* as it was between the respondent and Kampala Capital City Authority therefore the learned judge was wrong in holding that the consent order was a judgment *in rem*.

[14] On ground 5, counsel for the appellant referred to Article 126(2) (e) of the Constitution which enjoins courts to administer substantive justice without undue regard to technicalities. Counsel for the appellant submitted that the trial judge ought to have over ruled the preliminary objections raised and advised the parties in High Court Civil Suit No. 501 of 2015 to proceed with the scheduling conference and raise the objections as issues for determination in the main suit. Counsel argued that had the learned judge allowed High Court Civil Suit No. 501 of 2015 to proceed on its merits, he would have possibly come up with a contrary decision. Counsel also submitted that the trial judge did not look at the entire record of proceedings in High Court Miscellaneous Cause No. 32 of 2012 to critically examine the parties to the suit and the nature of the claim. Counsel referred to the case of Karia & another v Attorney General & others (supra) and Ponsiyano Semakula v Susane Magala & others [1993] 2 KALR 2. Counsel was of the view that the foregoing was a grave anomaly and omission by the trial judge. Counsel for the appellant submitted that it was erroneous for the learned judge to dismiss High Court Civil Suit No. 501 of 2015 with costs basing on the preliminary objections devoid of merit.

[15] In conclusion, counsel for the appellant prayed that this court allows the appeal and set aside the orders dismissing High Court Civil Suit No. 501 of 2015 and High Court Miscellaneous Application No. 916 of 2015. Counsel also prayed that this court order both suits to be fixed for hearing on their merits and that the respondent pays the costs of this appeal and of the court below.

[16] In reply to ground 1, counsel for the respondent submitted that the cause of action in High Court Civil Suit No. 501 of 2015 was the same as in High Court Miscellaneous Cause No. 94 of 2009, Collins Kateera & Others v Kampala Capital City Nakasero Market Sitting Vendors and Traders Ltd. That the only difference is that the latter was instituted by individuals who are all members of the appellant company. Counsel for the respondent argued that the plaintiff company members never appealed against the decision in High Court Miscellaneous Cause No. 94 of 2009 and are now bringing similar matters under a different title which amounts to abuse of court process. Counsel also stated that the appellant was aware of High Court Miscellaneous Application

No. 32 of 2012 but never applied to be joined as parties and neither challenged the suit.

- [17] In reply to ground 2, counsel for the respondent submitted that the appellant does not own any shop, stall, pitch or space in the market and neither is it shown anywhere that it is a vendor or trader in the market. Counsel submitted that the presidential directive and government policy was supposed to benefit all vendors, traders with or without shops, stalls, space which the appellant is not. Counsel for the respondent also argued that there is no contractual or legal relationship between the appellant and the respondent, that the suit premises are owned by Kampala Capital City Authority as a lessee which awarded the sublease to the respondent. Counsel for the respondent submitted that the appellant ought to substantiate its allegation that it is the legitimate beneficiary of the sublease by showing its rights in the subject property.
- [18] Further, counsel for the respondent submitted that the Memorandum of Association and Articles of Association of the appellant company show that it is a private limited company with only 15 members which does not cover all the vendors and traders in the market as per the government policy and presidential directive. Counsel for the respondent averred that the members of the plaintiff company who own some stalls, pitch or space in the market do so in their individual capacity and not on behalf of the company.
- [19] Counsel for the respondent contended that the appellant never applied for the sublease and therefore the allegation that it should be awarded the same is baseless. Counsel stated that the various receipts attached for payment of rent by the appellant are all in the names of Sentamu J which means that the alleged members of the company are not tenants or traders in the market. Counsel for the respondent concluded that the plaint does not disclose a cause of action and relied on the cases of Tororo Cement Co. Ltd Vs Frokina International Ltd [2002] UGSC 24 and Auto Garage and others v Motokov (supra).
- [20] Counsel for the respondent also submitted that this appeal is overtaken by events because it is premised on challenging the grant of the sub lease offer by

Kampala Capital City Authority to the respondent. However, the respondent has fully complied with the terms and conditions of the sublease offer. Therefore, there is a binding contract which automatically confers proprietary rights and interests of the suit land to the respondent.

- [21] With regard to the cross appeal, counsel for the respondent submitted that the evidence on record shows that the appellant is a private company with only fifteen subscribers though the appellant alleged in the plaint that the suit was filed on behalf of and for the benefit of various traders under the NAMASITE trust who are a separate entity from the appellant. Counsel for the respondent contended that section 5(1) (B) of the Companies Act 2012 limits the membership of a private company to 100 persons and section 47 of the Act provides that one has to be a subscriber to the Memorandum and Articles of Association and entered onto the register of company's members to become a member of a company. Counsel contended that the appellant has not proved that the 600 members of the NAMASITE trust are members of the appellant company hence it ought to have obtained a representative order under Order 1 rule 8 of the Civil Procedure Rules in order to sue on behalf of the members of the trust. Counsel for the respondent relied on Paul Kanyima v Rugooba (1982) HCB 33. Counsel for the respondent also submitted that there was no power of attorney produced by the appellant to sue on behalf of the alleged 600 members.
- [22] In reply, counsel for the appellants submitted that the provisions of Order 1 rule 8 of the Civil Procedure Rules do not apply to this case because the appellant is a legal entity with some of its members listed as subscribers in its Memorandum and Articles of Association and others listed as associates. Counsel argued that a company cannot be required to apply for and obtain a representative order to sue on behalf of its members, associates or supporters. Counsel for the appellant prayed that this court finds that obtaining a representative order before filing High Court Civil Suit No. 501 of 2015 was not necessary.

Analysis

Ground one

[23] The doctrine of *res judicata* is provided for under section 7 of the Civil Procedure Act cap 7 as follows:

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.'

[24] In Karia & another v Attorney General & others [2005] 1 EA 83 at page 93, Tsekooko JSC (as he then was) while interpreting section 7 of the Civil Procedure Act stated:

'The provision indicates that the following broad minimum conditions have to be satisfied:

1. There have to be a former suit or issue decided by a competent Court.
 2. The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
 3. 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 High Court civil case number 553 of 1966 (*Karshe v Uganda Transport Limited*) cases on Civil Procedures and Evidence Volume 3 page 1, Sir Udo Udoma, former Chief Justice of Uganda, put it this way:

"Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to relitigate the issue again or to deny that a decision had in fact been given, subject to certain conditions."

In my opinion this is a correct summary of section 7. There is no doubt that neither appellant was a party to civil appeal number 36 of 1996.'

[25] In Ponsiyano Semakula v Susane Magala & ors [1993] II KALR , this court held:

'The doctrine of *res judicata*, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine is succinctly expressed in the well-know maxim: "Nemo debet bis vexari pro una et eadem causa" (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded for ever between the parties. The test whether or not a suit is barred by *res judicata* appears to be is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res judicata* applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence might have brought forward at the time: See Kamuye and Others V. The Pioneer General Assurance Society Ltd. [1971] E.A 263.'

[26] The foregoing decisions articulate the correct circumstances in which the doctrine of *res judicata* may apply and will guide me in the consideration of this issue.

[27] High Court Miscellaneous Cause No.32 of 2012 was an application for judicial review instituted by Nakasero Market Sitting Vendors and Traders Ltd (the respondent) against Kampala Capital City Authority. The application was not availed on the record of proceedings but it appears a consent order was entered into between the parties. The consent order was to the effect that the respondent was to continue collecting market rent or dues in the subject property, the sublease offer or award made to the respondent by Kampala Capital City Authority through a letter dated 2nd June 2010 was to remain effective and

would result into a sublease agreement upon the respondent fulfilling the terms and conditions of the agreement. **It should be noted that appellant was not a party to this application.** Nor does the appellant bring this action as successor in title to any party to the previous suit. Much as the subject matter under litigation was the same in both suits, the issues raised by the plaintiff in High Court Civil Suit No.501 of 2015 appear not to have been handled in the application. The appellant's main contention in High Court Civil Suit No. 501 of 2015 was that Kampala Capital City Authority had fraudulently and or illegally awarded the sublease to redevelop Nakasero market to the respondent to the appellant's detriment.

[28] In light of the above, I find that the doctrine of *res judicata* did not apply to High Court Civil Suit No. 501 of 2015. Therefore, this ground and ground 3 succeed.

Ground 2

[29] The appellant contends that the learned trial judge erred in law and fact when found that High Court Civil Suit No. 501 of 2015 did not disclose a cause of action.

[30] In Auto Garage and others v Motokov [1971] 1 EA 514 at page 519 Spry V-P while setting out what amounts to a cause of action stated:

'I would respectfully adopt those words. I think it is reasonable and proper to distinguish between r. 1, which says that the plaintiff shall contain the facts constituting the cause of action, and r. 11, which says that the court shall reject the plaintiff where it does not disclose a cause of action. I think that a plaintiff may disclose a cause of action even though it omits some fact which the rules require it to contain and which must be pleaded before the plaintiff can succeed in the suit. In *Cottar v. Attorney-General for Kenya* (1938), 5 E.A.C.A. 18, it was said by Sir Joseph Sheridan, C.J. that:

"what is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated."

In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible. I think this accords with the words I have quoted from Law, J., in *Lake Motors*' case, with which I respectfully agree.

[31] It is necessary to study the plaintiff to determine whether it discloses a cause of action. See Boutique Shazim Ltd V Norattam Bhatia & Anor [2009] UGCA 45. The facts constituting the cause of action under paragraph 5 of the plaintiff are as follows::

‘5. The plaintiff’s cause of action against the defendants jointly and severally arose as hereunder:-

(a) Sometime in 2005, KCC as the then controlling authority of Nakasero market entered into sub lease and management agreements with Sheila Investments Limited for the redevelopment of the land comprised in LRV 2808 Folios 22 and 24 plots 7B and 4B Market street, Kampala (herein called Nakasero Market) whereof the said lessor or manager started collecting rent and other dues from the tenants, traders and vendors.

b) The coming in of Sheila Investments Limited in Nakasero market, which was considered an outsider caused discontent, bickering and anger amongst the *bona fide* sitting tenants, vendors and traders which led to the opposition and resistance that culminated into stand-offs, strikes and total defiance by the tenants, vendors and traders to pay rent and dues to Sheila Investments Limited.

c) In June, 2006, the old *bona fide* sitting tenants who had been an association incorporated the plaintiff with a view of applying for and acquire the management and the sub-lease for redevelopment of Nakasero market in line with the government policy and the relevant laws. A copy of the plaintiff’s memorandum and articles of association with a certificate of incorporation and the official list of all the plaintiff’s members are attached herewith collectively as annexures “A1” and “A2” respectively.

- d) At the same time a group of new vendors some with mere stalls only and others none, who were not *bona fide* sitting tenants of Nakasero market but who heard about the opportunity of a sub-lease and managing the market, hurriedly incorporated the 2nd defendant as a rival faction to that of the plaintiff; approached and misled KCC that they were the true representatives of all the genuine sitting tenants, vendors and traders of Nakasero market, whereas not.
- e) Between June, 2006 and June 2007, the plaintiff approached KCC and sought for advice and permission to manage and redevelop their market as the only company/organization of the legitimate old and *bona fide* sitting tenants, vendors and traders thereof but KCC turned them away unfairly and instead stealthily dealt with the 2nd defendant. Refer to some of the tenancy agreements and samples of rent receipts of some of the old members of the plaintiff herewith attached collectively as annexures "B1" and "B2" respectively.
- f) The said two companies, that is the plaintiff and the 2nd defendant intensified wrangles degenerating into chaos, fights and insecurity with Sheila Investments Ltd which led to the intervention of government and KCC.
- g) Due to too much pressure from the plaintiff as stakeholders and the above problems, in July 2007, KCC stopped Sheila Investments Ltd from managing the market and cancelled its sub-lease with a promise to all tenants and vendors of tendering the sublease a ward through a transparent and open bidding to give a chance to the real or genuine sitting tenants, vendors and traders to manage and redevelop their market in line with the government policy and the relevant laws.
- h) In February, 2007 plaintiff applied to and physically approached KCC for permission to manage the market in the meantime as well as being considered for the offer of a sub-lease to re-develop their market but KCC turned away the plaintiff without legal justification. Refer to the letters dated 02/02/2007, 12/02/2007 and 10/05/2007 attached herewith as annexures "C1", "C2" and "C3" respectively.
- i) In July, 2007, the plaintiff, having felt unfairly treated by KCC, they met His Excellence the President of Uganda at Nakasero State House, where after briefing him about the unfair and unjust treatment of KCC, he re-affirmed his stand and directed KCC to implement the government policy to the effect that Nakasero market be managed and developed by the genuine sitting tenants, traders and vendors in line with the government policy and the relevant laws. Refer to the

letters to the President dated 18/01/2007 and 17/07/2007 attached herewith as annexures "D1", "D2" and "D3" respectively.

j) Surprisingly; on 02/05/2008, KCC totally ignored the president's directive, met with the 2nd defendant stealthily alone, having unfairly excluded the plaintiff; deliberated on all issues of management and redevelopment of Nakasero market and agreed to give the management thereof to the 2nd defendant.

k) On 06/04/2009, the then KCCA Ag Town Clerk fraudulently granted the management of Nakasero market to the 2nd defendant for a period of one year from 15/04/2009 up to 15/05/2010. Refer to a copy of the letter from the Ag. Town Clerk herewith attached as annexure 'E'.

l) The plaintiff strongly protested this decision and appealed to KCC very many times to review its aforesaid decision but KCC ignored their pleas. This prompted the management of the 2nd defendant to mistreat the plaintiff by illegally evicting some of its members who were old *bona fide* tenants from their shops, grabbing some of the shops, stalls and properties, assaulting and battering as well as banishing some of them from their market. Refer to a decree and an order herewith attached as annexures "F1" and "F2" respectively.

m) In his letter to the Town Clerk of 12/06/2009, after several complaints about the poor leadership, over harassment, wrangles and unfairness of the 2nd defendant the then Mayor having been touched by the woes, pain, suffering and loss to the plaintiff, suspended the collections of any rent and dues by the 2nd defendant in Nakasero market until further notice. A copy of the said letter is herewith attached as annexure "G".

n) But surprisingly on 21/09/2009, after purportedly 'analyzing' the situation, without any consultations and meeting of the plaintiff; the said Mayor lifted the suspension of revenue collection from the market by the 2nd defendant which aggravated the said problems already encountered by the plaintiff. Refer to the Mayor's letter dated 21/09/2009 attached herewith as annexure "H".

o) On 02/12/2009 without the knowledge, involvement and notice to the plaintiff, the favoured 2nd defendant mischievously and fraudulently applied for the award of a sublease for the redevelopment of Nakasero market.

p) The 2nd defendant had exhibited incompetence, high handedness and extreme indecorous manner in the handling of all market affairs, to wit using very rough body builders (kanayamas) to collect rent,

beat up tenants, confiscating their merchandise, evicting, grabbing, reallocation of shops and stalls among others which culminated into very many cases. This led to the filing in the High Court Misc. Cause no. 94 of 2009 in which a group of tenants and vendors who are all members of the plaintiff sued the defendants.

q) On 30/03/2010, the parties in the aforesaid case, that is the 1st and 2nd defendants and its individual tenants executed a consent interim order in which they all agreed that :-

i) All the tenants of Nakasero market shall belong to one business organisation.

ii) All the tenants of Nakasero market shall be listed and shall be free to contest in leadership positions in the business organization that will embrace all tenants.

iii) A list of all company members and prospective members (tenants) shall be presented to court. Refer to the consent interim order herewith attached as annexure "I".

f) The 2nd defendant refused to implement the terms of the said interim consent order. On 02/06/2010, without any prior notices, invitations for bids or without any advertisement of any new tender for a sub lease; KCC fraudulently offered the award of a sub lease for the redevelopment of Nakasero market to the 2nd defendant wherein it set the following conditions precedent for the execution of a sub-lease agreement.

i) Production of a register of all individuals operating in the market and show that they are all incorporated in the said company and the register must be duly endorsed by the representatives of all the groups.

ii) Payment of a premium of U.Shs 1, 800,000,000/= in a lump sum before the execution of the sub-lease.

iii) Payment of ground rent of U.Shs. 45,000,000/= per year in advance.

iv) Sub-lease for an initial period of 5 years extendable to 49 years upon fulfillment of the developments.

v) Carry out a traffic impact assessment to be approved by KCC prior to the commencement of the project.

vi) Development of the project in line with KCC approved plans. Refer to a copy of the sub lease award herewith attached as annexure "J".

s) The manner in which the award of the sublease to the 2nd defendant was done again sparked off very bitter wrangles between the plaintiff

and the 2nd defendant worse than the ones seen above during the management of Sheila Investments Limited. The 1st defendant totally abdicated its duty as the landlord/lessee to settle the disputes which caused more suffering, pain, financial loss and embarrassments meted upon the plaintiff's members' shops; illegal evictions; banishments; loss of property and even loss of a life.

t) Despite the expiration of the 2nd defendant's management agency in May 2010, the 1st defendant still abdicated its duty when it totally ignored the plaintiff's pleas to stop the 2nd defendant from further mismanagement, insecurity and poor leadership of the market in vain.

u) In an attempt to fulfill the first condition of the sub lease offer sometime in or around July, 2011 the said 2nd defendant compiled a list of 17, 727 members purportedly being the number of sitting tenants, vendors and traders of Nakasero market and submitted it which was accepted by the 1st defendant as fulfillment of the first condition for the execution of a sub-lease agreement above and clause one of the interim consent order in Misc. Cause No. 94 of 2009.

v) The said list was to say the least highly suspect, concocted and false. It was full of names of persons who do not own a shop, a stall or ever been sitting tenants, traders or vendors of Nakasero market with an inflated/ exaggerated number intended to justify the 2nd defendant's bid.

w) In August 2011, the patient plaintiff formally applied to the 1st defendant for an administrative review of the sublease offer by revoking the one of 02/06/2010, to stop the ongoing attempt by the 2nd defendant to collect and compiling fake names as tenants, stop collecting rent; but the 1st defendant declined to grant the application. Refer to the said application herewith attached as annexure "K".

x) In January, 2012, the plaintiff still applied as the legitimate company/ organisation for the sub-lease but the 1st defendant kept on promising to review the matter by summoning all the stake holders to resolve this impasse. Thus 2 meetings were held on 10/08/2011 and 15/02/2012 to that effect but the 1st defendant refused to review the sub-lease award to the 2nd defendant to the detriment of the plaintiff. Refer to the plaintiff's letter dated 04/01/2012; that of the 1st defendant's Executive Director dated 09/08/2011 that of the 1st defendant's Director Legal Affairs herewith attached as annexures "L," and "M1" and "M2" respectively.

y) Worse still' after the foregoing frustration by the 1st defendant on 26/06/2012, without the knowledge, invitation, notice or consent of the plaintiff, the 1st defendant executed a consent order in the said Misc. Cause No. 32 of 2012 with the 2nd defendant that finally sealed the former's commitment and readiness to execute a sub-lease agreement for the redevelopment of Nakasero market meaning that the plaintiff did not merit the grant of a sub-lease which aggravated the mental anguish, pain, suffering, loss and deprivation thereof that all warrant the grant of the reliefs sought therein. A copy of the consent order is herewith attached as annexure "N".

- [32] The Black's law dictionary 8th edition at page 1347 defines a right as an interest, claim, or ownership that one has in tangible or intangible property. The appellant's claim in High Court Civil Suit No. 501 of 2015 was that it had a right to apply for the sublease offer from Kampala Capital City Authority and be given the first priority. The appellant claimed that this right stemmed from the Ministry of Local government policy on the development and management of markets in the city, municipalities and towns dated 11/09/2007. Under this policy sitting tenants who own stalls or kiosks in markets were to register under their associations and the registered market vendors be given the first priority to redevelop and manage the markets. The appellant claimed to have been established following this policy. It alleged that it is a body of legitimate tenants of Kampala Capital City Authority who rent its shops, stalls and spaces in Nakasero market and who qualify for the sublease award as opposed the respondent. The appellant contended in the plaint that this right was infringed upon, denied or violated by Kampala Capital City Authority in collusion with the respondent when the former stealthily, fraudulently or illegally manipulated the bidding process and granted the sublease offer to the respondent, a body comprising of outsiders who are not legitimate vendors or tenants in the market.
- [33] The appellant exclusively seems to derive its right from a government policy backed by a presidential directive. Can such a policy give rise to a right enforceable at law? In my opinion, government policies are merely guidelines or executive instructions whose compliance thereof cannot be enforced through courts and neither can a party derive a legal right from such policies. This is

because such guidelines, by their very nature, do not fall into the category of legislation.

[34] The Supreme Court of India in GJ Fernandez v State of Mysore & Ors. [AIR 1967 SC 1753] while considering the question of whether instructions contained in the Mysore Public Work Department Code have statutory force or not stated:

‘Taking first the contention with respect to the code not being followed in the matter of tenders, the question that arises is whether this Code consists of statutory rules or not. The High Court has observed that the so-called rules in the Code are not framed either under any statutory enactment or under any provision of the Constitution. They are merely in the nature of administrative instructions for the guidance of the department and have been issued under the executive power of the State. Even after having said so, the High Court has considered whether the instructions in the Code were followed in the present case or not. Before however we consider the question whether instructions in the Code have been followed or not, we have to decide whether these instructions have no statutory force. If they have no statutory force, they confer no right on anybody and a tenderer cannot claim any rights on the basis of these administrative instructions. If these are mere administrative instructions it may be open to Government to take disciplinary action against its servants who do not follow these instructions but non-observance of such administrative instructions does not in our opinion confer any right on any member of the public like a tenderer to ask for a writ against Government by a petition under Art. 226. The matter may be different if the instructions contained in the Code are statutory rules.
..... We are therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules.

.....we are of opinion that no claim for any relief before a court of law can be founded by a member of the public, like the appellant, on the breach of mere administrative instructions.’


[35] I find this decision highly persuasive. I would hold that neither government policy nor a presidential directive, not anchored in legislation, have any legal force to confer a right on, or interest, to the appellant. The appellant ought to show that it has a legal interest in the subject matter which was violated by the defendants and as a result of which it is entitled to a remedy for it to establish a cause of action. This is not evident on the plaint in High Court Civil Suit No. 501 of 2015. For different reasons I am in agreement with the learned trial judge that the appellant had not established a cause of action in its suit aforesaid.

[36] I would hold that this ground of appeal fails for lack of merit. As it disposes of the claim in the court below, it is unnecessary to consider the remaining grounds of appeal as well as the cross appeal. Save for grounds 1 and 3, I would dismiss this appeal with costs. Much as the appellant succeeded on grounds 1 and 3 this is not able to save the suit in the court below as the suit does not disclose a cause of action.

Decision

[37] As Musota, JA and Kasule, Ag. JA, agree this appeal is allowed in part and dismissed in part. The respondent shall be entitled to half the costs on appeal. The main suit in the court below is struck out with costs to the respondent.

Dated, signed and delivered at Kampala this 27th day of May 2021.


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO. 90 OF 2016

*(Arising from High Court Miscellaneous Application No. 1081 of 2015 before
Bashaija, J delivered on 31st March 2016)*

**NAKASERO MARKET SITTING TENANTS
(NAMASITE) LIMITED** **APPELLANT**

VERSUS

**NAKASERO MARKET SITTING
VENDORS & TRADERS LIMITED** **RESPONDENT**

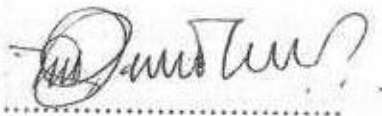
**CORAM: HON. JUSTICE F. M. S EGONDA-NTENDE, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE REMMY KASULE, Ag. JA**

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I had the benefit of reading in draft the judgment of my brother Hon. Justice Fredrick Egonda Ntende JA.

I agree with his reasoning, conclusions and orders he has made. I have nothing useful to add.

Dated at Kampala this.....^{27th}.....day of^{May}.....2021.



.....
Stephen Musota
JUSTICE OF APPEAL

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO. 90 OF 2016

10 *(Arising from High Court Miscellaneous Application No. 1081 of 2015)*

BETWEEN

15 Nakasero Market Sitting Tenants (NAMASITE) Ltd :::::::::: Appellant

AND

Nakasero Market Vendors & Traders Ltd :::::::::::::::::::: Respondent

20 *(On Appeal from the Ruling of the High Court of Uganda (Land Division),
Bashaija, J. Delivered on 31st March, 2016)*

25 **Coram: Hon. Mr. Justice Fredrick Egonda-Ntende, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Justice Remmy Kasule, Ag JA**

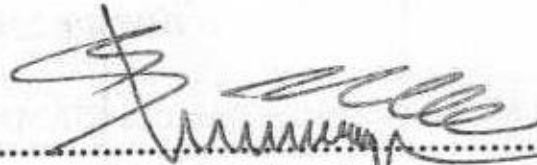
Judgment of Remmy Kasule, Ag. JA

I have had the benefit of reading through the lead Judgment of His Lordship Egonda-Ntende, JA.

30 I agree with the analysis of the issues, both of law and fact, and the conclusions he reaches. I too concur that this appeal is allowed in part and dismissed in part and that High Court Civil Suit No. 501 of 2015 be struck out.

As to costs, I, too, am in agreement with the Order that the
respondent be awarded half the costs of this appeal as well as the
35 full costs of the struck out High Court Civil Suit No. 501 of 2015.

Dated, signed and delivered at Kampala this 27th day of May 2021.



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Remmy Kasule
Ag. Justice of Appeal

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