THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 07 OF 2017
(ARISING FROM HCCS NO. 649 OF 2013)
(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

EVARISTO MUGABI} ..... APPELLANT

VERSUS

CHINA ROAD CORPORATION LTD} ..... RESPONDENT

(Appeal from the Ruling and Orders of the Learned Hon. Justice Alfonse Chigamoy Owiny Dollo of the High Court in HCCS No 679 of 2003 delivered on 25th September 2015)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This is an appeal from the Ruling and orders of Hon Justice Alfonse Chigamoy Owiny Dollo, in HCCS No. 649 of 2013 delivered on 25th September 2015.

The Respondent filed HCCS No. 649 of 2013 against the Appellant for a declaration that it is the lawful owner of leasehold comprised in LRV 3326 Folio 17 Plot 99, Kyadondo, Block 197 at Kitetika Mutuba 1 Wakiso, an order for specific performance compelling the Appellant to execute a proper lease in respect of the suit land in its favour, and a permanent injunction to restrain the Appellant from interfering with its quiet enjoyment of the suit property.

The brief background to the dispute is contained in the judgment of the learned trial Judge. The parties executed a lease agreement in favour of the Respondent showing that the lease to the respondent was out of the Appellant's Mailo land comprised in Kyadondo Block 197 Plot 99 at Kitetika. The lease agreement provided for a lease of 99 years and the Respondent paid UGX 91,901,000/= as full and final payment for premium for the lease, and UGX 1,000/= as full payment for the ground rent for 99 years. Thereafter

the Respondent took possession of the suit property. The parties executed and registered a lease memorandum under instrument No. KLA 268927.

The Appellant filed HCCS No. 84 of 2013 in the High Court Land Division against the Respondent seeking nullification of the lease. Kwesiga, J, found in favour of the Appellant and ruled that the Certificate of Leasehold Title and the Lease memorandum pursuant to which the leasehold title had been issued contravened the provisions of section 147 of the Registration of Titles Act which provides for disclosure of the identity, capacity and qualification of the person who attests to the Lessor's signature; and section 148 of the Registration of Titles Act which provides for signing a lease memorandum in Latin character. The Respondent then filed HCCS No. 649 of 2013, from which this appeal now arises, in which it claimed that it was a lawful lessee on the suit land and was entitled to an order of specific performance against the Appellant to compel him to perform the terms of the agreement to lease executed by the parties.

Before the hearing of HCCS No. 649 of 2013, the Appellant filed Miscellaneous Application No. 112 of 2014 in which he raised a preliminary point of law to the effect that the suit was *res judicata* since the subject of contention had been adjudicated by the High Court in HCCS No. 84 of 2013. The learned trial Judge sustained the preliminary objection in part on the ground that the Court had in the previous suit, HCCS No. 84 of 2013, declared the lease illegal, with the effect that the Respondent held no lease from the Appellant. However, the learned trial Judge further held that the part of the claim touching the Respondent's prayer for an order that the Appellant executes a proper lease pursuant to the negotiated agreement between the parties was not *res judicata* since it did not form part of the subject of contention in the previous suit. Consequently, the learned trial Judge found that the lease agreement executed by the parties constituted a valid contract, *inter partes*, enforceable by law and binding on the parties, the cancellation of the lease memorandum and leasehold Certificate of Title notwithstanding.

The learned trial Judge made an order for specific performance that the lease contract executed by the parties is valid and binding on the parties and the Appellant shall within one month of the judgment execute a proper and registrable lease pursuant to the lease contract executed by the parties which shall embody the exact terms and covenants of the lease agreement, and lastly, costs shall be payable to the Respondent with interest of 8% per annum on the unpaid from the date of judgment till payment in full.

The Appellant being dissatisfied with the Ruling and orders of the learned trial Judge appealed to this court on six grounds, that:

1. The learned trial Judge erred both in fact and law by failing to find that the suit was wholly *res judicata.*

2. The learned trial Judge erred both in fact and law by finding that the parties entered into a valid contract for a lease and thereby arriving at a wrong conclusion occasioning a miscarriage of justice.

3. The learned trial Judge erred both in fact and law by altering the agreed facts outlined in the Joint Scheduling Memorandum, thereby arriving at a wrong conclusion occasioning a miscarriage of justice.

4. The learned trial Judge erred in law by ordering for the specific performance of an agreement for a lease and thereby arriving at a wrong decision occasioning a miscarriage of justice.

5. The learned trial Judge erred both in law and fact by finding that the Respondent acquired an equitable interest in the Appellant's land and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

6. The learned trial Judge erred both in law and fact by finding that the lease hitherto held as invalid, was a valid contract between the

Appellant and the Respondent and thereby erred occasioning a miscarriage of justice.

The Appellant prayed that this appeal be allowed with costs of the appeal and of the Court below, and the Judgment of the High Court be set aside.

Representation

At the hearing of the appeal, the Appellant was represented by learned counsel Brian Othieno while the Respondent was represented by learned counsel Paul Ekochu.

Appellant's submissions

The Appellant's counsel submitted on grounds 1, 5 & 6 jointly. He submitted that there was a lease between the parties which was declared void and cancelled in HCCS No. 84 of 2013. This implied that all the matters concerning the lease, whether legal or equitable, were concluded in HCCS No. 84 of 2013 and could not be raised again in a fresh suit. Learned counsel relied on **Tukamuhebwa George & another v Attorney General, Constitutional Petition No. 59 of 2011** where the Constitutional Court held that a decision made on a point of law finally determines the matter unless there is an appeal. He also relied on; **Sunday Edward Mukooli v Administrator General SCCA No. 6 of 2015, Kamunye & others v Pioneer General Assurance Society Ltd (1971) EA 262, at 265, and Maniraguha Gashumba v Nkundiye CACA No. 23 of 2005** for the same point.

The Appellant's counsel submitted that the matters raised before the trial court in HCCS No. 649 of 2013 were substantially in issue in the earlier suit, HCCS No. 84 of 2013, before the same court, which rendered the suit *res judicata.* He relied on **Ponsiano Semakula v Susane Mugala & others (1993) Kalr 213**, where this court held that the test of whether a suit is barred by *res judicata* or not is whether the Plaintiff in the second suit is trying to bring before 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.

The court further held that the plea of *res judicata* applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. Counsel relied on section 7 of the Civil Procedure Act. He submitted that the Respondent ought to have raised the matter of the agreement for a lease in the former suit.

Secondly, learned counsel for the Appellant submitted that it was not open for the learned trial Judge to canvas issues relating to the lease which had already been determined in the earlier suit. He relied on **Greenhalgh v Mallard (1947) 2 All E.R. 255** and **Fidelitas Shipping Co. Ltd v V/O Exportchleb (1965) 2 All E.R. 4** where it was held that a plaintiff was barred by *res judicata* from instituting a new claim by way of a new cause of action, the substance of which was adjudicated in an earlier suit. Counsel submitted that the Respondent having lost in the earlier suit on the ground of invalidity of the lease could not bring the same matter up by way of a new cause of action in a second suit.

Thirdly, counsel submitted that the Ruling of the trial Judge in HCCS No. 84 of 2013 where he declared the lease illegal and invalid did not only cover the question of registration of the lease but also declared the lease itself illegal. He submitted that the lease contract which the trial Judge declared valid in HCCS No. 649 of 2013 had been declared illegal and invalid in the earlier suit and therefore, the trial Judge erred by revisiting the matter. Counsel invited court to uphold grounds 1, 5 & 6 of the appeal and find that the whole suit was *res judicata.*

With regard to ground 2 & 4, the Appellant's counsel submitted that the parties entered into a contract for a lease, which is different from a lease contract. He submitted that by way of a contract for a lease, the parties agreed to enter into a lease. This was a precursor to a lease and its terms are different from those of a lease. In the premises, counsel submitted that the learned trial Judge erred in law and fact by finding that the parties entered into a valid contract for a lease.

Secondly, counsel submitted that the trial Judge erred by finding that it was discernible from the parties' pleadings, evidence and agreed facts set out in the scheduling memorandum that the parties agreed to enter into a lease. He contended that this claim was denied by the Appellant in paragraph 4 of his Written Statement of Defence and formed part of the issues for adjudication by the trial Court. In the premises, counsel submitted that it was erroneous for the trial Judge to find that the matter was agreed between the parties and that it was discernible from the evidence adduced by the parties that there existed a contract for a lease.

The Appellant's counsel submitted that the payments for premium and ground rent, and possession of the suit land were all done pursuant to the lease agreement, which was declared illegal by the court in HCCS No. 84 of 2013, and not pursuant to the contract for a lease which the trial court declared valid. He contended that the contract between the parties came into existence at the execution of the lease agreement which was declared null and void by the High Court in HCCS No. 84 of 2013 thereby leaving no contract in existence between the parties. Counsel submitted that the negotiations between the parties to enter a lease agreement did not constitute a contract between the parties. He referred to **Green Boat Entertainment Ltd v City Council of Kampala HCCS No. 580 of 2003** for his submission.

Learned counsel for the Appellant submitted that the trial Judge erred when he ordered specific performance of a non-existent agreement. He submitted that the trial Judge erred when he ordered the Appellant to specifically perform a lease contract which had been nullified by order of Court.

On ground 3, counsel submitted that the learned trial Judge erred in law and fact when he altered the agreed facts contained in the parties' Joint Scheduling Memorandum by holding that it was discernible from the agreed facts in the parties' scheduling memorandum that the parties agreed to enter into a lease contract. He submitted that it was never agreed in the

Joint Scheduling Memorandum or anywhere else that the parties had agreed to enter into a contract for a lease.

Counsel prayed that the appeal is allowed with costs of the appeal and of the High Court.

Respondent's submissions in reply

In reply, the Respondent relied on its conferencing notes and authorities which it adopted as its submissions in the appeal with the permission of the court.

In reply to ground one, the Respondent's counsel submitted that the right of appeal is a creature of statute and appeals do not lie as of right from interlocutory orders. Counsel submitted that the Appellant erroneously sought to argue ground one of the appeal which arises from orders given by the High Court in Miscellaneous Application No. 112 of 2014. He referred to Order 44 rule 2 & 3 of the Civil Procedure Rules for the proposition that an appeal shall not lie from any other order except with leave of Court. In the premises, counsel submitted that the Appellant should have first sought for and obtained leave of court to argue ground one of the appeal. In the alternative, counsel submitted that the learned trial Judge duly considered the law and principles relating to *res judicata* and came to the right conclusion.

In reply to submissions of the appellant on grounds 2 & 6, the Respondent's counsel reiterated the trial Judge's finding that the parties entered into a valid and binding contract for a lease. He submitted that the trial Judge properly evaluated the evidence before him including the lease agreement executed by the parties and properly deduced the intent of the parties. Counsel relied on: Halsbury's Laws of England 4th Ed. Vol 9 at paragraph 203, Lord Denning; The Discipline of the Law, 7th Ed, Butterworths, 1979, 32, and **Souza Figuerado & Co. Ltd v Moorings Hotel Co. Ltd 1966 EA 926**, which state the requirements of a valid contract. He submitted that the parties' agreement met all requirements for a valid contract thereby creating a valid and binding contract.

With regard to ground 3, counsel submitted that the trial Judge based his judgment on the evidence and facts placed before him during the trial. He contended that the trial Judge did not import or alter facts as alleged by the Appellant.

On ground 4, the Respondent's counsel submitted that the learned trial Judge having found that the lease agreement was valid and binding on the parties, it was a matter of course to enforce the contract by ordering specific performance. Counsel relied on **Manzoor v Baram [2003] 2 EA 58** and **Smt. Mayawanti v Smt Kaushalya Devi, 1990 SCR (2) 350, 1990 SCC (3) 1**, for this submission.

In reply to ground 5, counsel reiterated the trial Judge's finding that the Respondent acquired an equitable interest in the suit land. He relied on **Ismail Jaffer Allibhai & 2 others v Nandlal Harjivan Karia & another SCCA No. 53 of 1995**, where it was held that the equitable title which passes to the purchaser is considered to be superior to the vendor's legal title, which is extinguished on payment of the purchase price. Counsel reiterated the trial Judge's findings that the Respondent acquired an equitable interest in the suit property in light of the actions taken by the parties in performing the contract.

The Respondent's counsel prayed that the appeal be dismissed with costs.

Appellant's submissions in rejoinder

In rejoinder to the Respondent's submission on ground one, the Appellant's counsel submitted that complaints against orders made in the course of a hearing may be considered when appealing against the final decision whether a right of appeal against the interlocutory order exists or not. He relied on **The Returning Officer Kampala & others v Catherine Naava Nabagesera, CACA No. 39 of 1997**, where it was held that in an appeal against a final decision, the Appellant may argue grounds of appeal related to interlocutory orders made in the course of the hearing. Further, counsel relied on **Noble Builders (U) Ltd v Sietco, SCCA No. 31 of 1995, and J. Hannington Wasswa & others v Maria Ochola & others, SCCA No. 5 of 1995**,

where it was held that it was not necessary to file separate appeals; one against interlocutory orders made in the course of the hearing and another one against the final decision. Counsel relied on **Gurdial Singh v Kaur (1960) EA 795** where the court found that to hold otherwise might lead to a multiplicity of appeals upon incidental orders made in the course of the hearing when such matters can more conveniently be considered in an appeal from the final decision.

With regard to the Respondent's submission on ground 2, the Appellant's counsel submitted in rejoinder that the Respondent did not show any evidence that the trial Judge relied on to find that there was a valid and binding contract between the parties to enter into a lease. Counsel reiterated his submission that the trial Judge failed in his duty to evaluate the evidence on record and apply the law to it.

In rejoinder to the Respondent's submissions on grounds 3, 4, 5 & 6, the Appellant's counsel reiterated his main submissions on the respective grounds and prayed that the appeal be allowed with costs in this court and the court below.

Resolution of the Appeal

I have duly considered the written submissions of the parties to this appeal through their respective counsel, the record of appeal, the judicial precedents and law referred to and the law generally.

The duty of this court as a first appellate court is to reappraise the evidence on record and arrive at its own inferences of fact. This duty is expressed under rule 30(1)(a) of the Rules of this Court. The East African Court of Appeal in **Peters v Sunday Post Limited [1958] 1 EA 424 at page 429** held that the duty of a first appellate court is to review the evidence adduced in the trial court in order to determine whether the conclusions drawn by the trial court should stand.

In this appeal, the main mixed question of fact and law relates to whether there was an agreement to lease property as well as a lease agreement

that was registered and subsequently nullified by order of court. Secondly, the crux of the matter is whether the nullification of the registration of a lease amounted to nullification of the agreement between the parties to the extent that the ruling in HCCS No 84 of 2013 rendered the subsequent suit in HCCS No 649 of 2013 res judicata. This further begs the question as to whether there was an agreement between the parties that is reflected in the nullified lease agreement or any other evidence.

In so far as the respondent claims that the ruling in Miscellaneous Application No 112 of 2014 arising from Civil Suit No 649 of 2013 was being appealed after the main judgment in Civil Suit No 649 of 2013 and that no leave of court was sought to appeal the interlocutory orders issued prior in time, there is a preliminary objection to parts of the appeal on the ground that there was a ruling that the matter before the court was not res judicata and no appeal was preferred or lies. The contention is that the grounds of appeal arising from the judgment of the court were determined in the interlocutory application and cannot be appealed without the leave of court.

Before considering that matter, it suffices to note that the grounds of appeal namely grounds 1, 2, 3, 4, 5 and 6 all relate to the question of whether the suit from which the Judgment appealed against arises is res judicata and it was erroneous for the court to entertain questions relating to an agreement for a lease. Further, if this court finds that the suit was not res judicata, it would have the effect of resolving grounds 2, 3, 4, 5 and 6 of the appeal. I would consider ground 1 of the appeal in detail as it is intertwined with the other grounds of appeal. This preliminary point arises from ground 1 of the appeal that:

> **The learned trial Judge erred both in fact and law by failing to find that the suit was wholly *res judicata.***

The question of whether the suit was wholly res judicata was the subject matter of Miscellaneous Application No 112 of 2014 in which the defendant who is now the appellant brought an application for rejection of the plaint in HCCS No 649 of 2013 seeking for orders that the plaint be struck out on

the ground that it is barred by statute for being *res judicata*. The appellant contended in the High Court that the claim had been decided in HCCS No 84 of 2013 between the same parties. Secondly that the suit was bad in law, vexatious and intended to derail and defeat the course of justice.

The appellant's application was allowed in part whereupon the court struck out part of the claim in HCCS No 649 of 2013 for being res judicata.

The respondent contends that the appellant is required to obtain leave of court to appeal against the ruling and therefore cannot raise the question of res judicata again since no leave to appeal was sought or granted.

In consideration of this issue, I have perused Miscellaneous Application No 112 of 2014 in which the appellant was the applicant therein he applied by chamber summons under Order 7 rule 11 and 19 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that the respondent's plaint against the applicant be rejected or struck out with costs and for costs of the application. The grounds averred were that allowing the suit would tantamount to sitting in appeal from the decision of the High Court in HCCS No 84 of 2013. Further that in HCCS No 84 of 2013, the High Court declared the lease between the parties illegal and nothing flows from an illegality. Secondly the respondents impugned suit is an attempt to legalise an illegality. Further that the suit was bad in law, vexatious and intended to delay and defeat the course of justice to enable the respondent to enjoy illegal occupation of the applicant's land.

The learned trial judge held that the court did not decide in the former suit whether the respondent is prohibited from entering into a lease contract with the applicant and that the claim in the subsequent suit HCCS No 679 of 2013 is that the parties had agreed to execute a lease and the respondent sought specific performance of that agreement. The learned trial judge specifically stated that:

> This is a matter this court is entitled to determine on the merits. Furthermore, the plaintiff (respondent herein) seeks, in the alternative, to recover premium and

ground rent it claims to have paid to the defendant (applicant herein) as pursuant to the agreement for lease.

It also seeks determination of the issue of its equitable interest in the suit property owing to the premium and ground rent it paid following the agreement to lease the suit property to it. Further still, it seeks award of damages for losses incurred in taking possession of the suit property and the developments it has carried out thereon pursuant to the agreement they entered into regarding the lease of the suit property. These are matters, which were not in issue in the former suit; hence, the court did not deal with them. Therefore, these claims are open for consideration and determination by this court on the merits; and so, are not barred on the grounds of res judicata.

The ruling was delivered on 10th June 2014. The suit proceeded for hearing and judgment in the main suit was dated 25th of September 2015 more than a year later. A decree was extracted on 19th November 2015 and it discloses that judgment came for final disposal of the suit on 2nd October 2015. Notice of appeal is dated 2nd October 2015 and lodged in the High Court on 5th October 2015. In the grounds of appeal, the ground on res judicata arises from the ruling of 10th of June 2014 which had not been appealed within the time set for appeals and no leave to appeal was obtained as submitted by the respondent's counsel.

The precedents I have reviewed and the provisions of law demonstrate that the matter is not free from controversy on the issue of whether the ruling on res judicata amounted to a preliminary decree or order and whether if it is an order, leave had to be sought first which the appellant had not done.

The question is whether it was necessary to seek the leave of court to appeal from the ruling. The chamber summons in Miscellaneous Application No 112 of 2014 disclose that the applicant moved under order 7 rule 11 and 19 to strike out the plaint or to reject the plaint. Does the rejection of a plaint amount to a decree? Under section 2 (c) of the Civil Procedure Act, the word "decree" means:

> (c) "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either

preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include—

(i) any adjudication from which an appeal lies as an appeal from an order; or

(ii) any order of dismissal for default;

Explanation—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when the adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Clearly section 2 of the Civil Procedure Act envisages the rejection of a plaint as amounting to a decree because it finally determines the rights of the parties. The distinguishing factor is that the controversy arises from the refusal of the court to reject the plaint on the ground of res judicata. Where the court refuses to reject the plaint and does not find that the suit is barred by res judicata, the question is whether the decision results into an order whose effect is the same as a decree of a preliminary nature. In other words, does it conclusively determine the rights of the parties with regard to whether that suit is barred or not? The East African Courts have over time adopted difference approaches to the issue either as requiring leave or as requiring a matter of law to be considered on appeal even where leave has not been sought. These different approaches seem to conflict at some point.

Starting with section 7 of the Civil Procedure Act, the import of the section is that 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. The gist of the section as interpreted in various precedents is that there is a statutory bar to try an issue or matter which was directly and substantially in issue or ought to have been made an issue in a former suit between the same parties litigating under the same title.

The determination of whether such a suit is barred proceeds under Order 7 rule 11 (d) of the Civil Procedure Rules. Order 7 rule 11 (d) of the Civil Procedure Rules provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In other words, where the suit is time barred or where the suit is barred by the doctrine of res judicata, the plaint shall be rejected. The rejection of a plaint results into a decree as defined under section 2 (c) of the Civil Procedure Act. There is no similar provision giving the effect of a ruling refusing to reject a plaint as to whether it is a preliminary decree or order and regard shall be had to the precedents to establish how the courts have over time treated the matter.

A plaint may be rejected under Order 7 rule 11 (a) of the Civil Procedure Rules for disclosing no cause of action or under Order 7 rule 11 (d) where the suit appears from the statement in the plaint to be barred by any law. In **Auto Garage v Motokov (1971) EA 514** the East African Court of Appeal held that the provision that a plaint be rejected for disclosing no cause of action is a mandatory provision. Secondly, a Plaint which discloses no cause of action is a nullity and cannot be amended and lastly an amendment will not be allowed when the cause of action is barred by the law of limitation. In **Iga v Makerere University [1972] EA 65** it was held that a plaint barred by law shall be rejected under Order 7 rule 11 (d) of the Civil Procedure Rules. Finally, in **Attorney General v Oluoch (1972) EA 392**, the East African Court of Appeal, per Spry Ag. President held at page 394 that:

> In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeroj Shariff & Co Vs Chotai Family Stores (1960 EA 374) and assumes that the facts alleged in it are true.

An adjudication of the controversy of whether a plaint discloses no cause of action or is barred by statute or by law results into a decree where the plaint is rejected and is appealable as of right. However, where the court determines a point of law, it proceeds under Order 6 rule 29 of the Civil Procedure Rules and results in an order that the suit is not maintainable or is maintainable. This was considered by the East African Court of Appeal in

Nurdin Ali Dewji & others v G.M.M Meghji & Co. and Others (1953) 20 EACA 132. The East African Court of Appeal was critical of the trial judge for failure to distinguish between the rejection of a plaint under Order 7 rule 11 of the Civil Procedure Rules and dismissal of a suit on an issue of law under Order 6 rule 29 of the Civil Procedure Rules. They held that the learned trial judge erred to reject the plaint when there was an objection to the suit on a point of law and the final result was that the learned judge rejected the plaint not on the ground of an inherent defect in the plaint but because he thought that the suit was unmaintainable.

In this case, the application of the Applicant did not rely on pleadings and was therefore an application for dismissal of the suit for being unmaintainable on the ground of res judicata. It could not be considered for rejection of a plaint which proceeds upon perusal of the plaint and anything attached to it forming part of the plaint only.

Section 68 of the Civil Procedure Act bars an appeal from a preliminary decree if it is not appealed after the decree is passed. It provides that:

> Where any party aggrieved by a preliminary decree does not appeal from that the decree, he or she shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

It is therefore crucial for the court to establish whether the ruling resulted into a preliminary decree to determine whether the question of res judicata can be raised again on appeal. Can the question of whether the suit is barred by section 7 of the Civil Procedure Act be raised again when no appeal had been preferred upon delivery of the interlocutory ruling? Moreover, the suit was found by the ruling of court to be partially res judicata. This issue of whether the lease was a nullity was determined in the Judgment of Kwesiga J in HCCS No 84 of 2013 between the same parties. The subsequent judgment of Owiny – Dollo, J (judge of the High Court as he then was) was that in HCCS No 84 of 2013, the appellant had claimed that the leasehold certificate was founded on a lease which did not comply with certain mandatory provisions of the Registration of Titles Act and Kwesiga J declared the lease of the respondents illegal on that basis and cancelled

the leasehold title. To the extent that the subsequent suit in paragraph 3 (a) of the plaint avers that the plaintiff held a lease over the land, that matter was put to rest by the High Court and was res judicata. The claim for execution of a lawful lease was not res judicata and the alternative claims for recovery of premium paid and ground rent pursuant to the lease agreement were not res judicata.

It is not in dispute that the appellant did not appeal the preliminary decree rejecting part of the plaint on the ground that it is barred by res judicata. Res judicata is a fundamental doctrine and the suit would not have proceeded for trial with costs as it did, had the appellant appealed the ruling on his contention that the entire suit had been determined in HCCS No. 84 of 2013.

For ease of reference I refer to the ruling of the High Court in Civil Suit No 84 of 2013 is dated 29th of November 2013 wherein the learned trial judge set out the agreed facts. The fact was that the plaintiff is the registered proprietor of Mailo land comprised in Kyadondo block 197 Plot 199 located and Kitetika. By a lease agreement dated 4th of November 2004, the plaintiff leased to the defendant the suit property for 99 years. The lease was subsequently registered in the land registry on 11th of November 2005 under instrument No KLA 268927 as LRV 3326 folio 17 plot 99 Kyadondo block 197. The lease agreement provided inter alia for a lease term of 99 years and the payment of premium in one lump sum for the entire 99 years. The defendant paid the premium and rent due as agreed and was in possession and occupation of the suit property. One of the issues was whether the defendant's lease on the suit property was lawful and valid. The court considered the lease agreement which was registered under the above stated instrument. The court found that section 148 of the RTA invalidates any instrument that does not comply with the requirements of this section which included the fact that the signature of each party is to be in Latin character or a translation into Latin character of the signature of any party whose signature is not in Latin character. The court found that the document shows that the instrument on the part of the respondent was in Chinese

character and the name and capacity authority of the person who scribbled on the document cannot be ascertained. He found that the instrument and witnessing of the documents offended the provisions of section 148 of the RTA. In the premises he found that the subject of the suit was invalid and illegal and the court cannot sanction it and therefore disposed of the suit on the finding that the lease is illegal and invalid. He further ordered the registrar of titles to cancel the illegalities and remove it from the register of titles.

Respondent did not appeal against the decision of the High Court dated 29th of November 2013 and instead subsequently filed a suit in High Court Civil Suit No 649 of 2013 from which the current appeal emanates. The amended plaint thereof shows that it is a claim for declaration that the plaintiff is the lawful lessee of the land comprised in the Leasehold Register Volume 3326 Folio 17 Plot 99 Kyadondo Block 197 at Kitetika Mutumba 1 Wakiso district (the suit property). Secondly it was for an order for specific performance ordering the defendant to execute a proper lease between the plaintiff and the defendant in respect of the suit property. Thirdly for a permanent injunction restraining the defendant and servants or agents from interfering with the respondent's quiet enjoyment of the suit property. In the alternative the plaintiff who is now the respondent sought punitive damages, general damages and special damages together with interest.

Clearly in its ruling in Miscellaneous Application No 112 of 2014, the High Court found that the part of the suit contained in paragraph 3 (a) of the amended plaint for declaration that the plaintiff is the lawful lessee of land comprised in leasehold register volume 3326 folio 17 plot 99 Kyadondo block 197 was res judicata. However, the rest of the claims were not res judicata.

The appellant did not appeal the above ruling and instead waited for the suit to be completed and appealed finally against the judgment wherein he also raised the question of whether the court was right to hold that the entire suit was not res judicata. An appeal from a preliminary decree or order can avoid inconvenience to the parties. The ruling of the trial court in the interlocutory application seeking to strike out the plaint or to reject the

plaint proceeded from an application by chamber summons. However, any challenge to a plaint on the ground that it discloses no cause of action or that it is barred by law does not require an interlocutory application by chamber summons or notice of motion for it to be considered. It is clear from the authorities cited above that, the determination of whether a plaint should be rejected is based on only a perusal of the plaint under Order 7 rule 11 cited by the appellant in the chamber summons.

In my judgment, the procedure under Order 7 rule 11 was erroneous. An application to determine whether a suit is not maintainable from facts other than what is averred in the plaint proceeds under Order 6 rule 29 of the Civil Procedure Act which provides that:

> 29. Dismissal of suit.
>
> If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.

The provision allows the court to dismiss the suit for not being maintainable on a point of law such as res judicata. However, to proceed under Order 7 rule 11 (d) of the Civil Procedure Rules requires a perusal of the plaint. In the premises, the matter and could not have proceeded under Order 7 of the Civil Procedure Rules because the applicant who is now the appellant gave facts by affidavit evidence. In the affidavit he stated that the matters concerning the lease were settled by the court in HCCS No 84 of 2013 and therefore was res judicata. He attached the relevant ruling in HCCS No 84 of 2013.

Order 44 rule 1 (1) lists the orders from which an appeal shall lie as of right from orders made under section 76 of the Civil Procedure Act. Neither Order 7 Rule 11 nor Order 6 rule 29 of the Civil Procedure Rules are listed as the orders from which an appeal lies as of right. Order 44 rule 1 (2) provides that an appeal shall not lie from any other order except with the leave of

court making the order or of the court to which an appeal would lie if leave were given.

Appeals that may be commenced as of right are catered for under section 76 of the Civil Procedure Act and do not include orders made under Order 7 rule 11 (a) and (d) of the Civil Procedure Rules or Order 6 rule 29 thereof. On the other hand, no appeal lies from any other order except with the leave of court. Such orders can be made a ground of appeal in the main appeal from the decree. This is made clear from section 77 (1) of the Civil Procedure Act which provides that:

> 77. Other orders.
>
> (1) Except as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding subsection (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal from it, he or she shall thereafter be precluded from disputing its correctness.

Section 77 (1) of the CPA only excepts any error, defect or irregularity in an order when appealing from the main decree for purposes of formulating any grounds of appeal arising therefrom. As noted above, the decision of the trial court was preliminary and finally determined the rights of the parties on the question of whether the suit was res judicata or not. The court having found that part of the suit was not res judicata, and the appellant having not appealed the decision of the court in High Court Miscellaneous Application No 112 of 2014, is the appellant precluded from appealing it at this stage after the court dealt with the merits of the suit and made its final judgment more than a year later? This question can only be addressed by considering the judicial precedents.

Judicial precedents on the issue are as considered below:

In **Kuna Arap Rono v Swaran Singh Dhanjal [1966] EA 184**, the term "decree" under section 2 of the Civil Procedure Act was considered by the High Court of Kenya per Trevelyan J. In that case, the respondent objected to the appeal for being incompetent on the ground that in the lower court the magistrate was invited to strike out the plaint under Order 6 rule 29 of the rules. The court found that the word "decree" includes the rejection of a plaint. In that matter the plaint of the respondent had been struck out and this claim dismissed by the magistrate. The court found that the magistrate had conclusively determined the rights of the parties in the judgment which was appealable. This interpretation is persuasive because its consistent with the statute though other interpretations of superior courts take another approach.

In **Michael Kamau v Gregory Gecharu [1953] 20 EACA 59** the East African Court of Appeal considered the question of preliminary judgment whether it is appealable within the time limited to appeal. The facts were that there was a suit alleging a partnership and suing for its dissolution and for undertaking of accounts whereupon judgment was entered for the plaintiff on the issue of existence of the partnership and an order was made for its dissolution. Subsequently other prayers for consequential orders were made after subsequent proceedings and judgment. It was agreed that the two judgments were preliminary and final decrees within the meaning of section 2 of the Civil Procedure Ordinance. The subsequent judgment was delivered 12 months after the preliminary judgment was entered and the appellant appealed with the leave of court from the final judgment. The respondent objected to the appeal on the ground that it was filed out of time in the relation to the preliminary judgment. The court considered section 68 of the Civil Procedure Ordinance which is in pari materia with the section 68 of the Ugandan Civil Procedure Act which provides that:

> Where any party aggrieved by a preliminary decree passed after the commencement of this Ordinance does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

The East African Court of Appeal held that:

> The decision of the Privy Council in Ahmed Musaji Saleji and Others v. Hashim Ebrahim Saleji and Others (1914) L.R. 42 I.A. 91 is good authority for saying that the judgment delivered on 7th February, 1951, was appealable within the time limited by rule 8 of the 1925 Rules of this Court i.e. within 90 days.

In **G.R. Mandavia v. Rattan Singh [1965] EA 118**, the East African Court of Appeal considered the question of whether a dismissal of the preliminary objection that the suit was res judicata was appealable in the circumstances. In that case there was a preliminary issue as to whether the suit was res judicata and the trial judge ruled that the suit was not res judicata whereupon the defendant without leave of court appealed against the ruling. At the hearing of the appeal, the respondent objected to the appeal on the ground that the ruling did not amount to "a preliminary decree" as defined by section 2 of the Civil Procedure Act of Kenya (in pari materia with the Ugandan section 2 of the Civil Procedure Act). The East African Court of Appeal found that the sole question on which the ruling of the court is required to be made is whether the decision or ruling of the learned trial judge amounted to a "preliminary decree" from which an appeal lies as of right to the Court of Appeal. Crabbe J.A. at page 123 stated that:

> Where in any suit res judicata is pleaded the court can do one of two things – (1) it may uphold the plea and dismiss the suit, or (2) dismiss the plea and hear the suit on the merits. In the first, the result is that the plaintiff is debarred from establishing his right to the relief which he seeks from litigating an issue, and in my view it is an adjudication which conclusively determines a right upon a matter or matters in controversy in the suit. In the second, the matter in controversy are still at large, since there has been no adjudication affecting the rights of the parties, and all the issues remain alive. It seems to me therefore that a finding or decision in limine which permits the suit proceed is not a preliminary decree. Thus a decision of the court on a preliminary issue framed on the plea of res judicata is not a preliminary decree and is, therefore, not appealable.....

Law J.A. stated that:

> The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal would lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal. It follows that in my view the preliminary objection succeeds. This appeal is incompetent and must accordingly be dismissed.

Clearly the refusal of a plea of res judicata is not appealable. However, in this case, res judicata partially succeeded and that part which held that the registered lease agreement was a nullity is no longer in issue. The rest of the of the plea in relation to the contract for a lease was disallowed and the suit heard. The decision of the East African Court of Appeal in **G.R. Mandavia v. Rattan Singh** (supra) followed the Privy Council decision in **Tzamburakis and Another v Rodoussakis [1958] EA 500**. At the High court the issue was whether the suit of the respondent was time barred. The time bar objection was overruled and the suit heard on merits. On appeal the appellant raised the issue of limitation again. The East African Court of Appeal held that since there was no appeal from the preliminary ruling holding that the suit was not time barred, the ground of appeal bringing up the issue for determination by the court was incompetent. On further appeal it was argued for the appellants that they were entitled to raise the issue at appellate level even when they did not appeal the preliminary ruling and the suit was determined on merits. At pages 404 and 405 Lord Tucker stated that:

> The Court of Appeal held that there having been no appeal entered within time from the decision of MAHON, J which in their view was a preliminary decree within the meaning of s. 2 (2) and s. 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack this decision were incompetent.
>
> Their lordships do not agree. They prefer the decision of the Full Court Bench in Bombay in the case of *Chanmalswami v. Gangadharappa* (1) (1915), 38 Bom, 339 which overruled the case of *Sidhanath Dhonddev v. Ganesh Govind* (2) (1912), 37 Bom. 60 in which it had been held that decisions as to misjoinder, limitation ad

jurisdiction were preliminary decrees from which unsuccessful parties must at once appeal by reason of s. 97 of the Code.

There is, however, another reason why their lordships are of the opinion that the Court of Appeal should have dealt with the issue of limitation, viz., that s.3 of the Indian Limitation Act, 1908, set out above, in terms requires the dismissal of every suit instituted after the prescribed period of limitation even though this limitation is not pleaded. ...

In the presence case their lordships are of the opinion that no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

Grounds 1 and 2 of the appeal in so far as they were determined in the ruling in High Court Miscellaneous Application No 112 of 2014 still relate to section 7 of the Civil Procedure Act and this court is required to consider any statutory bar to a suit even where it is not pleaded. Such a suit would be an illegality.

Ground 1 of the appeal.

1. The learned trial Judge erred both in fact and law by failing to find that the suit was wholly *res judicata.*

As I have noted above the ruling of the learned trial judge rested on the proposition that there was an agreement for a lease between the parties that could be the subject of a separate suit for specific performance or for damages and what the court declared to be a nullity is the lease agreement that was registered.

The appellant faults the trial judge for finding that there was a separate agreement for a lease between the parties as a question of fact. This is a very narrow area for discussion as the trial court in the former suit declared the lease agreement a nullity. Did this nullify the undertaking of the parties or only the registration of a lease and obtaining of a lease title?

I also have carefully considered the question of the existence of a lease which forms the crux of the arguments of the appellant against the finding

of the learned trial judge that there was an agreement between the parties for a lease. I do not need to go any further than to consider the summary of facts which were agreed between the parties before Honourable Mr Justice Kwesiga in High Court Civil Suit No 84 of 2013 between the same parties. In that suit the learned trial judge clearly indicated from page 1 to page 2 the agreed facts were set out in writing and formed the basis of the ruling that the lease instrument was a nullity.

The agreed facts were that the plaintiff is the registered proprietor of the suit property as described therein. Secondly by a lease agreement dated 4th of November 2004, the plaintiff released to the defendant the said land (the suit property). Thirdly the defendant's lease interest was duly registered according to the description of the land under instrument and the registration was done on 11 November 2005. It was also agreed that the lease agreement which was registered provide for a lease term of 99 years. Secondly it provided that the lessee was to pay premium and rent in one lump sum for the entire 99 years. Further the lessee was to hold the lease subject to the covenants and powers implied under the Registration of Titles Act and the Land Act. It was also agreed that the respondent who was the defendant paid to the plaintiff the premium and rent due as agreed in the lease agreement and that the defendant who is now the respondent is in possession and occupation of the suit property.

Among other issues agreed upon which is relevant to ground 1 of appeal is whether the defendant's lease on the suit property is unlawful and invalid. The decision of the learned trial judge rested on the provisions of section 148 of the RTA which stipulates how a lease instrument is to be embodied. It is on that basis that the learned trial judge found that section 148 of the RTA invalidated any instrument that did not comply with the requirements of this section. This was primarily because the lease instrument was supposed to be signified by the signature of each party in Latin character or in the alternative translation into Latin character of the signature of any party whose signature is not in Latin character. Because the respondent executed the lease in Chinese characters, the lease was invalidated.

In the subsequent suit HCCS No 649 of 2013 and in the ruling of the learned trial judge in High Court miscellaneous application No 112 of 2014, the learned trial judge found that the suit was not wholly res judicata and only rejected the part of the plaint in paragraph 3 (a) as sought a declaration that the plaintiff is the lawful lessee of the land as described in the plaint. However, the learned trial judge found that the suit for specific performance ordering the defendant to execute a proper lease was a valid suit and was not res judicata. The other grounds dealt with a claim for the remedy of a permanent injunction to restrain the defendant who is now the appellant from interfering with the plaintiff's quiet enjoyment of the suit property or in the alternative for special damages as well as for punitive damages and general damages.

It is therefore the holding that the lease agreement which was registered was not in Latin character and not duly witnessed and therefore a nullity which was considered res judicata. I have considered the written statement of defence and paragraph 5 thereof clearly discloses that all the terms of the lease outlined in the plaint were reduced into a lease agreement which he attached as Annexure "D1". Annexure "D1" is a lease agreement between the parties.

In that agreement the lessee was required to pay Uganda shillings 18,400,000/= upon execution of the lease agreement. In paragraph 7, the balance of Uganda shillings 73,600,000/= was supposed to be paid after the lease had been duly registered. Secondly the lessor agreed and undertook to demolish any buildings on the property and vacate all occupants within one month from the date of signing the lease. Thirdly the lessor was required to remove any encumbrances on the property particularly a mortgage registered in favour of Greenland bank Ltd. Last but not least the lessee was required to take possession of the property immediately after signing the lease. The lease was subsequently registered. In the previous suit, the learned trial Judge found that the lease had been registered on 11th of January 2005. The trial court considered the claim for refund or execution of a valid lease.

I have carefully considered the issue and it is clear that the previous suit dealt with the registration of the lease under the Registration of Titles Act and particularly sections 147 and 148 thereof which required certain categories of persons to witness the signature of the parties and the signatures of the parties to the lease to be in Latin character respectively. Failure to have the statutory category of witnesses and for the signatures to be in Latin character is only relevant to registration of the lease and the obtaining of a lease title under the RTA. It does not affect the obligation of the parties under an agreement which was subsisting. The appellant's case was that the agreement was nullified and no other agreement could be read after the court decision since there was no evidence of another agreement. However, even a contract declared void does not absolve the parties of obligations under certain conditions. This is made evident by the provisions of the Contracts Act, 2010.

Section 54 of the Contract Act allows an aggrieved party to reclaim from a person who has received an advantage under a contract which has been declared void, the advantages that person received under the contract. It provides that:

> 54. Obligation of person who receives advantage under a void agreement or a contract that becomes void.
>
> (1) Where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract is bound to restore it or to pay compensation for it, to the person from whom he or she received the advantage.
>
> (2) Where a party to a contract incurs expenses for the purposes of performance of the contract, which becomes void after performance under section 25(2), the court may if it considers it just to do so in all the circumstances—
>
> (a) allow the other party to retain the whole or any part of any advantage received by him or her;
>
> (b) discharge the other party, wholly or in part, from making compensation for the expenses incurred; or

(c) make an order that the party recovers the whole or any part of any payments, discharge or other advantages not greater in value than the expenses incurred.

Under the section 54 (1) where an agreement is found to be void or where a contract becomes void, a person who received advantage under the contract is bound to restore it or pay compensation. The court has power to award compensation after declaration that the contract is void for failure to execute it in terms of sections 147 and 148 of the RTA. Moreover, a lease is registrable but an equitable lease can be considered where it is not registered or where the lease agreement has formal defects for purposes of registration. The respondent paid the lease premium of 99 years in advance and went into possession. The respondent also paid all the ground rent for 99 years in advance. The appellant signed the lease agreement without due witnesses and the respondent's signature was not in Latin character.

The learned trial judge held in HCCS No 84 of 2013 that:

> I consider the issue of general damages and prayers for costs of this suit together. Mr. Evarist Mugabi the plaintiff is a lawyer with long experience who in my view ought to have known that he was entering into an agreement that is illegal. He took unfair advantage of his knowledge and benefited from this illegal lease and received payment of shillings 91,901,000/= as a one-time premium for the invalid lease. It would amount to sanctioning of illegal enrichment of the plaintiff to award him general damages over a transaction where he is clearly guilty by executing an instrument where his signature was witnessed by a person whose identity, capacity and qualification to witness his signature was not disclosed. On this point alone the lease was found in invalid. On this basis I do not find the plaintiff an aggrieved person to deserve general damages or costs to the suit. The prayers for general damages and costs of the suit are hereby dismissed for the above reasons in addition to the fact that no evidence was adduced to show any injuries that call for award of general damages. Each party will suffer its own costs.

The illegality only related to the formal requirements of a lease agreement for purposes of registration. This did not affect the equitable title since all the elements of a contract were present and consideration was paid after a bargain of the parties whereupon the respondent took possession of the

property. According to **Halsbury's Laws of England 4th Edition reissue Volume 9** (1) Paragraph 836 at page 595:

> "Some contracts may be illegal in the sense that they involve the commission of a legal wrong, whether by statute or the common law or because they offend against the fundamental principles of order and morality. Less objectionable contracts may be simply void by common law or statute"

In my judgment the contract was less objectionable because it breached a formal requirement for purposes of registration. In fact, the learned trial Judge quoted the rationale of enactment of section 147 and 148 of the RTA as held by the Supreme Court of Uganda in **Frederick J. K Zaabwe v Orient Bank Ltd and 5 others (Civil Appeal No 4 of 2006) [2007] UGSC 21** (10th July 2007). In that appeal Katureebe JSC considered the rationale for enactment of sections 147 and 148 of the RTA when he stated that:

> Further, Exhibit D5 at page 33 of the record which is the letter from the 1st respondent to the 2nd respondent communicating the availability of credit facilities was accepted by the said directors whose signatures appear on the document. So there may not have been doubt in the mind of the 1st respondent's manager that the persons signing before him were directors of the 2nd respondent. But that was knowledge between the Bank and its customer. However, it has to be appreciated that the mortgage was to be registered at the Land Office. It is a public document in which third parties may have an interest. How was the registrar to know that the scribbled signatures without names or capacity of the signatories, and in absence of the company seal, had the authority to sign on behalf of the 2nd respondent? In my view, the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. When the witness attesting to a signature merely scribbles a signature, without giving his name or capacity, how would the Registrar or anyone else ascertain that that witness had capacity to witness in terms of section 147 of the Registration of Titles Act?
>
> ...
>
> Whatever definition one comes up with, the signature of instruments under the Registration of Titles Act must comply with section 148.

> Therefore, as to whether the signature on the mortgage complied with Section 148, I must note the following: The names of the signatories are not given, nor their capacity to sign on behalf of the company. One cannot tell whether they are directors, secretary or even officers of the company at all. There is no company seal or stamp at all. Furthermore, even the witness to the signatures has neither disclosed his name nor his capacity to witness instruments as provided by section 147 of the Act. In the circumstances, how would the registrar know that the persons who signed the mortgage deed on behalf of the company, had authority to execute that deed? Or that the attesting witness had the legal capacity to do so? It is to be noted that the company had opted for signatures instead of the company seal as would have been permitted under section 132 of the R.T.A.
>
> In my view, the execution of the mortgage by the 2nd respondent did not comply with the provisions of sections 147 and 148 of the R.T.A. I agree with the decision in the **General Parts** case (supra) that such irregularity renders the mortgage invalid.

It is clear from the above two passages that the court considered the rationale being for the registrar of titles and anybody to know that the document was duly executed and the capacity of the signatories. The fact that the parties to the agreement knew each other was not considered material. It follows that between the parties some quasi contractual obligations can be implied and enforced. These contractual obligations remained subsisting and are enforceable from time to time. Obligations of parties in a contract do not necessarily depend on the formal requirements for registration of the instrument embodying the contract for purposes of notice to the public. Where all the elements of a valid contract are available, that relationship is enforceable as between the parties to the contract. For instance, an agreement to execute a lease is enforceable. In other words, in such cases the lease could be based on a prior agreement and the formal requirements of the lease are subsequent requirements to the contract to execute a lease. The question may be one of fact as to what embodied an agreement to execute a lease and obtained a lease title.

There are illustrations with regard to the doctrine of unjust enrichment for parties under a void agreement to have a cause of action to recover the money had and received unjustly. In **Fibrosa Spolka Akcyjna v Fairbairn**

Lawson Combe Barbour, Ltd [1942] 2 All E.R. 122 Lord Wright at page 135 noted that:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.

Clearly, upon having the lease declared void, the respondent still had the cause of action to recover money had and received by the appellant and such a cause of action cannot be res judicata since it would be unjust for the appellants who executed the instrument as a party to retain the benefit from it and have the instrument declared null and void. Such an arrangement is unconscionable. Further, according to **Halsbury's laws of England 4th Edition Volume 9 paragraph 674** with regard to payment under a void contract, it is written that:

> Money paid under a contract void at common law is recoverable on grounds of total failure of consideration; and an action in conversion auditing may be brought in respect of goods delivered under such an apparent contract.

In addition, the appellant having received the full payments under the lease cannot run away from his obligations as a lessor without compensation of the respondent. His obligations are in any case enforceable. To hold otherwise is to use sections 147 and 148 as an instrument of injustice or fraud.

In **Rochefoucauld vs. Boustead [1897] 1 Ch. 196** Lindley L.J. who read the judgment of the court held that the Statute of Frauds should not be used as an instrument of fraud. In that case, the Plaintiff had made a conveyance to the Defendant in trust for her but there was no evidence in writing of the trust. The plaintiff brought an action for account of the defendant's dealings in the property. The defendant claimed that the property was conveyed to him as a beneficial owner. Secondly that the trust was not proved by any

writing signed by the defendant as required by the Statute of Frauds. There was however evidence of many correspondences which could prove the trust arrangement. Kekewich J dismissed the action on the basis of the requirement for the trust to be evidenced in writing signed by the defendant and the plaintiff appealed. LINDLEY L.J. who delivered the judgment of the Court (Lord Halsbury L.C. and Lindley and A. L. Smith L. JJ) held at pages 205 and 206:

> This conclusion renders it necessary to consider whether the Statute of Frauds affords a defence to the plaintiff's claim. The section relied upon is s.7, which has been judicially interpreted in *Forster v. Hale* (1) and *Smith v. Mathews*. (2) According to the authorities, it is necessary to prove by some writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial. It is further established by a series of cases, the propriety of which cannot be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parole evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

By claiming the land himself after the ruling of the court showing that the lease agreement which was registered was void under sections 147 and 148 of the Registration of Titles Act, the appellant was using the provisions of the law as a vehicle to take back vacant possession of the leased land whereat he had given vacant possession to the respondent for full consideration.

Coming to the facts of this appeal, the judgment in High Court Civil Suit No 84 of 2013 went beyond the issue of illegal registration and lease agreement which was the basis of it under sections 147 and 148 of the RTA to suggest that the contract between the parties which culminated in a formal lease

agreement was void. What was void was based on the requirement for registration but the obligations of the parties had been partially fulfilled in that the respondents had paid the premium for 99 years and all the ground rent in advance for the same period of time. The Respondent was given vacant possession of the leased property. Even without a formal contract in terms of a formal lease instrument that could be registered, there was an equitable lease which had been paid for and which is implied at law. Last but not least, the statutory basis for part of the cause of action under a void contract is *inter alia* section 54 (1) of the Contracts Act referred to above.

In **Walsh v Lonsdale (1882) 21 Ch. D. 9** the plaintiff brought an action for illegal distress for rent. The plaintiff had agreed to let and the defendant had granted the right to a lease on certain terms for seven years and the terms were inserted in a certain lease which had a term of four years. What is material being that the terms of the existing lease were different. The defendant demanded one year's rent in advance and other dues which the plaintiff paid. The plaintiff commenced an action for improper distress for rent and for injunction. There was an agreement but no lease instrument had been executed. The question was whether the distress was improper in light of the fact that no formal lease had been executed. It was argued that to justify a distress there had to be a legal tenancy and rent in arrears. In opposition, it was argued that a tenant holding under an agreement for which specific performance could be granted stands in the same position as to liability as if a lease had been executed.

Jessel M.R, noted that there was an agreement for a lease under which possession has been given. He found that the tenant falls under an agreement for a lease. He holds in at the same terms in equity as if a lease had been granted, and in the premises the tenant could not complain of the exercise by the landlord of the same rights as the landlord would have had as if the lease had been granted.

Lindley L.J. held inter alia at page 17 that:

> I also think that the rights of the parties in this case turn upon the lease has it ought to be framed in pursuance of the contract into which these parties have entered.

In conclusion, the question is whether the parties entered into a contract and the answer is yes. The terms of the contract are also reflected in the lease instrument albeit executed contrary to sections 147 and 148 of the Registration of Titles Act. This contract was partially fulfilled by the respondent paying the sums stipulated thereunder. However, the formal instrument which was registered did not conform to the statutory requirements and was void. The respondent however was given possession of the land and paid for the lease.

In the premises, the learned trial judge could not be faulted for finding that the suit was not wholly res judicata. What was only res judicata was the issue of whether the formal lease instrument which was registered and pursuant to which a leasehold certificate of title had been issued, was void because it contravened the provisions of sections 147 and 148 of the Registration of Titles Act. The question of the relationship between the parties in terms of the payment of premium, and rent as stipulated above remained. The learned trial judge could not be faulted for finding that there was an agreement between the parties to execute a lease. This is not based on the formal instrument that was nullified but on the relationship between the parties wearing both parties accepted the terms of a lease in which the respondent was given possession of the lease and paid for it. There was a subsisting equitable lease which could be formalised by the execution of a contract reflecting the terms upon which the parties had agreed. The question of the signatories to the lease while formal requirements. In the premises, ground 1 of the appeal has no merit and is disallowed.

With regard to ground 2 of the appeal, the memorandum of appeal stipulates that:

2. The learned trial Judge erred both in fact and law by finding that the parties entered into a valid contract for a lease and thereby arriving at a wrong conclusion occasioning a miscarriage of justice.

Ground 2 of the appeal has been resolved in my finding in ground one of the appeal in that the learned trial judge found that there was an agreement between the parties in which consideration was given and the respondent was given possession and there was therefore unenforceable equitable lease. Ground 2 of the appeal has no merit and is hereby disallowed.

3. The learned trial Judge erred both in fact and law by altering the agreed facts outlined in the Joint Scheduling Memorandum, thereby arriving at a wrong conclusion occasioning a miscarriage of justice.

With regard to ground 3 of the appeal, I find no merit in stating that the learned trial judge altered the agreed facts. It is by implication of the law that an equitable lease was inferred in the relationship between the parties and this was based on a contract in which the parties had executed a formal lease that was nullified. The relationship between the parties was proved by possession of the premises given to the respondent and acceptance of a premium and ground rent by the appellant. Further, the formal lease agreement only reflected the terms of the agreement part of which had been executed by the parties. Ground 3 of the appeal has no merit and is hereby disallowed.

With regard to ground 4 of the appeal the appellant averred in the memorandum of appeal that:

4. The learned trial Judge erred in law by ordering for the specific performance of an agreement for a lease and thereby arriving at a wrong decision occasioning a miscarriage of justice.

Having decided grounds 1, 2 and 3, ground 4 also has no merit because the terms of the lease agreement were evident from the conduct of the parties in that there was payment by the respondent, there was possession given to the respondent and the appellant received the money. Further, there was evidence of the terms of the lease in the impugned agreement which was nullified not because of the terms thereof but because of the signatories which did not comply with the sections 147 and 148 of the Registration of

Titles Act. In the premises ground 4 of the appeal is also disallowed for want of merit.

5. The learned trial Judge erred both in law and fact by finding that the Respondent acquired an equitable interest in the Appellant's land and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

Similarly, having found that there was an equitable lease interest in the resolution of grounds 1, 2, 3 and 4, ground 5 of the appeal has no merit and is hereby disallowed.

In ground 6 of the memorandum of appeal, the appellant averred that:

6. The learned trial Judge erred both in law and fact by finding that the lease hitherto held as invalid, was a valid contract between the Appellant and the Respondent and thereby erred occasioning a miscarriage of justice.

Ground 6 of the appeal has been resolved in grounds 1, 2. Ground 6 of the appeal has no merit and is hereby disallowed on the basis of my findings in ground one of the appeal.

In the premises, grounds 1, 2, 3, 4, 5 and 6 of the appeal are devoid of merit. I would find that the appeal of the appellant lacks merit and is hereby dismissed with costs.

My learned sisters Lady Justice Irene Mulyagonja, JA and Lady Justice Monica Mugenyi, JA also agree that the appeal be dismissed. Accordingly, the appellant's appeal stands dismissed with costs.

Dated at Kampala the 12th day of July 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 07 OF 2017
(Arising from HCCS No. 649 of 2013)

(Coram: Madrama, Mulyagonja, Mugenyi, JJA)

EVARISTO MUGABI::APPELLANT

VERSUS

CHINA ROAD CORPORATION LTD:::::::::::::::::::: RESPONDENT

(Appeal against the decision of Justice Alphonse Chigamoy Owinyi-Dollo, J. (as he then was) delivered on 25th September 2015 in High Court Civil Suit No. 649 of 2013)

JUDGEMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother, Christopher Madrama Izama, JA. I agree with his decision and the reasons for it and the conclusion that the appeal be dismissed.

Dated at Kampala this 12th Day of July 2022.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA & MUGENYI, JJA

CIVIL APPEAL NO. 7 OF 2017

EVARISTO MUGABI ..... APPELLANT

VERSUS

CHINA ROAD CORPORATION LTD ..... RESPONDENT

(Appeal from the Ruling of the High Court of Uganda at Kampala (Owiny Dollo, J) arising from Civil Suit No. 649 of 2013)

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of my brother, Hon. Justice Christopher Madrama, JA in this Appeal. I agree with the decision arrived at the reasons therefor and the orders proposed therein, and have nothing useful to add.

Dated and delivered at Kampala this 12th day of July, 2022.

Monica K. Mugenyi
Justice of Appeal