THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0486-2005

G W WANENDEYA PLAINTIFF

VERSUS

STANBIC BANK (U) LTD DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The plaintiff, G W Wanendeya, brought this action, seeking to recover from the defendant, Stanbic Bank (U) Ltd, special and general damages, interest and costs of this suit. The plaintiff contends that the defendant, or its predecessors in title, on 24th April 1992, dishonestly and secretly, entered on the plaintiff's certificate of title, LRV 527 Folio 11 Plot No. 122 Sixth Street, Kampala, a caveat, and maintained such caveat from such time until recently. By so doing the defendants denied the plaintiff an opportunity to rent out the said certificate of title to those interested in mortgaging the same from whom he would have raised income at the rate of shs1,350,000.00 per month.
2. The plaintiff claims special damages of Shs148,500,000.00, general damages, interest at the rate 35% per annum from 1st May 1995 till payment in full, costs and any other relief this court may deem fit.
3. The defendant in its written statement of defence raised various defences including several points of law, three of which were argued as preliminary points of law. These

were that this suit discloses no cause of action, that it was time barred, and finally that it was res judicata in so far as the plaintiff had filed in the same court civil suit no. 437 of 2001 and civil suit no. 75 of 2004 dealing with the same subject matter, and which had been decided finally by this court.

4. Learned Counsel for the defendant, Mr. Pope Ahimbisibwe, submitted that this suit did not disclose a cause of action as it had not shown which civil right the plaintiff was entitled to that was breached by the defendant. He referred to the case *of Motokov v Auto Garage East Africa [1971] EA 541*. Secondly he submitted that this suit was time barred in so far as the caveat was alleged to have been entered on the property in 1992 and only removed 2003. *Section 3(1) of the Limitation Act* limited such actions in contract or tort to a period of six years only within which an action could be brought.
5. Lastly Mr. Ahimbisibwe submitted that this suit was res judicata in so far as the matters in issue in this suit were previously in issue in two previous civil suits filed in this court, civil suit no. 437 of 2001 and civil suit no.75 of 2004 which were dismissed on 10th March 2003 and 18th May 2004 by Arach Amoko, J. This suit therefore is filed in contravention of *Section 7 of the Civil Procedure Act*. He relied on the case of *Ponsiano Ssemakula v Suzan Magara & 2 others, [1979] HCB 90.*
6. Learned Counsel for the plaintiff, Mr. Augustine Ssemakula, submitted that this suit disclosed a cause of action in so far the defendant had wrongly retained the certificate of title in question, and wrongfully entered onto it, a caveat, in addition to wrongfully passing it on to the Cooperative Bank Ltd. These actions of the defendant had caused loss to the plaintiff which he claimed in this suit. With regard to limitation, Mr. Ssemakula

submitted that detention of a certificate of title was a continuing cause of action which could not be defeated by limitation.

7. Lastly with regard to the plea of res judicata, Mr. Ssemakula submitted, if I understood him correctly, that this suit was not res judicata as the previous decisions referred to by the defendant were decided as preliminary points of law. The matters in issue in this suit were not heard and determined in those previous suits. He referred me to the case of *Ismail Dabule v Wilson Osuna Otwanyi, High Court Civil Suit No. 804 of 1991.*
8. I find no merit on the claim that this suit discloses no cause of action. The plaint clearly sets out the rights of the plaintiff that were violated by the defendant, and that the plaintiff suffered loss as a result thereof for which relief is sought from this court. I also agree with Mr. Ssemakula for the plaintiff that the cause of action was a continuing cause of action with regard to the continued detention of the plaintiff's certificate of title and the maintenance of a caveat on the said title. This suit in that regard is not time barred.
9. I now turn to the issue of res judicata. It is clear that the facts set out in the plaint in civil suit no.437 of 2001, civil suit no. 75 of 2004 and the current suit are substantially the same, claiming loss of income from the none availability of the certificate of title to Plot 122 Sixth Street, Kampala, at the rate of shs1,350,000.00 per month. The suits are between the same parties in this suit. The only significant difference is in the relief sought. In civil suit no. 437 of 2001 there was a prayer for 'vacation of the caveat on plot 122 Sixth Street, Industrial Area, Kampala.' In civil suit no. 75 of 2004 there was a prayer for 'The return of the duplicate title deed after the removal of the caveat.'
10. In the suit before this court now there is no prayer for either vacation of the caveat or the return of the title deeds. The prayers are otherwise the same in substance as the prayers in

the previous two suits. In civil suit no. 75 of 2004 there are prayers for '1,350,000.00 per month from May 1st 1995 until paid off, general damages, interest, costs and any other relief.' In civil suit no. 437 of 2001 the prayers are for 'Shs152,550,000.00, general damages, interest on the above, costs of the suit and any other relief.' These are in substance the prayers in this suit arising from the same cause of action expressed in all the three suits.

11. It is true as pointed out by Mr. Ssemakula that the previous suits were decided on a preliminary point of objection. In civil suit no.437 of 2001, Arach Amoko, J., decided thus,

> 'The plaintiffs have not followed the right procedure. Applications for removal of caveats are done under S 149 of the RTA. They should seek legal advice from an advocate. This matter is misconceived and wrong in law. It is accordingly dismissed with costs to the defendant.'

12. In civil suit no. 75 of 2004, again Arach Amoko, J., decided the case in the following words,

> 'My ruling in 437/2001 still stands. The plaintiff is advised either to abide by it or to appeal against it if he so wishes. For that reason, I find this suit again misconceived and in disregard of my Ruling aforesaid. It is accordingly dismissed with costs to the Defendant.'

13. Those are the facts. Now to the law. *Section 7 of the Civil Procedure Act* states,

> '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 such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

14. The *Court of Appeal for East Africa in Kamunye v Pioneer Assurance Ltd [1971] EA 263* considered the foregoing provision. Law, Ag. V-P., stated,

> ‘The test whether or not a suit is time barred by res judicata seems to me 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 applies 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 the parties, exercising reasonable diligence, might have brought forward at the time *Greenhalgh v Mallard, [1947] All E.R. 255*. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply *Jadva Karsan v Harnam Singh Bhogal (1953), 20 E.A.C.A. 74*.’

15. If I understood Mr. Ssemakula correctly his contention is that though the matters in issue in this suit may have been substantially in issue in the previous suits those matters were never heard and determined in those previous suits, and as such this suit is not res judicata. In support thereof Mr. Ssemakula provided to the court a copy of the decision of this court in *Ismail Dabule v Wilson Osuna Otwanyi Civil Suit No. 804 of 1991.* Unfortunately the copy of the decision provided to this court is not complete, and it contains no citation for me to attempt and trace the same. I am unable to conclude that this decision supports the arguments of Mr. Ssemakula.
16. Be that as it may, it is clear that the decision in civil suit no. 437 of 2001 by Arach Amoko, J., is a final decision that disposed of the suit wholly, and amounted to a decree. In such circumstances it is sufficient to raise the bar of res judicata as it has wholly disposed of the matters in issue in that suit. The option for plaintiff at that stage, if dissatisfied, was to appeal against the decision, and not file another action. It would be for the appellate court to consider whether the trial court was right to dispose of all issues in that suit without providing the parties an opportunity to be heard on all the issues that were in issue in that former suit.

17. I suppose that it is for that reason that the Arach Amoko, J., dismissed the second suit, as it was res judicata, though no mention was made of either res judicata or *Section 7 of the Civil Procedure Act*.

18. I am fortified in my view by the decision of the Court of Appeal for East Africa in *South British Insce Co. Ltd v Mohamedali Taibji Ltd [1973] E.A. 210* on appeal from Kenya. In the trial court the judge struck out the plaint for disclosing no cause action. The plaintiff appealed against that decision which had been extracted as 'Order'. On appeal it was argued for the respondent that the appeal was incompetent. Mustafa, J.A., stated,

> 'I agree with Mr. Lakha that what emerged from the decision of the trial judge was a "decree". The trial judge struck out the plaint and dismissed the suit with costs. That conclusively determined the rights of the parties.'

19. The other two judges agreed with Mustafa, J.A. The appeal was available to the parties as of right according to the rules as the decision of the trial court was a decree.

20. Decree is defined under *Section 2 of the Civil Procedure Act* in the following words,

> '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 all or 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 Sections 35 or 95 of this Act, but shall not include— (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default;'

21. The decision in civil suit no. 437 of 2001 was not a decision in default. As far as the court deciding was concerned that decision conclusively determined the rights of the parties, leading to the dismissal of the civil suit no.75 of 2004 which was basically and substantially about the same subject matter between the same parties. As the decision of the court in civil suit no. 437 of 2001 was a decree, it was final. Only an appeal against

the decree in civil suit no.437 of 2001 is able to challenge the same, and not a subsequent suit.

22. For those reasons I accept the preliminary objection and conclude that this suit is barred by *Section 7 of the Civil Procedure Act*. It is dismissed accordingly with costs to the defendant.

Dated, signed and delivered at Kampala this 23rd day of January 2006

FMS Egonda-Ntende
Judge