THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 319 OF 2009

MAVID PHARMACEUTICALS LTD}.....PLAINTIFF

VERSUS

ROYAL GROUP OF PAKISTAN}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection to the Plaintiff's action against the Defendant, by way of an address of the court through written submissions. On 19 September 2013, the Defendant was represented by Counsel Brian Kaggwa of Messrs Impala Advocates while the Plaintiff was represented by Counsel Richard Latigo of Messrs Lex Uganda Advocates.

Upon completion of pre-trial conferencing in which issues for trial were agreed, are firstly whether there was a breach of contract between the parties and secondly what remedies the parties are entitled to. The Defendants Counsel intimated to court that the third issue is on the competence of the suit as a preliminary point which was capable of determining the suit wholly. It was agreed that Counsels should address the court in written submissions on the preliminary point of law.

Preliminary objections of the Defendant to the suit

The Defendants Counsel submitted that on 16 April 2009, the Defendant filed Company Cause No 19 of 2009 as a creditor petitioning the court and seeking to windup the Plaintiff Company for failure to settle a debt of US$23,439.92. He submitted that the debt arose out of a series of transactions in which the Defendant was the supplier and the Plaintiff the purchaser with specific documentary credit terms of payment. The Defendants Counsel relies on the facts pleaded in the

winding up Petition and the defence of the Plaintiff to the Petition by way of an affidavit of its Managing Director sworn on 30 July 2009. It is the Defendants case that in the winding up Petition at the close of pleadings and preliminary submissions before the trial judge, the Plaintiff who is the Respondent therein conceded by way of a consent judgement that the debt is due and not disputed as alleged in the affidavit in opposition to the winding up Petition. The Plaintiff settled the debt by remitting payment to the Defendant in a sum of US$23,439.92 together with costs.

In the current suit, the claim in the plaint is for the immediate payment of US$72,093.79 being a claim for the purchase price of goods paid for but not allegedly used and charges for the destruction of the said goods. The facts in the plaint are premised on the same facts as those pleaded in Company Cause No 19 of 2009. In fact the words in the affidavit in reply are repeated verbatim in the plaint namely in civil suit No 319 of 2009. The transaction arose out of a series of transactions conducted between the parties at the same time with documentary credits payment terms.

The issue before this honourable court under Company Cause No 19 of 2009 was whether the debt arising out of the series of transactions was indeed due, and if so, whether allegations by the Plaintiff that the Defendants supplied it with raw materials that were subsequently rejected by the National Drug Authority amounted to a plausible defence entitling it not to effect the payment arising from the supply contract and documentary credits terms.

In the instant case, Counsel contends that the issue is whether there was a breach of contract by the Defendant arising from the Defendant supply of raw materials to the Plaintiff and the letter of credit, which were accepted (on the basis of an on-site letter of credit) by the Plaintiff and whose bankers effected payment on that basis. It is on the basis of those facts that the debt under the winding up Petition and the claim in the instant matter arose out of the same series of transactions which included as the present matter the supply of raw materials for the Plaintiff to manufacture the Semodex drug. The facts giving rise to the claim in both suits are the same with payments arise out of the same series of transactions already determined and concluded by this honourable court. Consequently the claim in the current suit is not only res judicata but does not give rise to a new cause of action upon which the Plaintiff can found its new claim. Both suits

are all about the same issue, the supply of pharmaceutical drugs and raw materials. Counsel referred to the bill of lading, documentary credits and consent judgement in Company Cause No 19 of 2009.

The Defendants Counsel further contends that the consent judgement in Company Cause No 19 of 2009 finally resolved the matter touching upon the Plaintiffs claim in the current suit. This is evidenced by the detail of the pleadings between the parties, and particularly so because the Plaintiffs opposition/defence to the Petition was premised on the Semodex raw materials which was conclusively determined upon resolving the whole suit under the consent judgement of 4 November 2009.

Finally Counsel contended that the Plaintiff on the basis of the documentary credits and other documents accepted the goods and did not object to it. The Plaintiff took the goods in its custody for a long time and even proceeded with the trial manufacturing exercise. The Plaintiff having accepted the goods cannot be seen to belatedly allege the contrary and also having led the Defendant to believe that it had accepted the goods. The Plaintiff has not returned the goods but also wants to keep the money, contrary to law and equity. Counsel submits that the foregoing facts provide the basis for the submission that the Plaintiff has no cause of action in the instant case against the Defendant. Secondly the Defendant asserts that the suit is res judicata and ought to be rejected or struck out with costs. Thirdly that it was clear that the Plaintiff is abusing court process by litigating about the same matters which were resolved or ought to have been resolved in Company Cause No 19 of 2009.

As far as the law is concerned, the Defendant's case is that the claim is in the present suit is barred by the doctrine of res judicata as it ought to have been made in the previous suit before this honourable court in Company Cause No 19 of 2009 between Royal Group of Pakistan versus Mavid Pharmaceuticals Ltd. Counsel relied on section 7 of the Civil Procedure Act and the case of **Chris Tushabe versus bank (in liquidation) HCCS No 364 of 2010**. Furthermore the cases of **Semakula versus Magala and two others [1979] HCB 90** and **Kamunye and others versus the Pioneer General Assurance Society Ltd [1971] EA 263** lay down the general principles that: no court shall try any suit or issue in which the matter directly and substantially in issue has also 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 of competent jurisdiction. Secondly in determining whether or not a suit is barred by res judicata, the test is whether the Plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action, a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and has been determined. The bar of res judicata does not only apply to all issues which the first court was called upon to adjudicate but also to every issue which might properly belong to the subject matter of litigation and which might have been raised through the exercise of due diligence by the parties. In Karia and another versus Attorney General and others [2005] EA the Supreme Court of Uganda summarised the tests for a plea of res judicata to succeed from previous precedents.

The Defendants Counsel contends that the plea of res judicata ousts the jurisdiction of the court and is a fundamental doctrine to the effect that there has to be an end to litigation.

As far as the pleadings in the Company Cause No 19 of 2009, which was a winding up Petition is concerned, the issue was whether the debt arising out of the series of transactions was indeed due and if so whether allegations by the Plaintiff that the Defendant supplied it with raw materials which were subsequently rejected by the National Drug Authority amounted to a plausible defence entitling it not to effect the payment arising from the documentary credits supply.

The issue the current suit is whether there was a breach of contract by the Defendant arising from the Defendants supply of raw materials to the Plaintiff under a letter of credit which was accepted (on the basis of an on-site letter of credit) by the Plaintiff and whose bankers effected payment on that basis. The Defendants Counsel contends that documentary credits are defined as:

> "Any arrangement however named or described whereby a bank called the issuing bank acting at the request and on the instructions of a customer (the applicant) or on its own behalf; is to make payment to or to the order of the third-party (the beneficiary); or is to accept and pay bills of exchange drawn by the beneficiary. Secondly authorising another bank to effect such payment or to accept and pay such bills of exchange; or authorise another bank to negotiate, against stipulated documents provided that the terms and

conditions of credit are complied with...” (See Roy Goode in his textbook Commercial Law, Second Edition at page 964).

It is the Defendants submission that it is a common feature of all types of letters of credit is reflected in the quotation below that:

> “In accordance with the agreement between the seller and the buyer in the contract of sale (the underlying contract), the buyer arranges the payment of the price by a bank normally at the seller's place, on presentation of specified documents which usually include the transport documents, and the performance of other conditions stated in the credit and advised by the bank to the seller. On the presentation of the documents the bank pays the purchase price, according to the terms of credit, by sight payment, deferred payment, or by acceptance or negotiation of bill of exchange is drawn by seller...” (See Schmitthoff’s Export Trade, The Law and Practice of International Trade 9th edition at page 400).

Counsel further contends that letters of credit are autonomous in character and the credit is separate from and independent of the underlying contract of sale or other transaction. The letter of credit is equivalent for that matter to a bill of exchange (see **Cumber International Ltd versus National Bank of Kuwait (1981) 1 WLR 1233**). Counsel submits that it is a settled position of law that acceptance of documents under a letter of credit does not preclude the purchaser from subsequently rejecting the goods if on arrival they are found not to conform to the contract of sale. Consequently the Plaintiff was contractually bound to make payment for the supplies according to the documentary credit terms committed to, by it. Furthermore upon receipt of the goods, it had ample time to reject the goods but did not. On the contrary the Plaintiff proceeded to accept the goods and kept it in its custody and proceeded with the manufacturing processes. The Plaintiff raised the issue concerning the raw material supply in Company Cause No 19 of 2009 and the same was conclusively determined in the consent judgement.

The Defendants Counsel secondly maintains that the plaint does not disclose a cause of action against the Defendant.

Counsel relied on Order 7 rule 11 (a) of the Civil Procedure Rules which provides that the plaint shall be rejected where it does not disclose a cause of action. Counsel further relied on the case

of **Tororo Cement Company Ltd verses Frokina International Ltd Civil Appeal No 2 of 2001** for the holding that a cause of action means every fact which is material to be proved to enable the Plaintiff to succeed or every fact which if denied, the Plaintiff must prove in order to obtain judgement. Counsel further prayed that the court considers the definition of a cause of action in the Court of Appeal case of **Auto Garage versus Motokov No three (1971) EA at 514** for the three elements necessary for a plaint to disclose a cause of action. A plaint which does not disclose a cause of action is a nullity and cannot be amended.

Furthermore, the Defendant's Counsel relies on the joint scheduling memorandum in which the Plaintiff admits certain facts and documents which include the bills of lading, documentary credits (irrevocable letters of credit) and supportive documents inclusive of the consent judgement in Company Cause No 19 of 2009. Once facts and documents are admitted, the court can use these without any further evidence to arrive at a decision. Counsel relied on several authorities and the case of **Administrator General versus Bwanika James and 9 Others, Supreme Court Civil Appeal No 7 of 2003** for the proposition that admissions made may form the basis of a judgement because there is no need for proof.

Plaintiff's submissions in reply to the preliminary objection

By way of background the Plaintiff's Counsel submits that Company Cause No 19 of 2009 was a Petition by the Defendant to windup the Plaintiff on the ground of failure to pay a liquidated demand of US$23,589.92. The matter did not go for trial on any of the issues and was settled by way of a consent judgement and the sum in question was paid. There was no counterclaim by the Plaintiff in the winding up Petition. As such there was no adjudication on the entitlement of the Plaintiff against the Defendant in the Company Cause. While the proceedings for the winding up were on going, the Plaintiff instituted the current suit. In the current suit the Plaintiffs claim is for breach of contract for a sum of US$62,093 on account of the supply of raw materials as well as additional claims for freight and storage charges related to the delivery of raw materials. The current claim is an entirely different cause from the Company Cause debt. The consent judgement did not in any way make any finding for or against entitlements of the Plaintiff as against the Defendant which position could not be determined under a Company Cause. It is arguable that because Royal group of Pakistan won its claim against the Plaintiff by consent, that

the Plaintiff could not or cannot file a claim against the current Defendant. The court and the parties being the same is not a bar for the issue of the entitlements of the Plaintiff to be brought for adjudication. The Plaintiff has not claimed the US$23,589.9 in its claim of US$62,093 but only claimed in the value of a contract that was executed by the same parties.

The case of **Karia and Another versus Attorney General and others [2005] EA 83** lays down the tests used to determine whether a suit is res judicata. The plaint in High Court civil suit No 319 of 2009 is for breach of contract in so far as the goods that were delivered were not fit for the purpose. The Plaintiff seeks compensation for freight charges and storage of the goods which are matters clearly not in issue in Company Cause No 19 of 2009. The defence of Royal Group of Pakistan/Defendant is that it was the Plaintiff's duty to ensure that the containers in which the materials were packed had to be tightly closed to prevent evaporation and subliming. The Defendants defence is that it does not have notice of the condemnation of the raw materials by the National Drug Authority and the Plaintiff has not suffered any damage or loss and if any, the same was self inflicted. It is clear from the written statement of defence that the Defendant admits receipt of US$62,093 but disputes that the sum includes an inflated sum being a balance on previous invoices between the parties. The Defendant contends that the actual invoice value should be US$22,381.30. The figure of US$22,381.30 is not the same figure the Defendant claimed and was paid under Company Cause No 19 of 2009.

Even though the current dispute is between the same parties, the claims alleged to be res judicata are not one and the same nor were they determined by the court in Company Cause No 19 of 2009. Consequently there are matters that require trial by adducing evidence. The issues outlined above are clearly not the same issues in the Company Cause which dealt with a liquidated debt that the Plaintiff has since paid off. The matters were not pleaded in the Company Cause nor were they determined in entirety by a court of competent jurisdiction.

The Plaintiff's Counsel further contends that the mere fact that the consent judgement was in favour of the Defendant does not mean that the issues raised in the present suit were determined. The arguments about res judicata are inapplicable. This is for the simple reason that an argument been raised now ought to have been raised in the previous pleadings does not make it res judicata but that issue in question should have been determined.

The doctrine of res judicata is intended to bar the trial of an issue which was directly or substantially in issue in a former suit between the parties. It requires that the issue had been raised, heard and finally decided by the court according to the case of Karia versus Attorney General and others [2005] EA (supra). On the basis of section 7 of the Civil Procedure Act and the decision of the Supreme Court in Karia versus Attorney General and others (supra), in the absence of a finding of the court or the parties on an issue, the plea of res judicata cannot be raised. The plea is a superfluous argument coming as an afterthought as is the practice of the Defendant to delay the resolution of the dispute through preliminary/interlocutory matters. At the commencement of the suit and upon the defence been filed, the Defendant applied for security for costs by which he contended that the Plaintiff was not seized with the means/sufficient resources to meet its costs in the event that the suit was decided in favour. Nowhere was it indicated that the suit was res judicata.

The security for costs has been deposited in court and the Defendant's efforts to defeat the same by way of appeal were defeated. Consequently it appears that the Defendant does not want the dispute to be resolved on the merits. The Defendant belaboured to render an explanation of its pleadings in the Company Cause No 19 of 2009 but the court ought not to accommodate those arguments without taking evidence. The Plaintiff agrees with the authorities on the necessary ingredients for the disclosure of a cause of action as laid out in several cases cited by the Defendants Counsel. The test comes into play upon perusal of the pleadings in question. The plaint on its own discloses a cause of action. In the written statement of defence, the Defendant in paragraphs 3 (b) and 3 (j) admits receipt of US$62,093. The Defendant only contends that the amount should have been a lesser sum as the invoice value included in part an outstanding payment to which effect there are several annexes attempting to explain that figure. This requires the adducing of evidence. In the premises, the preliminary objections ought to be dismissed with costs and the suit set down for hearing.

Defendant's submissions in rejoinder

In rejoinder the Defendants Counsel reiterated submissions on the ingredients of res judicata. On the basis of the doctrine it is submitted that the matters raised by the Plaintiff in the current suit are the same as in Company Cause No 19 of 2009. The Defendants Counsel relies on the

proceedings in the court before the consent judgment was signed other than considering the pleadings. Counsel submitted that the crux of the Plaintiffs defence lay in the counterclaim for a sum of US$62,097 which was evaluated by the trial judge and that led to the settlement of the Company Cause. Consequently Counsel contends that the liability of the Defendant for the sum of US$62,093.73 is res judicata because it was directly and substantially in issue in Company Cause No 19 of 2009 between the same parties and before a court of competent jurisdiction.

Counsel relied on the pleadings and affidavit evidence in the Company Cause No 19 of 2009. The pleadings disclosed that there was a claim of the Plaintiff for US$62,093.73. Counsel submitted that in terms of Order 15 rule 1 of the Civil Procedure Rules, the matter is in issue when a material proposition of law or fact is affirmed by one party and denied by the other.

As far as the consent judgement is concerned, the Defendants Counsel relies on Halsbury's laws of England volume 12 and 5th edition 2009 paragraph 1172 at page 7078, that a judgment which would be final if it resulted from a judicial decision after a trial is not prevented from being res judicata by the fact that it was obtained by consent so long as the parties against whom it is set up were under no disability. The Plaintiff opted to enter into a consent judgement with the Defendant which judgement is a bar to the Plaintiff’s claim of US$62,093.73 which was a defence and counterclaim to the Defendants winding up Petition in Company Cause No 19 of 2009. According to Halsbury's laws of England volume 12 and fifth edition 2009 at paragraph 1172, a Defendant who has consented to judgement after pleading in his defence the matters which he sought to set up in the latter proceedings was bound by the doctrine of res judicata. In the circumstances the question of the Plaintiffs claim for US$62,093.73 was directly and substantially litigated upon by the parties.

In conclusion the Defendants Counsel maintains that the Plaintiff executed a consent judgement with the Defendant Company in Company Cause No 19 of 2009 for a winding up order after realising that the Defendants claim for US$23,439.70 was legitimate and Plaintiffs counterclaim for US$62,093.73 was not a valid claim/defence to the winding up Petition. In the circumstances the current claim for US$62,093.73 is res judicata.

Ruling

I have carefully considered the written submissions of Counsels, the authorities cited and pleadings both in the suit and in Company Cause No 19 of 2009 being a winding up Petition as far as was availed to court by the parties.

There are three questions for consideration. The first question is whether the Plaintiff's plaint discloses a cause of action against the Defendant. The second issue is whether on the basis of available evidence agreed to in the joint scheduling memorandum and trial bundle, the Plaintiff has a cause of action against the Defendant. The third question is whether the Plaintiff's suit is res judicata.

I will start with the third question which is whether the Plaintiff's suit is res judicata. This is because there is no need to consider whether the plaint discloses a cause of action unless the action can otherwise be maintained in this court.

> "7. Res judicata.
>
> 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."

Section 7 of the Civil Procedure Act provides that no court shall try any suit or issue in which the matter directly and substantially in issue has also been directly and substantially in issue in a former suit between the same parties. The former suit is defined in Explanation 1 to mean a suit decided prior to the suit in question irrespective of whether or not it was instituted prior in time. Explanation 3 of section 7 of the Civil Procedure Act refers to the pleadings by explaining that the issue or matter directly or substantially in issue must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other. Explanation 4 furthermore provides that any matter which ought to have been made a ground of defence or attack shall be deemed to have been a matter directly and substantially in issue.

The question therefore is whether the matter or issue/or issues in the current suit was/were substantially in issue between the parties litigating under the same title and was/were

conclusively determined by a court of competent jurisdiction. I agree with the definition of the Defendant that a matter is in issue as defined by Order 15 rule 1 of the Civil Procedure Rules.

According to Order 15 rule 1 (1) issues arise where a material proposition of law or fact is affirmed by one party and denied by the other. Under Order 15 rule 1 (2) of the Civil Procedure Rules, material propositions are those propositions of law or fact, which the Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Thirdly Order 15 rule 1 (3) of the Civil Procedure Rules further provides that each material proposition affirmed by one party and denied by the other shall form the subject matter of a distinct issue. The rule further goes on to specify that there are two kinds of issues namely issues of law and issues of fact.

It is therefore necessary not only to read the judgement of the court but also to peruse the pleadings of the parties in order to ascertain the issues arising from the pleadings. I have consequently had opportunity to peruse the Petition in Company Cause No 19 of 2009 and the available affidavits.

Company Cause No 19 of 2009 is between Royal Group of Pakistan as the Petitioner and Mavid Pharmaceuticals Ltd as the Respondent. Paragraph 5 of the Petition avers that the company is indebted to the Petitioner in the sum of US$23,439.70 arising out of the supply by the Petitioner to the Respondent of various pharmaceutical products under documents against acceptance terms. In paragraph 5 (G) it is averred that on November 20, 2009, the legal Counsel of the Petitioner made a demand for payment of the debt and letter thereof was attached to the Petition as “RG7”. The attachment which I perused is a letter dated 20th of November 2009 to the Plaintiff being a demand for payment of a debt of US$23,439.7 owed to Messieurs Royal Group of Pakistan. Paragraph 6 of the Petition avers that following the demand for payment, the Respondent failed to pay the debt. In paragraph 7 it is averred that the Respondent is indebted to the Petitioner and is insolvent and unable to pay its debts. Where for the Petitioner prayed that the company namely the Respondent is wound up by the court under the provisions of the Companies Act. The Petition was filed in April 2009 possibly on 20 April 2009. On 22 September 2009 Bukenya Sulaiman on behalf of the Respondent filed an affidavit in reply to an application of the applicant/Petitioner against the Plaintiff seeking the appointment of an interim

receiver of the Plaintiff Company. The Respondent denied being indebted to the applicant/Petitioner to the tune of US$23,439.70 as alleged. In paragraph 4 (l) the Respondent's director Mr Bukenya Sulaiman deposes as follows:

> "(l) That the applicant/Petitioner thereafter cancelled the authorisation of the Respondent for the local manufacture of 'Semodex ointment' which left the Respondent with unusable raw materials and packaging materials which he had paid for. The Respondent has incurred and claims against the Petitioner a sum of US$62,093.73 for the materials supplied and US$4500 for freight and clearing charges."
>
> "(N) that the Respondent has since filed HCCS No 319 of 2009 against the applicants wherein they are seeking to recover a total of US$67,168.79 (a copy of the plaint is attached hereto as annexure "J").

The plaint attached annexure "J" is HCCS No 319 of 2009 between Mavid Pharmaceuticals Ltd versus Royal Group of Pakistan. In paragraph 3 thereof, the Plaintiffs claim against the Defendant is for the immediate payment of US$62,003.79 or its equivalent in Uganda shillings being the purchase price for goods paid for personal use, US$5075 or its equivalent in Uganda shillings being freight charges; shillings 600,160 being charges for destruction of the said goods, supervision thereof, storage, clearing agency fee and transport thereof, general damages for breach of contract and costs of the suit. In paragraph 4 thereof it is averred that in pursuit of an intended manufacturing business, the parties agreed that the Defendant would supply the Plaintiff all the required raw materials at an agreed price of US$62,093.79. It is further averred that the Defendant shipped the goods. Secondly the Plaintiff commenced manufacturing samples for analysis by the Regulatory Authority. The Authority namely the National Drug Authority did not permit the Plaintiff to manufacture the product. Thereafter the Plaintiff notified the Defendant of the non-use of its raw materials for failure to meet the standard requirements set up by the Authority.

I have carefully considered the evidence in support of the propositions that the Plaintiff's suit is res judicata under section 7 of the Civil Procedure Act. I have noted that the Petition in Company Cause No 19 of 2009 was filed at some time in 2009. The date written on the stamp of the High Court is not clear. What is clear is that the Petition was signed by Counsel for the Petitioner on

14 April 2009. The affidavit in support of the Petition is affirmed by the General Manager of the Petitioner. This was affirmed at Kampala on 20 April 2009. It is affirmed by Syed Tariq Ali, the Managing Director of the Petitioner. On 20 August 2009 Syed Tariq Ali filed on court record another affirmation on oath. It was commissioned before the Commissioner for oaths on 18 August 2009. In paragraph 2 he affirms that he read and understood the affidavit in opposition of Mr Bukenya Sulaiman to the Petition. In paragraph 3 thereof he affirms that the Respondent was served with the Petition on 17 August 2009 upon the Petition being signed and sealed by the court on 13 August 2009. He bases his conclusion on the affidavit of service annexure "A" to his affidavit. The affidavit of service is sworn by one Ogola Abdullah and paragraph 2 thereof provides that on 14 August 2009, he received a Petition in Company Cause No 19 of 2009 together with a notice of change of advocates for service upon the Respondent to the Company Cause. On the instructions of the Respondents managing director Mr Bukenya Sulaiman, he served the Petition on the advocates of the Respondent.

I have looked through the trial bundle and failed to locate the affidavit in opposition to the Petition. The affidavit is not among the agreed documents or documents of the Defendant. I have additionally read through a document of the Plaintiff dated 9th of September 2013 entitled "Special Audit Report" by Kakande and company Certified Public Accountants which contains the Petition and some affidavits but I have not found it. I requested the registry to trace the file but it was reportedly not listed under company causes in 2009 at the Commercial Court Division.

Last but not least I have carefully gone through the written submissions of the Defendant on the preliminary point of law. At page 3 of the written submissions, reference is made to the affidavit of the managing director Sulaiman Bukenya dated 30th of July 2009. The affidavit was not attached to the written submissions. It is not among the documents agreed to in the scheduling memorandum of the parties. Furthermore it is not among the list of documents which are not agreed to by the parties and supposed to be proved in evidence.

In the submissions of the Defendant in rejoinder filed on court record on 1 November 2009, the Petition in Company Cause No 19 of 2009 is attached. Secondly the affidavit in reply by Syed Tariq Ali is also attached. The affidavit in reply is actually an affidavit in rejoinder and response to the affidavit in opposition of Mr Bukenya Sulaiman in the Company Cause No 19 of 2009. In

other words it is the affidavit of the Petitioner's General Manager. Finally the affidavit in reply which was attached was filed on court record on 22 September 2009 and is deposed to by Mr Bukenya Sulaiman. It is not the affidavit in opposition to the winding up Petition in Company Cause No 19 of 2009. Instead it is an affidavit in reply in Miscellaneous Application No 456 of 2009 arising from the Company Cause No 19 of 2009. Miscellaneous application No 456 of 2009 has not been attached. The affidavit in opposition to the Defendant's Petition in Company Cause No. 19 of 2009 referred to in the objections of the Defendant's Counsel is not on the record.

In the circumstances, there are no pleadings showing the position of the Respondent/Plaintiff to the suit with regard to the claim of US$62,093.73 by the Plaintiff in the current suit. The above amount is only reflected in the affidavit in reply filed on court record on 22 September 2009 in miscellaneous application No 456 of 2009. It was an application seeking the appointment of an interim receiver according to paragraph 2 thereof.

I have further had opportunity to peruse the consent judgement. The consent judgement is dated fourth of November 2009. The plaint in HCCS No 319 of 2009 was filed on 29 August 2009 prior to the consent judgement. However the consent judgement made no reference at all to High Court civil suit No 319 of 2009. The consent judgement provides that the Respondent pays to the Petitioner entire sum of US$23,429.70 not later than 30th of January 2010. The managing director of the Respondent Mr Suleiman Bukenya was supposed to execute a personal guarantee for the entire sum ordered in the consent decree. In other words, the amount in the demand notice of the Petitioner prior to filing of the winding up Petition was settled by the Respondent. There are no words about any other civil suit.

Without prejudice, I have considered the affidavit of Bukenya Sulaiman attached by the Defendants Counsel to the submissions in rejoinder. As I have indicated above the affidavit in reply was in Miscellaneous Application No 456 of 2009 arising out of Company Causes No 19 of 2009. The affidavit was filed on court record on 22 September 2009. In paragraph 4 (l) and (N) the Respondent's director Mr Bukenya Sulaiman deposes as follows:

> "(l) That the applicant/Petitioner thereafter cancelled the authorisation of the Respondent for the local manufacture of 'Semodex ointment' which left the Respondent with unusable

raw materials and packaging materials which he had paid for. The Respondent has incurred and claims against the Petitioner a sum of US$62,093.73 for the materials supplied and US$4500 for freight and clearing charges."

"(N) that the Respondent has since filed HCCS No 319 of 2009 against the applicants wherein they are seeking to recover a total of US$67,168.79 (a copy of the plaint is attached hereto as annexure "J").

In this subparagraph (N) it is clear that the Plaintiff/Respondent to the Petition's Managing Director, was in paragraph (L) referring to a claim which had already been filed in the High Court. It is immaterial whether the claim had actually been filed by the 22nd of September 2009. What is material is that the affidavits notifies the Petitioner and the court that the Plaintiff/Respondent to the Petition had filed an action claiming US$62,093.73 with other freight and clearing charges amounting to a total of US$67,168.79. In other words it was not a counterclaim in that Petition that was determined by virtue of the consent judgement subsequently executed between the parties, but an amount that was averred as a notice of a claim allegedly filed in a separate suit. The question is whether the consent judgement could determine a claim in a separate suit not the subject of the consent judgement? Furthermore, the evidence on record is that summons to file a defence in HCCS No 319 of 2009 were issued by the court on 27 August 2009. In other words by the time the affidavit in reply to Miscellaneous Application No. 456 of 2009 (arising from company cause number 19 of 2009) and affirmed by Bukenya Sulaiman and filed on court record on 22 September 2009, was deposed to, the Plaintiff had already filed HCCS No 319 of 2009. Last but not least, it is the averments in the affidavit which are seemingly relied upon by the Defendants Counsel. In any case the Defendants Counsel has not availed the affidavit in reply to the Petition stated to be filed in July 2009. The court cannot therefore determine whether the claim in the current suit was also the subject matter of the winding up Petition which was resolved by a consent judgement.

In the circumstances the test provided for under section 7 of the Civil Procedure Act and explanation 3 thereof has not been met. It provides that the matter must in the: "former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other." Those matters must have been reflected in the pleadings of the parties namely the Petition and

the affidavit in opposition. The admission relates to the claim in the winding up Petition which was based on a statutory demand for a liquidated debt. In other words there are not sufficient materials before the court to determine whether the claim of US$62,093 was a matter in controversy. That question cannot be determined at this stage and without evidence. I agree with the Plaintiff's Counsel that the point of law as to whether the suit is res judicata cannot be determined without evidence. Because it cannot be determined, it cannot be resolved at this stage of the proceedings. The question of whether the suit is res judicata is accordingly stayed for final determination of the main suit and after adducing material evidence.

Whether the plaint discloses a cause of action?

On whether the plaint discloses a cause of action, the Defendants Counsel submitted that the Plaintiff cannot eat its cake and have it too. This is because the Plaintiff accepted the goods and cannot be seen to belatedly allege anything to the contrary having led the Defendant to believe that all was well. The Plaintiff has not returned the goods but also wants to keep the money, contrary to law and equity. Furthermore Counsel contends that in the joint scheduling memorandum the Plaintiff admitted certain crucial documents inclusive of bills of lading, documentary credits (irrevocable letters of credit) and supportive documents including the consent judgement in Company Cause No 19 of 2009. His contention therefore is that on the basis of the admitted facts, the court does not require further evidence to arrive at a decision on whether there was a cause of action.

As far as the law is concerned, in order to determine whether there is a cause of action all that is required is the perusal of the Plaintiff's pleadings without any reference to the Defendant's written statement of defence. The Supreme Court of Uganda in the case of **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Per W. Wambuzi CJ held that in determining whether a plaint discloses a cause of action under Order 7 rule 11 of the Civil Procedure Rules or a reasonable cause of action under order 6 rule 29 (now rule 30 under the revised Civil Procedure Rules) only the plaint can be looked at:

> " I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 (revised rule 30) only the plaint can be looked at..."

The court does not consider the defence to establish whether a plaint discloses a case of action as held by the Supreme Court in the case of **Major General David Tinyefunza vs. Attorney General of Uganda Const**. **Appeal No. 1 of 1997**. It is apparent that the Defendant relies both on Order 7 rule 11 of the Civil Procedure Rules and also on a point of law based on the scheduling memorandum and admitted facts and documents therein.

As far as the plaint is concerned, the Defendant has not demonstrated how it does not disclose a cause of action. The necessary ingredients of a cause of action were laid out the Court of Appeal in the case of Auto **Garage versus Motokov [1971] EA 514** and are that the plaint must disclose that the Plaintiff enjoyed or enjoys a right, that the right was violated and thirdly that the Defendant is responsible for the violation. Furthermore the court proceeds on the assumption that everything alleged in the plaint is true (See **Jeraj Shariff versus Fancy Stores [1960] EA 374** for the holding that only the plaint and any attachments thereto are to be perused with the assumption that the averments therein are true to determine whether the plaint discloses a cause of action).

For the assertion of the Defendant that the Plaintiff accepted the goods, it is clear that the Plaintiff pleads that it received the goods and begun manufacturing products whereupon the National Drug Authority rejected the product. The Plaintiff alleges that the raw materials supplied were not fit for the purpose and the Defendant's conduct amounted to a fundamental breach of contract of sale of goods (see paragraph 5). Consequently accepting the goods per se cannot at this stage bar the Plaintiff from claiming that the goods received were not fit for the purpose. The matter requires trial of the allegations of the Plaintiff that there was breach of contract by reason that the goods were not fit for the purpose.

The Defendant further relies on assertions of fact in Company Cause No 19 of 2009. For the same reason that the affidavit in opposition in Company Cause No 19 of 2009 is not available to the court, there are insufficient facts to determine the point of law. Even on the question of the nature of documentary credits or irrevocable letters of credit, the legal doctrine submitted on by the Defendant does not resolve the allegations that the goods supplied were not fit for the purpose. Furthermore, the Defendant's submissions relating to facts in support of the plea of res

judicata namely that the Plaintiff cannot claim over 62,000 US$ cannot be determined as a point of law on the basis of the facts admitted or the documents admitted in evidence.

Under the Civil Procedure Rules, a point of law is ordinarily argued under the provisions of Order 6 rule 28 of the Civil Procedure Rules. A point of law is either raised by pleadings or by an agreement of parties or by an order of the court. Whichever way the point of law is raised, the facts in support of the point of law have to be established. Where facts need to be proved or there is doubt as what the relevant facts are, the point of law should not be determined preliminarily but should await the trial of the action by adducing evidence for and against allegations of fact. In the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** (Court of Appeal at Nairobi) Windham JA at page 58 considered rule 27 equivalent to Order 6 rule 28 of the Ugandan revised edition of the Civil Procedure Rules. Order 6 rule 27 of the Kenyan Civil Procedure Rules quoted in the decision provides as follows:

> "27. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing."

Windham JA held at page 58 that:

> "Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end."

In other words the facts have to be pleaded (in the plaint) or admitted or agreed before a point of law based on the facts can be determined. Finally the Defendant has not proceeded under the provisions of Order 6 rule 28 of the Civil Procedure Rules. The intention of the Defendant to raise objections is reflected in paragraph 2 of the written statement of defence which I will quote for ease of reference as follows:

"The Defendant denies the contents of paragraph 3 of the plaint in toto and the Plaintiff shall be put to strict proof thereof. The Defendant shall further content and aver that the Plaintiff has no cause of action against it whatsoever and the suit is frivolous, vexatious, barred in law and an abuse of courts time and process. The Defendant should move court to have the suit rejected, struck out and or dismissed with costs."

The question of cause of action was intended to be raised on the basis of pleadings. Secondly whether the suit is barred in law may be the point on res judicata. Thirdly whether a suit is frivolous and vexatious or an abuse of the process of court is ordinarily raised under Order 6 rule 30 of the Civil Procedure Rules on the basis of the pleadings alone.

In the premises the plea of res judicata cannot be resolved on the basis of materials availed to the court neither can the case be made that the Plaintiff has no cause of action on the basis of admitted facts. The matters raised in the objection were prematurely raised and accordingly overruled with costs without prejudice to any point of law being raised in final submission on the basis of admitted evidence.

Ruling delivered in open court 22 November 2013.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Michael Okot for the defendant,

Plaintiffs MD Mr. Bukenya Sulaiman in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

22 November 2013