THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-249 -2012

(Arising from CIVIL SUIT NO. 467 OF 2009)

MITCHELL COTTS LTD::APPLICANT

VERSUS

PETER MULIRA::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This is an application brought under Order 7 rules 11 and 19 of the Civil Procedure Rules SI 71-1 seeking for Orders that:

1. The Plaint in H.C.C.S No. 467 of 2009 be rejected

2. The Original decree in H.C.C.S No. 1471 of 1999 be executed by the Applicant

3. Costs of this application be paid by the respondent.

This application is supported by the grounds contained in the affidavit of Mr. Mohsen Mousavi the Director of the applicant company. He deposed that on the 14th December 1999 the applicant filed H.C.C.S No. 1471 of 1999 against the respondent for recovery of Ug. Shs. 1,030,842,523/=, interest at 15% p.a on Ug. Shs. 1,030,842,526 from 9/11/19991 till payment in full. A copy of the plaint was attached and marked "A".

He also stated that on 16th August 2000 the defendant filed an amended Written Statement of Defence (WSD) in H.C.C.S No. 1471 of 1999 denying the applicant's claims. A copy of the (WSD) was attached and marked "B".

It was further stated by the deponent that all matters in H.C.C.S No. 1471 of 1999 were conclusively settled by a consent judgment and decree issued by the court on 22/11/2000. A copy of the decree was attached and marked “C”. Further that an appeal by the respondent challenging the consent judgment instituted as Civil Appeal No. 15 of 2002 was dismissed by the Court of Appeal which confirmed the judgment of the High Court and a decree was issued. A copy of the decree was attached and marked “D”.

He deposed further that on 9/3/2001 the respondent filed a Notice of Appeal against the judgment of the Court of Appeal but subsequently abandoned his appeal to the Supreme Court and resorted to filing numerous applications and suits in the High Court including H.C.C.S No. 467 of 2009 to challenge the consent decree in H.C.C.S No. 1471 of 1999 which had already been confirmed by the Court of Appeal. A copy of the Notice of Appeal was attached and marked “E”.

Mr. Mohsen also stated that he was advised by the applicant’s advocates Mr. Peter Mukidi Walubiri that all matters arising from H.C.C.S No. 1471 of 1999 which were conclusively determined by the High Court and confirmed by the Court of Appeal are ***res judicata*** and that the plaint in H.C.C.S No. 467 of 2009 is barred by law.

An affidavit in opposition to the application was deposed by the respondent wherein he stated that he is advised by his lawyer, which advice he believes, that H.C.C.S No. 1471 of 1999 has never been determined on its merits and therefore matters arising from it cannot be *res judicata*.

Mr. Mulira deposed that he was advised by his lawyer that even if the consent judgment and consent decree in H.C.C.S No. 1471 of 1999 had been derived from conclusive investigation of the issues that were the cause of its being filed, the veracity of the consent judgment and the resultant decree as being procured through fraud and mistake which is the substance of HCCS No. 467 of 2009 has never been considered and tested by any court of law of competent jurisdiction and therefore the present H.C.C.S No. 467 of 2009 is not *res judicata* and thus not barred by law.

He stated that the aspects of fraudulent manipulation and mistakes on the part of the applicant herein, which are pleaded in H.C.C.S No. 467 of 2009 were

discovered after entering the consent judgment and decree arising from H.C.C.S No. 1471 of 1999 and upon proof of fraud in procurement of the judgment and decree nullifies them.

He stated that it is in the interest of the preservation of the sanctity of the process of court, its jurisdiction, justice and rule of law that H.C.C.S No. 467 of 2009 is heard and determined on its merits.

The deponent stated that the Court of Appeal only decided in the following issues:-

a) ***That there was a consent judgment as entered by Justice Okumu Wengi,***

b) ***That the Judge did not err in issuing a decree in the absence of an amendment of the plaint,***

c) ***That the judge was not wrong to determine the case without first allowing the appellant to give his evidence,***

d) ***That the judge was right in awarding costs to the Respondent,***

e) ***That the consent judgment was a judgment.***

Mr. Mulira further stated that the present suit which the applicant/defendant claims to be res judicata seeks to set aside the consent judgment as approved by the Court of Appeal. Further that since he had not signed any consent judgment he appealed to the Supreme Court against the judgment of the Court of Appeal but failed to get an order of stay of execution from the Supreme Court.

He stated that in addition to fraud the plaint raises the issue of mistake in that the government paid a sum of United Kingdom Pounds 1,071,756 at the rate of Shs 1,935/= per pound which translated a total of Shs 2,073,847,860 but the judgment of Okumu Wengi,J and calculations by the applicant/defendant is based on a total payment of Shs. 2,180,067,541 which converts to United Kingdom Pounds 1,126,649.8. In addition he stated that both applicant/defendant and its counsel knew that calculation was wrong as counsel is on record as admitting that government paid United Kingdom Pounds 1,071,756 at the rate of Shs 1,935/= per pound. He referred to annexture F.

The deponent stated that he only retained a sum of Shs. 276,962,852 by way of lien for unpaid professional fees but because of the said mistake the consent judgment mentions Shs. 339,489,897/=.

When this application came up for hearing on 17th September 2012 Mr. Peter Walubiri represented the applicant while Mr. G.S Lule and Mr. Peter Allan Musoke represented the respondent. Both counsel based their submissions on the affidavits sworn by their respective clients as summarized above. I have considered their submissions together with the affidavits and the documents relied upon.

The background to this application has been highlighted in the affidavit in support and the submissions of counsel for the applicant but I feel it is imperative for me to state it more elaborately so as to put this application in its proper perspective.

In 1999 the applicant instituted H.C.C.S No 1471 of 1999 against the respondent who had been its counsel for recovery of the money that had been received from the Government of Uganda details of which are already stated above. Although the respondent filed an amended Written Statement of Defence (WSD) in which the applicant's claims was denied, the parties subsequently settled the dispute in favour of the applicant by a consent judgment dated 22/11/2000 executed before Okumu Wengi, J.

In 2002 the respondent appealed against the consent judgment and orders on 15 grounds. All the grounds failed and the appeal was dismissed by the Court of Appeal in its judgment delivered on 3/3/2004. In effect the consent judgment dated 22/11/2000 was confirmed by the Court of Appeal.

On 8/6/2004, the respondent filed H.C.C.S No. 370 of 2004 seeking for an order to set aside the consent judgment on the grounds that all the calculations in the consent judgment were based on wrong figures arising from the mistake made by the applicant and that the total amount recovered from Government by the respondent on behalf of the applicant is stated to be Shs. 2,180,067,541/= whereas it was Shs. 2,073,847,860/=.

From the correspondences on record, it appears H.C.C.S No. 370 of 2004 was transferred to Civil Division and given a new number H.C.C.S No 424 of 2004 and subsequently dismissed for want of prosecution. On 30/7/2007 a warrant of arrest

was issued in execution of the consent decree in H.C.C.S No 1471 of 1999 and the respondent filed several applications among them were those seeking for an order of stay of execution. They include Misc. Application No. 427 of 2008 (for interim order of stay of execution) and Misc. Application No. 428 of 2008 (for stay of execution pending disposal of application for reinstatement of H.C.C.S No. 424 of 2004. Misc. Application No. 427 of 2008 was heard and dismissed with costs.

It appears the respondent was arrested and brought before the Assistant Registrar High Court and the parties signed a consent order dated 22/8/2008 where they agreed that the judgment debtor (respondent) would pay the applicant Shs. 100,000,000/= on or before 7/10/2008. The parties also agreed that they would within 30 days from the date of signing that consent order agree on the total amount payable and the terms of such payment and report to court. The respondent also agreed to pay costs of Shs. 80,000,000 and the taxed costs. The respondent further undertook not to file any other proceedings to challenge the decree in the suit. The parties agreed to stay proceedings and vacate the warrant of arrest that had been issued.

However, the respondent subsequently filed several other applications which include Misc. Application No. 521 of 2008(for stay of execution pending hearing and disposal of application for reinstatement of C.S No 424 of 2004 and Misc. Application No. 357 of 2009 to declare the consent judgment in H.C.C.S No. 1471of 1999 a nullity. The grounds of that application were firstly that Mitchell Cotts Ltd had not instructed counsel who instituted the suit; secondly that Mitchell Cotts Ltd lacked locus to bring the suit and thirdly, that the consent judgment was based on a wrong figure.

When Misc. Application No. 357 of 2009 came up for hearing before Kiryabwire J. on 26/8/2009, he suggested to the parties that the matter be referred to a mediator so that it could be resolved differently as it was a 1999 dispute that was 10 years old by then. Both parties agreed to that suggestion and the matter was accordingly referred to a court annexed mediator. They were directed to report back to court at the end of that day.

According to the record of proceedings, at 3:42 pm court resumed and Mr. Mulira who was personally conducting his matter reported as follows:-

> ***"We have discussed the matter extensively and in the spirit of give and take, I shall pay in full and final settlement of all our disputes the sum of Ug. Shs 540,000,000/=(five hundred and forty million shillings only). I propose to pay as follows; 50% that is 270,000,000/= on or before 30th November 2009 and 50% on or before the 27 February 2010. Should I fail to pay on the 30th November 2009 then the whole sum shall be due and payable immediately and attract at 8% p.a from then until payment in full"***

Mr. Walubiri who appeared for the applicant confirmed that that was the agreed position. In view of that, Kiryabwire J. entered a consent judgment in Misc. Application No. 357 of 2009 in the above terms on the same day.

About three and half months later ,that is, on 14th December 2009 the respondent instituted H.C.C.S No. 467 of 2009 to set aside that consent judgment and decree on account of mistake and/or fraud and/or coercion. The plaintiff was basically challenging the consent judgment that was entered on the 26th day of August 2009 basing on more or less the same grounds as those in Misc. Application No. 357 of 2009 that sought to set aside the earlier consent judgment but was settled by consent.

On 15th June 2011 the respondent filed Misc. Application No. 318 of 2011 seeking to amend his plaint as well as costs. Upon being served with the application, counsel for the applicant (respondent in that application) wrote a letter to this court pointing out that the annextures on the affidavit in support of that application and on the supplementary affidavit did not tally with the copies on which the respondent's counsel acknowledged service. Counsel for the applicant herein then requested the respondent who was the applicant in that case to correct the mismatch in the annextures before the same could be sent to their client so that an affidavit in reply could be prepared and filed. However, on 1st September 2011 the respondent wrote a letter to this court requesting that the application be marked as withdrawn with no order as to costs since no affidavit in reply had been filed.

Interestingly, on the 7th of September 2011 the respondent filed another application titled ***"Chamber Summons (Ex Parte)"*** seeking to amend the same plaint. When that application came up for hearing before this court on 28th November 2011, Mr.

Peter Allan Musoke from M/S. G.S. Lule Advocates held brief for the respondent (applicant in that application) who had all along been personally handling his matters. He informed court that his law firm was due to take over conduct of the case upon filing notice of instructions.

He also undertook to serve the application on counsel for the respondent (applicant herein). For the above reasons, he sought an adjournment which was granted. The matter was adjourned to 27th February 2012 for hearing but on that date none of the parties or their representatives appeared in court. Consequently, the application was dismissed for want of prosecution.

On 10th May 2012 Mitchell Cotts Ltd filed this application on the ground that the plaint in H.C.C.S No. 467 of 2009 is barred by law because it is *res judicata*. The issue for determination by this court now is whether this matter is *res judicata*.

Section 7 of the Civil Procedure Act bars court from trying any suit or issue that has already been adjudicated upon by a court of competent jurisdiction. It provides as follows:-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that court. Six explanations are made under that section to clarify on matters that may be mistaken".***

According to ***Black's Law Dictionary 7th Edition***, the term *res judicata* is a Latin word that refers to an issue that has been definitively settled by judicial decision. The three essential elements as stated by the author are firstly, an earlier decision on the issue; secondly, a final judgment on the merits and thirdly the involvement of the same parties, or parties in privity with the original parties.

In ***Kamunye v Pioneer Assurance Ltd [1971] EA 263 at page 265***, Law, Ag. V-P stated the test to be applied in determining whether a suit is barred by *res judicata* in the following words:-

> *"**The test whether or not a suit is 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 adjudged 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".***

Richard Kuloba in his book titled, ***"Judicial Hints on Civil Procedure" 2nd Edition, Law Africa***, while considering *res judicata* on consent judgment at page 48 states that the effect of a consent judgment is the same as that of judgment given after exercise of judicial discretion.

Mr. Walubiri in his submission argued firstly that this court cannot set aside as prayed in H.C.C.S No. 467/2009 the decree in H.C.C.S No. 1471/1999 because it was already confirmed by the Court of Appeal which is a superior court to this court. He submitted that once the High Court decree was confirmed by the Court of Appeal as an appellate court, this court lost jurisdiction over the matter. His view was that upon confirmation by the Court of Appeal, it became a Court of Appeal Decree. He pointed out that under the hierarchy of courts as set out in the Constitution a Court of Appeal is higher than the High Court. It was his view that this matter is barred by law given the hierarchy of courts.

Mr. Walubiri's second point was that even if this court could reverse the judgment and decree of the Court of Appeal (which he disputed), the issues raised by the respondent in H.C.C.S No. 467 of 2009 and in the affidavit in opposition to this application were settled by the Court of Appeal on appeal from the High Court and they are *res judicata* in terms of section 7 of the Civil Procedure Act.

He referred to the Court of Appeal judgment and highlighted the relevant grounds that raised those issues and the decision of the Court on them. Mr. G.S. Lule in his reply conceded that all the other issues raised in the plaint and in the affidavit in support of the application were adjudicated upon as submitted by counsel for the

applicant apart from the point of fraud that was never raised and dealt with. I will therefore not consider those issues that are conceded to have been determined by the Court of Appeal since in effect they are admitted to be *res judicata.*

Mr. G.S. Lule however made his submission on the alleged fraud based on new particulars that were not pleaded in the plaint on court record filed on 14th December 2009 which has never been amended.

In that plaint the particulars of fraud were stated to be firstly, that the applicant claimed to be the successor of Mitchell Cotts PLC which was the original owner of the decretal sum whereas not. Secondly, that the applicant claimed to be the successor of Mitchell Cotts PLC yet the said company had ceased to exist at the time of the institution of H.C.C.S No. 1471 of 1999. Thirdly, that the applicant claimed to be the successor of Mitchell Cotts PLC whereas it was in fact the successor of Market View PLC.

It was strongly argued by Mr. G.S. Lule based on paragraph 14 (d) of the affidavit in opposition to this application that the claim of the original Mitchell Cotts PLC was settled by the Government during Obote II regime and as such the applicant's present claim is tainted with fraud. Mr. G.S. Lule then made a very elaborate and impressive submission on the issue of fraud and illegality supported by a number of authorities. In my view that submission was misconceived as the particulars of fraud relied upon were not at all pleaded as already stated above.

It is now a settled principle of law that a party is not allowed to succeed in a case not pleaded. In ***Interfreight Forwarders (U) Ltd v East African Development Bank SCCA 33/1993*** Oder, JSC (RIP) stated that:-

> ***"A party is expected and is bound to prove his case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment of pleadings"***.

See also ***Remmy Kasule vs Makerere University [1975] HCB 391***.

Where fraud is alleged the requirement is even more stringent because by its very nature it is a serious allegation which must be specifically pleaded with particulars

given and strictly proved. In fact, the standard of proof is higher than on a balance of probabilities generally applied in civil matters. See ***Bullen & Leake & Jacob's Precedents of Pleadings, Fourteenth Edition, Volume 2***, at page 809 where the authors referred to a number of cases including the decision of ***Lord Denning in Bater v Bater [1951] P.35.***

See also **Kampala Bottlers Ltd v Damanico (U) Ltd [1009-1994] EA 141** where fraud was pleaded but its particulars were not given and Platt, JSC stated in his brief judgment in concurrence with Wambuzi, CJ who wrote the leading judgment that:-

> *"….. **Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged……..".*** **(Emphasis added)**

In view of the above authorities, this court cannot be persuaded by the arguments for the respondent based on allegations of fraud that was never pleaded and its particulars not set out in the plaint.

As regards the alleged particulars of fraud that was pleaded, I find that as rightly argued by counsel for the applicant, the issue of the applicant not being the right party to bring H.C.C.S. No. 1471 of 1999 was raised by the respondent in his appeal under ground number four and the Court of Appeal made a finding on it.

At page 23 Kitumba, JA (as she then was) in her lead judgment stated thus:-

> ***"I now turn to consider ground 4, which is a complaint that the respondent had no locus to bring the suit. Submitting on this ground, learned counsel for the appellant contended that in paragraph 2 of the amended written statement of defence the appellant had pleaded that he would raise a preliminary objection under Order 6 rule 27 of the Civil Procedure Rules that the respondent had no locus to bring the suit. It had by its resolution assigned the debt to Project Investment Inc. of Jersey of Channel Island. This was a preliminary point which the learned trial judge should have heard and disposed of before hearing the main***

> ***suit….On the other hand counsel for the respondent contended the question of assignment had been addressed in the application for leave to appear and defend. He argued that, in any case, if there was an assignment of the debt that in law does not take away the power of the assignor from instituting a suit against the debtor".*** **(Emphasis added).**

The Justice of Appeal then made a finding on this ground as follows:-

> ***"It is appreciated that the preliminary point of law should be set down and determined before trial. However, the appeal before this court is against a consent judgment that was recorded by court at the end of the respondent's case. The appellant by his very consent agreed that he was liable to the respondent. I would like to observe that at the beginning of the trial the appellant was unrepresented as his counsel abandoned him. However, the appellant is a senior advocate who could have raised a preliminary objection that was pleaded but the judge had inadvertently not set it down for hearing. Ground 4 also fails****"*. (Emphasis added).

It is clear from the above quotation from the Court of Appeal judgment that the issue of locus was raised as the fourth ground of appeal and determined. It is therefore not true that this issue came to the knowledge of the respondent after the appeal was heard and determined. The respondent has now very tactfully repackaged the same issue and dressed it as fraud in H.C.C.S No 467 of 2009 so as to fit it within the legally acceptable grounds for setting aside a consent judgment. To my mind this is an abuse of the court process a mischief section 98 of the Civil Procedure Act seeks to address.

I also wish to point out that the respondent raised this very same issue in Misc. Application No. 357 of 2009 which he also settled by entering a consent in the main suit which superseded the earlier one. In my considered view the issue of locus in whatever way it is phrased could not be determined in that application or subsequent suits because it was already adjudicated upon. In any event, I believe it was even overtaken by the signing of the consent judgment by which the respondent agreed that he was liable to the applicant. Since the respondent had

alleged that there was fraud I do not see why he would opt to quickly settle the matter and then file another suit to challenge the consent judgment on the same grounds.

This is a very old case that entered the court system in 1999. It has now taken over thirteen years and the court has had to hear several applications arising from it. Litigation cannot be endless. It must be brought to an end. Indeed the rationale for the plea of *res judicata* is that there must be an end to litigation.

Richard Kuloba (supra) states at page 45 of his book that it must be understood by those administering the law that there must be a quieting of actions. Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the matter.

The respondent should have pursued his appeal in the Supreme Court up to its logical conclusion so as to put a stop to this matter instead of reverting to the Commercial Court with numerous civil suits and applications over the same matter.

From the above background and analysis of the evidence on record the conclusion is that all the issues raised in H.C.C.S No. 467 of 2009 were already adjudicated upon and there is an earlier decision on them. The issues were raised as grounds of appeal in Civil Appeal No. 15 of 2002 between the same parties in the current suit, argued before the Court of Appeal and a final judgment on the merits was given. In essence, all the three essential elements of *res judicata* are met by H.C.C.S No. 467 of 2009 and as such it is barred by section 7 of the Civil Procedure Act.

In the result, the first prayer in this application is granted and the plaint in H.C.C.S No. 467 of 2009 is accordingly rejected as prayed.

As regards, the second prayer for an order that the original decree in H.C.C.S No. 1471 of 1999 be executed by the applicant, I wish to observe that that decree was superseded by the subsequent consent decree dated 26th August 2009 which the respondent was seeking to set aside in H.C.C.S No. 467 of 2009. This court cannot therefore order execution of what was superseded. However, the applicant is at liberty to execute the decree of 26th August 2009 whose execution was stayed pending disposal of H.C.C.S No. 467 of 2009.

Costs of this application are awarded to the applicant.

I so order.

Dated this 23rd day of January 2013.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Peter Walubiri for the applicant whose Managing Director Mr. John Prinscoo was also present and Mr. Peter Allan Musoke for the respondent.

JUDGE

23/01/13