

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**HCT - 00 - CC - CS - 21 - 2010**

**AMAMU LIMITED ::: PLAINTIFF**

**VERSUS**

- 1. BARCLAYS BANK OF UGANDA LTD**  
**2. STELLAR PROPERTIES LIMITED ::: DEFENDANTS**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

**R u l i n g**

This is a ruling on a preliminary objection by the defendants that this suit is bad in law as it raises matters that are res judicata having been settled in full in HCCS 310 of 2008 by a consent order.

It is the case for the plaintiff that this present suit is not res judicata as it covers issues that were not the subject of HCCS 310 of 2008 and furthermore the consent order on record was tainted with fraud and is therefore ineffective

At the hearing the First Defendant was represented by Mr. Masembe of MMAKS Advocates; the Second Defendant was represented by Mr. David Mpanga of M/S A.F Mpanga Advocates while the Plaintiff was represented by Counsel Okello Oryem of M/S Okello Oryem & Co Advocates.

Counsel for the first defendant submitted that the prayers in this present suit were the subject of a previous suit HCCS 310 of 2008 which resulted in a consent Decree dated 7th January 2009 and a further consent Order dated 17<sup>th</sup> December 2009.

Counsel for the first Defendant submitted that in the previous suit the present plaintiff had defaulted in his loan (which was secured by the mortgage of the suit property) to the present defendant bank. Subsequently the mortgaged property was put under receivership, advertised and

was to be sold. The Plaintiff then instituted H.C.C.S 310 of 2008 in a bid to forestall the sale of suit property which led to a consent decree dated 7<sup>th</sup> January 2009 (Annexure Ciii).

By the said consent decree the Plaintiff was to pay his outstanding loan sum according to a set repayment schedule. He then defaulted on the second installment of the schedule. As authorized by the decree, the defendant bank then advertised and sold the mortgaged property to the second Defendant by private treaty for US \$ 5,400,000. Counsel for the first defendant further submitted that the plaintiff contested the said sale of its property in Court which led to a second consent order of 17<sup>th</sup> December 2009 where the plaintiff accepted the said sale.

Counsel further submitted that following the consent order of 17<sup>th</sup> December 2009 it is not open to the Plaintiff to contest the sale without first setting aside the order.

Counsel for the first Defendant referred Court to section 7 of the Civil Procedure Act Cap 71 on Res judicata, explanation note 4 (in particular) which he said was instructive regarding this case. He argued that if there was an issue that should have been taken or raised in a previous matter but was not then the law under the said section deems it to have been taken and this is what should have happened in this case but did not.

Counsel for the first defendant further submitted that in Paragraph 4(f) of the Plaint the plaintiff admitted to signing the consent order which was signed by its lawyers M/s Didas Nkurunziza & Co Advocates.

In relation to the Consent order having been procured by fraud, Counsel for the first defendant submitted that the plaintiff ought to have filed an application to set aside the order other than filing a fresh suit. He relied on Section 34 of the Civil Procedure Act which provides that;

*“All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit”*

Counsel for the first defendant submitted that the consent order recognizes and adopts the sale of the Property by the First Defendant to the Second Defendant. He argued that a couple of communications passed between the parties that clearly indicate that the Plaintiff was aware and in the know of the sale, even after the sale, the Plaintiff demanded and received the balance on the Purchase price of the suit property. Ultimately the Plaintiff is barred from bringing a fresh suit by reason of Res judicata, estoppel and the doctrine against approbating and reprobating (He cited the Authorities; Chitale & Rao, **The Code of Civil Procedure** 7<sup>th</sup> Edition Vol. 1 Page 419 Para 114, **Banque De Moscow v Kindersley** [1950] All E.R 649)

Counsel for the first defendant submitted that by reason of the consent Order this suit is therefore res judicata and bad in law.

Counsel for the Second Defendant submitted that the second defendant claims under the first defendant and is therefore also entitled to the defence of res judicata.

Counsel cited **Mulla, The code of Civil Procedure**, 16<sup>th</sup> Edition, vol.1 at page 240-242, which states;

*“Res judicata not only affects parties but their privies i.e. persons claiming under them and each privy stands in the shoes of the party under whom he claims...in order that a decision in a suit between A and B may operate as res judicata in a subsequent suit between A and C, it is necessary to show that C claims under B by a title arising subsequently to the commencement of the first suit”*

Counsel for the second defendant further submitted that the second Defendant has a common interest in the subject matter of the suit because the subject matter of the two suits is the same property of which the second Defendant is now currently the owner and is in possession thereof. He noted that this position has been affirmed in **Semakula v Magala & ors [1979] H.C.B 90**.

Counsel for the second Defendant concurred with Counsel for the first defendant and prayed that the suit be struck out.

Counsel for the plaintiff submitted that the order dated 17<sup>th</sup> December 2009 is not a consent order that finally determined the rights of the parties in H.C.C.S No. 310 of 2008 and it is certainly not a judgment. He further submitted that the said order was never signed by the parties, and there is nothing that shows that the said consent Order arose from H.C.C.S No. 310 of 2008, since that suit had long been settled by a decree extracted twelve months earlier in January 2009, and by reason of this decree the court was functus officio at the time the consent Order was made.

Counsel for the plaintiff further submitted that the consent decree dated 7<sup>th</sup> January 2009 and the Order dated 17<sup>th</sup> December 2009 were procured by illegality, fraud, misapprehension and ignorance of the material facts and therefore should be set aside. In this regard he referred Court to the case of **Supreme Court Civil Appeal No. 8 of 2004, Attorney General & Uganda Land Commission versus James Mark Kamoga & James Kamala**.

Counsel for the plaintiff further submitted that the present suit was not Res judicata because H.C.C.S No 310 of 2008 never went to trial and issues in the same therein were never substantially heard and determined on merit by a competent court of law.

Counsel for the plaintiff further submitted that the issues raised in recent pleadings are substantially different from the matters substantially in issue in H.C.C.S No. 310 of 2008. He noted that this present suit seeks to challenge the sale of suit property.

Counsel for the plaintiff referred Court to Explanation No 3 under Section 7 of the Civil Procedure Act and submitted that the matters referred to in this present suit must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly which did not happen in this suit.

Counsel for the plaintiff further submitted that Section 7 of the Civil Procedure Act does not deal with setting aside consent judgments which were the out come of the previous suit. Further that the plea of res judicata is not available to the second Defendant who was not party to H.C.C.C No 310 of 2008 and that it did not exist legally at the time. He ultimately prayed that the point of law raised by the Defendants be rejected with costs.

I have considered the preliminary objections and the arguments by both counsels for and against the objections which I am grateful.

*Section 7 of the Civil Procedure Act (Cap 71)* states that the court is barred from conducting the trial of 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 under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or in a suit in which the issue has been subsequently raised, and has been heard and finally decided by the court.

According to ***Black's Law Dictionary 7<sup>th</sup> Edition***, the term *res judicata* is a Latin word that refers to an issue that has been definitively settled by a judicial decision. The three essential elements as stated by the authors of that dictionary 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.

The prayers in the present case among others, is for a declaration that the sale of the suit property under a mortgage by the first defendant to the second defendant be declared null and void and that the consent order for vacant possession be set aside.

It is the case for the Defendants that the sale of the suit property that the Plaintiff wants court to declare null and void was the subject of a former suit where there was a consent Order recognizing the sale of the suit property to the second defendant, and the Plaintiff accepted to vacate possession of the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> floors of the suit property as part of the settlement.

It is clear to my mind that the consent order dated 17<sup>th</sup> December 2009 in H.C.C.S No. 310 of 2008 did revolve around the same suit property as in this suit in as so far as it recognized by the present plaintiff the sale of the suit property to the second defendant. It is also important to point out that deductions were made from the proceeds of the purchase price and a percentage of them were given to the plaintiff.

Furthermore the plaintiff acknowledges both the consent decree and consent order in its pleadings. Paragraph 4 (b) of the plaintiff's Plaint clearly shows that a consent decree was entered between the parties for repayment of the outstanding loan. Also, the said consent was clearly signed by the Plaintiff's lawyers who in law are recognized agents of parties to the suit. Apart from submitting that the Plaintiff never signed the decree and order, it never denied having given instructions to M/s Didas Nkurunziza & Co Advocates to represent it in matters relating to H.C.C.S No 310 of 2008.

The First Defendant also attached to its defence communications dated 8<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> December 2009 that clearly show that the Plaintiff was in the know of the sale that is the subject of the consent order dated 17<sup>th</sup> December 2009. These communications were not challenged by the Plaintiff.

***In Mitchell Cotts Ltd vs Mulira MA 249 of 2012 Justice Hellen Obura made reference to Richard Kuloba's book titled "Judicial Hints on Civil Procedure", 2<sup>nd</sup> Edition, Law Africa page 48, where it is stated "that the effect of a consent judgment is the same as that of judgment given after exercise of judicial discretion."***

***In the case of Attorney General and Uganda Land Commission vs James Mark Kamoga and Anor SCCA No. 8 of 2004 Supreme court held that;***

*"Unlike judgments in uncontested cases, consent judgments are created as fresh agreements and may only be interfered with on limited grounds such as illegality."*

On the above authorities I find that it cannot be said that the Court was functus officio after the decree of the 7<sup>th</sup> January 2009, as the Order dated 17<sup>th</sup> December 2009 arose from the decree of 7<sup>th</sup> January 2009.

It is a fact that the first defendant and the Plaintiff in this matter were the parties to H.C.C.S No. 310 of 2008. However I find that by virtue of the consent order dated 17<sup>th</sup> December 2009, the

second defendant is also privy to it. This particular case raises issues relating to suit property only after the sale of the yet the earlier suit and /or consent order dealt with the sale itself.

**Explanation 4 of section 7 of the Civil Procedure Act** clearly states that;

*“Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit”*

In **Kamunye and others versus Pioneer General Insurance Society Ltd [1971] EA 263** the court of appeal held

*“that res judicata applies not only to points upon which the first court was actually required to adjudicate upon 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.”*

In **Greenhalgh vs Mallard [1947] 2 All ER 255**, Somervell held that res judicata;

*“...is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be the abuse of the process of the court to allow a new proceeding to be started in respect of them”*

I therefore find that this present case raises issues and facts which were clearly part of the previous suit and could have been raised in it but were not. I also agree with Counsel for first defendant that the Plaintiff approbated the sale of the suit property to the 2<sup>nd</sup> Defendant and is therefore estopped from bringing a fresh suit challenging the same.

As to the allegation of fraud which the plaintiffs use to set up a front to attack the consent Order a review of the plaint shows that this area of attack was not pleaded which is fatal to the allegation raised

In case of **Interfrieght forwarders (U) Ltd vs East African Development Bank SCCA 33/1993 Oder, JSC (RIP)** held 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 for amendment of the pleadings”*

***Order 6 Rule 3 of the Civil Procedure Rules*** provides that where pleading relies on fraud in which particulars maybe necessary, the particulars must be stated.(*see Kampala Bottlers Ltd vs Damanico (U) Ltd [1009-1994] EA 141.*

***In Mitchell Cotts Ltd vs. Mulira (Supra)Justice Hellen Obura further held that;***

*“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 view of the above authorities, this court is not persuaded by the arguments for the Plaintiff based on allegations of fraud that was never pleaded and its particulars not set out in the plaint.

All in all based on my findings above I find that the preliminary objections are sound and sufficient to dispose of this suit which I accordingly dismiss with costs.

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Geoffrey Kiryabwire  
JUDGE

Date: 28/05/13

28/05/13

**Ruling read and signed in open chambers in the presence of;**

- Masembe for 1<sup>st</sup> Defendant (with B. Kalibala)

Also h/b for D. Mpanga for 2<sup>nd</sup> Defendant.

**In court**

- None of the parties

Rose Emeru – Court Clerk

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Geoffrey Kiryabwire  
JUDGE

Date: 28/05/13