

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**HCCS NO 461 OF 2009**

- 1. PETER KATWEBAZE}**  
**2. SUZAN KATWEBAZE}.....PLAINTIFFS**

**VERSUS**

- 1. GROFIN EAST AFRICA FUND LTD}**  
**2. DFCU BANK LIMITED} .....DEFENDANTS**  
**3. HELLEN KAKYO}**

**BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

This ruling arises from an application by the Plaintiff's Counsel for judgment in light of admitted facts.

At the hearing of the oral application, the Plaintiffs were represented by Nestor Byamugisha while Counsel Nicholas Ecimu represented the first Defendant and Diana Namulondo represented the second Defendant. The third Defendant was represented by Naboth Muhirwe.

Counsel for the Plaintiff submitted that he had the preliminary matter to raise on the basis of the trial bundle filed on the court record pursuant to scheduling directions issued by the court for the parties to file a joint scheduling memorandum reflecting the points of agreement and disagreement and on the basis of the trial bundle comprising of agreed documents and documents intended to be relied upon but not agreed to.

On the basis of the trial bundle, the Plaintiff's Counsel submitted that when the Plaintiffs filed this suit, there was an existing suit between the first and second Defendants as Plaintiffs and the third Defendant and Messieurs Joan Traders Limited as Defendants in HCCS No 268 of 2008. The amended plaint thereof is one of the agreed documentary exhibits in the trial bundle. An amended written statement of defence is also included in the agreed documents. The suit was compromised in a consent judgment dated 11th of June 2012. The consent judgment was received by the court on 20 June 2012 and is also part of the trial bundle. Under the consent, the Defendants were to pay specific amounts and the question remained for decision as to whether the judgment creditors were entitled to interest.

On 21 September 2012, the court ruled that the judgment creditors were not entitled to interest. Furthermore in the current suit brought by the Plaintiffs, there was a partial compromise between the Plaintiff and the first and second Defendant's dated 27th of May 2010 filed prior in time.

On the other hand the consent in HCCS No 268 of 2008 was in full and final settlement of the suit. It was entered after judgment creditors had received Uganda shillings 110,000,000/= from the Plaintiffs for the suit property. The Plaintiff's Counsel contends that when the consent judgment in HCCS No 268 of 2008 was executed, it must have taken into account the Uganda shillings 110,000,000/= paid by the Plaintiffs. Consequently there is nothing owing to the first and second Defendants from the Plaintiffs in this case. There is no justification for them to sell the suit property. Furthermore the liability of the mortgagor had been extinguished. The Plaintiffs had filed this suit. They advertised the sale of the suit property. Consequently on the basis of those facts, the Plaintiffs would be entitled to judgment in light of admitted facts referred to.

In reply the first Defendants Counsel Nicholas Ecimu submitted that the scheduling conference had to be completed fully before coming to the point raised by the Plaintiff's Counsel. The first Defendant admits that consent judgment was entered in HCCS No 268 of 2008 secondly the partial consent in the present case is also admitted. He contends however that none of the consent judgments discharged the suit property from being security. This was especially in view of the fact that the third Defendant has not paid the decretal sum in HCCS No 268 of 2008. The Plaintiffs claim was to stop an impending sale which they had participated in. The counterclaim of the first Defendant is for the Plaintiffs to pay the balance. The Plaintiffs bid to buy the property for Uganda shillings 290,000,000/=. The partial settlement in this suit was for a sum of Uganda shillings 110,000,000/= and the first Defendant claims the balance of the bid offer of 290,000,000/=. The first Defendants Counsel contends that the admission of the debt in HCCS No 268 of 2008 did not discharge the suit property. Secondly the issue raised by the Plaintiff's Counsel should not be tried as a summary matter and the court should proceed to hear arguments on the merits of the case.

Counsel for the third Defendant Mr Naboth associated himself with the submissions of the Plaintiff's Counsel. In the third Defendant's written statement of defence and cross claim, the third Defendant indicated that she would raise a preliminary objection based on the same grounds as the Plaintiff's Counsel. That is that the settlement in HCCS No 268 of 2008 and determination of the court on the question of interest coupled with the final payment of Uganda shillings 110,000,000/= by the Plaintiffs to the first and second Defendants, discharged the obligations of the third Defendant to the first and second Defendant completely because that was a balance owing on the loan. The third Defendant's Counsel further submitted that the claim of the first Defendant against the third Defendant in the cross claim is *res judicata*. All issues being brought up were settled in HCCS No 268 of 2008. The preliminary point on *res judicata* can be addressed later.

Diana Namulondo Counsel for the second Defendant associated herself with the submissions of the first Defendant's Counsel. She contends that as much as the consent and partial compromise are admitted, the third Defendant has not yet discharged her obligations there under. Secondly the Plaintiffs still owes some money to the mortgagee.

In rejoinder Counsel Nestor Byamugisha, Counsel for the Plaintiff, submitted that the question of whether judgment should be entered was raised as a preliminary point. HCCS No 268 of 2008 sought to recover the money advanced by the judgment creditors to the judgment debtors against the security of property. The current suit seeks to stop the exercise of the statutory power of sale. When the first and second Defendants chose to go to court in the year 2008, they could not talk about the exercise of the statutory power of sale. Consequently they are bound by the court regime and if they want to recover any money, it must involve execution proceedings. They cannot exercise the statutory power of sale. Finally Counsel contended that the consent judgment is in full and final settlement of the suit and discharged the loan.

### **Ruling**

I have duly considered the Plaintiffs application for judgment on the basis of alleged admitted facts which we shall consider presently. However certain facts have indeed been admitted namely the fact that there was partial judgment in High Court civil suit number 461 of 2009 between the Plaintiffs and the first and second Defendants. The partial judgment was executed on the 27th of May 2010 and endorsed by the court on the 28th of May 2010 wherein judgment was entered by the registrar. The second agreed fact is that there was a partial settlement of High Court civil suit number 268 of 2008 between the first Defendant and the second Defendant as Plaintiffs against Joan Traders Limited and Helen Kakyo as Defendants. The consent was executed on 11 June 2012 and entered as a judgment of the court on 20 June 2012. Under the partial settlement the question of interest payable to the second Plaintiff namely DFCU Bank Ltd on the principal sum under the loan agreements was to be decided by the court on the merits. The third admitted fact is that High Court civil suit number 268 of 2008 terminated in a judgment of the court dated 21st of September 2012. In the judgment the question of interest was finally resolved in favour of the Defendants. I have further considered the submissions of Counsels set up above.

I do not have the benefit of any laws in support or against the prayers of the Plaintiff's Counsel and I have tried my best to examine the admitted facts in light of the prayers and the pleadings of the Plaintiff in the current suit and establish the applicable laws.

Admissions are generally governed by order 13 of the Civil Procedure Rules. Order 13 rule 6 specifically provides for judgment on admission in the following words:

"Any party may at any stage of the suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any

other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just."

It is the right of any party at any stage of the suit to apply for judgment on the basis of admission of facts made either on the pleadings or otherwise as in this case for judgment if the facts admitted warrant the entering of judgment. An admission must however admit the claim of the Plaintiff. Order 13 rule 6 of the Civil Procedure Rules gives the court discretionary powers upon an application to make such order or give such judgment as the court may think fit. However at this stage the rule on judgment on admission ought to be read together with Order 12 rule 1 (2) of the Civil Procedure Rules which deals with the scheduling conference and provides that where the parties reach an agreement, orders shall immediately be issued in accordance with rules 6 and 7 of Order 15. I will without prejudice consider the application of the Plaintiff's Counsel in light of Order 13 rule 6 of the Civil Procedure Rules to determine whether an order or judgment may be issued as prayed for on the basis of admissions. To do so, it is necessary to consider what the claim of the Plaintiff is before considering matters of fact admitted in the three documents referred to above and their effect on the resolution of the dispute.

The Plaintiffs claim as contained in HCCS No 461 of 2009 was lodged on the court record on 11 December 2009 and is against the Defendants jointly and severally for declaration that the intended advertised sale of Kyadondo Block 185 Plot numbers 2746 and 2747 is unlawful or wrongful and an order stopping it. It is for a permanent injunction, general damages, interest and costs. The prayers at the end of the plaint repeated in more detail the claim of the Plaintiffs. The first claim is for a declaration that the advertised/intended sale of the suit land is illegal/unlawful, unjust, and inequitable, null and void. Secondly it is for an order stopping the intended/advertised sale. Thirdly it is for an order compelling the second Defendant to accept the outstanding mortgage loan repayment on account of the vendor with it in full and final payment, releasing the mortgage and retrieving the certificates of title to the suit property. Fourthly the Plaintiffs seek a permanent injunction restraining the Defendants from ever interfering with the Plaintiff's ownership, occupation or any other interests and quiet enjoyment of the suit property. The Plaintiffs also seek general damages, interest, costs of this suit and interest on the costs.

On the 27th of May 2010 parties to the suit executed a consent partial settlement of HCCS No 461 of 2009. The terms of the consent judgment were that it was agreed that the suit is partly settled as follows:

1. ... "That the Plaintiffs admit liability to the Defendants to the extent of Uganda shillings 110,000,000/= only and hereby agree to pay the said sum in the following manner.
2. That the Plaintiffs shall settle the above sum in the following instalments:
  - a. The first instalment of Uganda shillings 50,000,000/= shall be paid on or before the 31st day of May 2010.
  - b. The second instalment of Uganda shillings 30,000,000/= shall be paid on or before 30 June 2010.

- c. The third instalment of Uganda shillings 30,000,000/= shall be paid on or before 30 July 2010.
3. The parties reserve the following issues for determination in this suit;
  - a. Whether the intended sale by the Defendants is lawful?
  - b. Whether the Plaintiffs are entitled to a permanent injunction?
  - c. Whether the Plaintiff is entitled to pay only the balance on the purchase price?
  - d. Whether the purported purchase by the Plaintiffs of the suit property was lawful?
  - e. Whether the Defendants are entitled to their prayers in the counterclaim? ..."

The facts constituting the cause of action under paragraph 5 of the plaint clearly indicate that the basis of the Plaintiffs claims is a sale agreement dated 2nd of June 2008 wherein the Plaintiffs purchased the property from the third Defendant Helen Kakyo. In the plaint the Plaintiffs alleged that they were willing to pay the outstanding balance on the vendor's loan with the second Defendant estimated at Uganda shillings 35,650,000/= on the basis of a statement of account issued by the second Defendant.

The amended written statement of defence of the first Defendant avers that the suit of the Plaintiffs is brought in bad faith. That the purchase was without its consent under the mortgage dated 19th of May 2006. Secondly the first Defendant was not a party to the agreement involving dealings between the Plaintiffs and the third Defendant (the vendor). Furthermore the first Defendant avers that the Plaintiffs should pay the value of the bid dated 16th of November 2009 of Uganda shillings 290,000,000/=. Consequently there is a counterclaim by the first Defendant for the balance of Uganda shillings 180,000,000/=.

Prior to the singular written statement of defence of the first Defendant, both **Defendants** had filed a joint written statement of defence and counterclaim. In paragraph 6 thereof they averred that the purported purchase was done without their consent as indicated under the mortgages dated 2<sup>nd</sup> of August 2005 and 19th of May 2006 which were executed in favour of the second and first Defendant's respectively. Secondly the Defendants were not party to the agreement or dealings between the Plaintiffs and the registered proprietor and as such cannot be bound by the terms and conditions under that agreement. Both Defendants counterclaimed against the Plaintiffs jointly and severally for the bid sum of Uganda shillings 290,000,000/=:, general damages for lost opportunity, bad faith and inconveniences caused the Defendants by the Plaintiffs and costs. It is admitted in the joint defence that the Plaintiffs tendered in their bid on 16 November 2009 in response on advertisement by the Defendants on the 7<sup>th</sup> and 13th day of November 2009 to buy the suit property. The Defendants received other bids for the property. In paragraph 25 thereof the Defendants jointly averred that the Plaintiffs bid was accepted by the Defendants on 3 December 2009. Subsequently the Plaintiffs sued the Defendants on 11 December 2009 to declare a sale that they had willingly participated in as unlawful.

Subsequently and by consent of the parties the Plaintiff filed an amended plaint and the first and second Defendants also filed amended written statements of defence peculiar to themselves and abandoned their joint defence.

In the amended plaint the Plaintiffs additionally claim that the intended sale by the Defendants would be in bad faith in light of HCCS No 268 of 2008 as it would amount to double payment to the Defendants. The Plaintiff intends to rely on a consent judgment between the Defendant's and Joan Traders Limited and the third Defendant and the partial consent settlement between the Plaintiffs and the Defendants. Furthermore the Plaintiffs aver that they are willing to pay the vendor's outstanding mortgage loan balance of Uganda shillings 110,000,000/= to the second Defendant and actually did pay in full under consent partial settlement dated 11th of May 2010. The Plaintiff further seeks a declaration that the Plaintiffs payments pursuant to the consent partial settlement entered into on the 11th of May 2010 and sealed by the court on the 28th of May 2010 discharged the Plaintiffs fully from liability if any to the Defendants.

The averment of the Plaintiff in the amended Plaint obviously generates an issue of law as to whether the Plaintiffs are discharged from liability to any of the Defendants pursuant to the orders of the court issued by consent of the parties. Before consideration of the issue raised by the Plaintiff's Counsel, on 4 December 2013 Counsels filed a joint scheduling memorandum executed by the Plaintiff and the first Defendants Counsel.

The following facts are admitted in the joint scheduling memorandum as between the Plaintiffs and the first Defendant namely:

- The Plaintiffs bought the suit property from the third Defendant and executed an agreement of sale on 2 June 2008 when the said property had been mortgaged to the second Defendant namely plots 2747 and plot 2746.
- Plot 2746 only was encumbered by caveat lodged by the first Defendant on 26 August 2008.
- The third Defendant had an account number 0103530089100 with the second Defendant.
- The Plaintiffs paid Uganda shillings 170,000,000/= first instalment to the third Defendant promptly on her account with the second Defendant and took immediate possession and occupation of the suit property. They are still in occupation and possession.
- The first Plaintiff notified the second Defendant of the purchase of the suit property and applied for a loan of the balance of purchase of Uganda shillings 110,000,000/= against the suit lands as security.
- For purposes of the loan the Plaintiff opened an account with the second Defendant.
- The second Defendant commissioned Messieurs Certified Properties Surveyors and Valuers and Real Estate Agents to value the said property following the application for a loan to it by the first Plaintiff.
- The valuers rendered their report in August 2008 and the Plaintiffs paid for the services of the valuers and related to the valuation.

- The first Defendant declined to grant the loan applied for by the first Plaintiff.
- The first Plaintiff lodged a caveat on plot 2746 on 20 November 2008.
- On 9 November 2009 Court Bailiffs and Auctioneers served a notice to vacate on the Plaintiffs pursuant to a notice of sale of the suit property in Saturday Monitor of 7th of November 2009 and scheduled for 20 November 2009.
- The Plaintiffs bid for the purchase of the suit property in writing on 16 November 2009.
- The first Defendant registered a mortgage on only plot number 2747 on 21 July 2008.
- On the 19th of May 2006 Joan Traders limited executed a mortgage with the first Defendant in respect of both plots.
- On 26 August 2008 the first Defendant lodged a caveat on plot 2746.
- The second Defendant's filed HCCS No 268 of 2008 against Joan Traders and the third Defendant.
- HCCS No 268 of 2008 was settled by consent.
- The Plaintiff partly settled the suit by payment of Uganda shillings 110,000,000/=.

After due consideration of the facts, it would be necessary to determine the chronology of events as this may put the settlements in the two suits in their proper context. The settlements have to be juxtaposed against questions of fact about the sale of the suit property and the context in which the sale was apparently made in terms of the agreed documents. It ought also to be placed in the context of the two suits.

The Genesis of the dispute should be taken to be the execution of a mortgage between Joan Traders Limited whose director is the third Defendant. The mortgage deed relied on by the Plaintiff is between Joan traders limited and GROFIN East Africa Fund LLC and is dated 19th of May 2006. Under that mortgage block 185 plots 2746 and 2747 were pledged as security for a loan. Subsequently there was a sale agreement between the first Plaintiff and the third Defendant. The contract price was Uganda shillings 280,000,000/=. The agreement is dated 2<sup>nd</sup> of June 2008. It is an agreed fact between the Plaintiffs and the first Defendant that on 26 August 2008, the first Defendant lodged a caveat on plot 2746. It is therefore apparent that the caveat was lodged after the sale agreement between the Plaintiff and the third Defendant. Proceedings were commenced in 2008 by the two Defendants namely GROFIN East Africa Fund LLC and DFCU Bank Ltd against Joan Traders Limited to which suit the third Defendant was added. This was High Court civil suit number 268 of 2008. The third Defendant is the registered proprietor of plots 2747 and 2746.

It is apparent that while the suit was pending the suit property was advertised for sale on 9 November 2009 and scheduled for sale on 20 November 2009 according to the agreed facts between the Plaintiffs and the first Defendant.

The court record shows that the Plaintiffs filed High Court civil suit number 461 of 2009 on 11 December 2009. This was apparently and as claimed in the plaint after the sale of the suit

property which had been advertised. It is also after the Plaintiffs bought the suit property from the 3<sup>rd</sup> Defendant.

Subsequently there was partial settlement of High Court civil suit number 461 of 2009. The terms of the settlement are important for resolution of the Plaintiff's application for judgment. The partial settlement is between the Plaintiffs and the first and second Defendants. It is dated 27<sup>th</sup> of May 2010. In that consent judgment, the Plaintiff's admit liability to the Defendants to the extent of Uganda shillings 110,000,000/= and agreed on a schedule of payment. Certain questions were reserved for determination namely whether the intended sale by the Defendants was lawful. Secondly whether the Plaintiffs are entitled to a permanent injunction and thirdly whether the Plaintiffs are entitled to pay only the balance on the purchase price. Fourthly, to determine whether the purported purchase by the Plaintiffs of this suit property was lawful? Lastly whether the Defendants are entitled to their prayers in the counterclaim?

The issues for resolution are part of an agreement endorsed as a judgment of the court and operate as estoppels against the Plaintiffs from asserting a different position. In other words the issues are supposed to be determined inter partes. However before taking leave of the matter, there was a subsequent resolution of the civil suit between the first and second Defendants and the third Defendant's company Joan traders limited and the third Defendant. The only matter for me to consider as far as the prayer of the Plaintiff's Counsel is concerned is whether the subsequent settlement of that suit and determination of the question of interest compromised the Plaintiff's suit.

Before considering the subsequent settlements in this suit between the second and first Defendant's against the third Defendant and her company Joan Traders Limited, there is an apparent admission of liability by the Plaintiffs in the consent partial settlement which was conceded to by the Defendants. The concession is that the Plaintiffs owe the first and second Defendants Uganda shillings 110,000,000/=. The Plaintiffs can only owe money to the Defendants on the basis of something. It is not apparent from the partial consent judgment why the Plaintiffs are indebted to the first and second Defendants. It cannot on the face of it be assumed that it is part of the sale of the said property. This is in light of the issues reserved for determination by the court under paragraph 3 of the consent judgment.

As far as High Court civil suit number 268 of 2008 is concerned, the Plaintiffs are not party to this suit. However as far as this suit namely 461 of 2009 is concerned, the parties thereto have admitted the consent judgment. The consent judgment was in the partial disposal of HCCS No 268 of 2008 between GROFIN East Africa Fund LLC and DFCU Bank Ltd as Plaintiff's and Joan Traders Limited and Helen Kakyo as Defendants. Under the consent judgment it is agreed that the Defendants jointly and severally owe and shall pay first Plaintiff Uganda shillings 190,701,803.5/=. Secondly it is also agreed that the Defendants jointly and severally owe and shall pay to the second Plaintiff Uganda shillings 190,701,803.5/=. Thirdly it was agreed that the issue of interest payable to the second Plaintiff on the principal sum shall be decided by the court



on its merits. The matter of the indebtedness of the Defendants in HCCS No 268 of 2008 to the second Plaintiff namely DFCU Bank Ltd was finally resolved by the judgment of the court on the merits on 21 September 2012 where it was held that interest was not payable to the second Plaintiff. The sum total of the result of HCCS No 268 of 2008 is that the Defendants namely the third Defendant to HCCS No 461 of 2009 and Joan traders limited owed the Plaintiffs in HCCS NO 268 of 2008 only the money reflected in the consent judgment amounting in total to Uganda shillings 381,403,607/= divided into two amongst the two Plaintiffs.

The question of liability of the Defendants as against GroFin East Africa Fund LLC and DFCU Bank Ltd was finally resolved by the judgment of the court in HCCS No 268 of 2008. The resolution of that suit did not affect the issues for determination in HCCS No 461 of 2009. Firstly this is because the Plaintiffs in HCCS No 461 of 2009 are not parties to HCCS No 268 of 2008. Secondly enforcement procedure in HCCS No 268 of 2008 would be between DFCU bank Ltd and GroFin East Africa Fund LLC as judgment creditors against Joan Traders Limited and Helen Kakyo as the judgment debtors.

Lastly it was by agreement in the partial consent judgment that the question of sale of the suit property in HCCS No 461 of 2009 would be determined by the court on the merits. The consent judgment remains valid. The issue is however intertwined with the question of whether the judgment debtor is in HCCS No 268 of 2008 have satisfied the judgment debt. It is a matter that may be taken up in execution proceedings. However it is bound to affect the issues in this suit because of the partial consent judgment wherein the Plaintiff's admit liability to the Defendants. The basis of the admission of liability is not apparent. It can only be inferred from the admitted facts and pleadings that it would be part of the sale of the suit property. The question cannot be decided conclusively on the basis of the admitted facts and documents. I therefore agree with Counsel for the first Defendant and the other Counsels who associated themselves with him that the issue has to be tried. At the very least, the scheduling as between the second and third Defendants and the Plaintiffs ought to be completed and issues may be sharpened by further agreement on matters of fact. Last but not least the indebtedness admittedly of Uganda shillings 110,000,000/= has to be clarified in light of the averments that the Plaintiffs purported to purchase the suit property without the consent or participation of the first and second Defendants.

In the premises, the suit shall be set down for further management by completing the conferencing between Counsels and the parties and perhaps setting down for hearing if it is not resolved.

Ruling delivered in open court this 20th of January 2014

**Christopher Madrama Izama**

**Judge**

Ruling/Judgment delivered in the presence of:

Byamugisha Nestor for the Plaintiff in court

Nicholas Ecimu for the first Defendant and holding brief for Leah Namulondo Counsel for the second Defendant.

No body for the 3<sup>rd</sup> Defendant

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**20/January 2014**