

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 341 OF 2015

KAIKA INVESTCO LIMITED}.....PLAINTIFF

VS

IMPERIAL BANK (UGANDA) LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection to the suit raised by the Defendants Counsel contends that the suit is res judicata. He contended that the Defendant had filed High Court civil suit number 750 of 2013 in the High Court of Uganda commercial division against the Plaintiff and its two shareholders and directors Mr Mugisha Justus and Mugisha Rachel respectively and the same had been finally determined. The Plaintiff is represented by Counsel Francis Sebowe while the Defendant is represented by Counsel Raymond Ndyagambaki.

Both Counsels filed a joint scheduling memorandum in which certain facts and documents are agreed. The agreed facts are that the Plaintiff was a customer of the Defendant bank operating account number 8100000953 and 8100000955. Secondly the Plaintiff was the recipient of a term loan from the Defendant of US\$90,000 disbursed to his loan account number 8100000955. Thirdly the Defendant sued the Plaintiff in the commercial court division High Court civil suit number 750 of 2015 between Imperial bank (Uganda) Ltd versus Kaika Investco Ltd whereupon a default judgment was entered against the Plaintiff on 13 March 2015.

The Defendant's written Submissions on a preliminary objection that High Court Civil Suit No. 341 of 2015 is res judicata

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Counsel for the Defendants submitted that prior to the filing of this suit, the Defendants filed **HCCS No. 750 /2013** against Kaika Investco Limited and its two shareholders and directors, Mugisha Justus and Mugisha Rachel in the High Court of Uganda Commercial Division for outstanding monies owing to it amounting to US\$ 82,012.45 arising out of a loan facility it had extended to the Plaintiff plus interest, general damages for breach of contract and costs for the suit. In **HCCS No. 750 /2013** the issues raised were in relation to breach of a loan agreement due to non-payment of the loan had and utilised by the Defendants (Plaintiffs in the instant case). At the trial evidence of two witnesses was considered and the court on 13th March, 2015 issued a final judgment. The Defendants (Plaintiffs in the instant case) preferred no appeal against the judgment but have now filed **High Court Civil Suit No. 341 of 2015** in the High Court of Uganda(Commercial Division) against the Plaintiff(Defendant in instant case) where the claim is for breach/violation of the banker-customer relationship, breach of duty of trust, breach of fiduciary duty, illegal closure of bank accounts, breach of constitutional rights, injury to reputation and or defamation, aggravated and exemplary damages, costs and interest on the claims.

The Defendant's Counsel objected to the suit on the ground of res judicata under **Section 7 of the Civil Procedure Act, Cap. 71**. Counsel also relied on the Court of Appeal of Uganda case of **Mubangizi Julius versus Uganda Baati No. 001 of 2011**, which defined the doctrine of res judicata to mean a bar to a suit where the matter has been:

“adjudged, a thing judicially acted upon or decided a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to any of them”.

Furthermore the bar of res judicata was considered in **Civil Appeal No. 4 of 2002, Farook Aziz (Administrator of the Estate of Salima Kabasingo) v Abdalla Abdu Maruku**, where Odoki C.J. as he then was with reference to the holding of Crabbe JA's in the case of **Mandavia v Singh (1965) EA 118** at page 121 agreed that it was a matter of pleading. Where res judicata is raised as a bar the court only declines to exercise its jurisdiction so as to permit the litigants to have the issue litigated again “when it is satisfied that the same parties are suing in the same

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capacity and that the issue before it is the same as that alleged to have been the subject of adjudication in previous proceedings”.

The basis of the objection is that the parties in **Civil Suit No. 341 of 2015** and **Civil Suit No. 750 of 2013** are the same, that is Imperial Bank (U) Limited (the Defendant) and Kaika Investco Limited (the Plaintiff) and that the issues adjudicated upon in **Civil Suit No. 750 of 2013** are the same issues raised in the current suit HCCS No. **341 of 2015**. The Plaintiff admits that the issue relates to a loan facility taken by the Plaintiff, which issue was exhaustively adjudicated upon in **Civil suit No. 750 of 2013** and that the matters were substantially heard and finally decided by a competent court. The Joint Scheduling Memorandum also confirms that the Defendant sued the Plaintiff in the commercial court vide **High Court Civil Suit No. 750 of 2013** whereupon final judgment was entered against the Plaintiff on 13th March, 2015. In the premises the Defendant’s Counsel submitted that HCCS No. **341 of 2015** is res judicata and ought to be dismissed because res judicata is a bar to hearing the suit according to the case of **Fr. Narsensio Begumisa and others v Eric Tibegaba, Supreme Court Civil Appeal No. 17 of 2002**. The dismissal should be with costs

In reply the Plaintiffs Counsel prayed that the preliminary objection is overruled with costs because it lacks merit and is misconceived. The Plaintiffs Counsel relied on the disagreed factual controversies in the joint scheduling memorandum where it is agreed that the former suit namely HCCS No. 750 of 2013 had been decided ex parte. The suit came to the knowledge of the current Plaintiff after ex parte judgment had been entered. A judgment by default cannot be deemed to have been heard and finally determined for the purpose of constituting res judicata under S.7 of **the Civil Procedure Act, Cap. 71** because the Plaintiff (Kaika) did not file a defence, counterclaim and or set off for court’s determination in **HCCS 750 of 2013**. With reference to the case of **Karshe v Uganda Transport Co Ltd [1967] 1 EA 774 Karshe vs. Uganda Transport Co. Ltd (1971) 1 EA 774** the High Court of Uganda Sir Udo Udoma CJ quoting from a passage in Everest and Strobe’s Law of Evidence (3rd Edn.), p. 37 that: “The mere omission by a Defendant to plead matters by way of set-off or counterclaim does not, it seems, estop him from bringing a subsequent action against Plaintiff in respect of such matters.”

In the East African Court of Appeal case of **Ghela Manek Shah and Two others v Mohamed Haji Abdulla and another [1962] 1 EA 769** it was held by the High Court of Kenya that there may be different causes of action arising from one transaction and in such case the res judicata does not operate to exclude a second suit on a different cause of action, especially if at the time of the first suit the cause of action in the subsequent suit had not arisen.

Similarly the Plaintiffs Counsel submitted that a suit solely restricted to the loan agreement and rights and obligations there under should not be held to be a bar to a subsequent suit arising from the banker-customer relationship and the breach of rights there under because the law permits a party to sue even after judgment has been pronounced in a previous action, for the purpose of asserting his right and recovering damages, provided in so doing he is not seeking to reopen the earlier case as to liability in its entirety.

Counsel referred to a case of this court **Hudson Musoke v Standard Chartered Bank, HCCS 258 of 2009**, where this court held that explanation 4 would be applied and it must be shown that the subject matter was clearly part of the subject matter of litigation and clearly should have been raised in the previous suit.

Counsel argued that under the law litigants can elect to institute suits at any time provided it is not caught by the statute of limitation. Furthermore it is not mandatory under Order 8 rule 2 of the Civil Procedure Rules S.I 71-1 for a Defendant to include a set-off and or counterclaim in a suit in which such Defendant has been sued. He submitted that it would be contrary to the quoted provisions of statutory law, for the Defendant Bank, to now move the Court into holding that the Plaintiff in the present suit (Kaika) should and or was by law mandated or obligated to raise in the previous suit a counterclaim and or set-off against the current Defendant bearing in mind that the Defendant Bank, herein, objected to Court granting the Plaintiff herein leave to be heard in **HCCS 750 of 2013**. He argued that section 14 of **the Judicature Act, Cap.13** enjoins the Court to exercise its jurisdiction in accordance with common law and in conformity with the principles of justice. According to Halsbury's Laws of England 5th Edition paragraphs 1 – 1108:

Estoppels by record based on a default judgment must be carefully limited, and a Defendant should only be stopped from setting up in a subsequent claim a defence which was necessarily, and with complete precision, decided by a previous judgment.

In the premises Counsel prayed that the preliminary objection is overruled.

Counsel prayed that the Court overrules the preliminary point of law raised by the Defendant with costs. Furthermore the Plaintiff raised objections to the defence for being frivolous and vexations.

Ruling

There are two objections. The Defendant objected to the Plaintiffs suit on the ground that it is barred by res judicata. On the other hand the Plaintiff prayed that the Defendant's written statement of defence is struck out for being frivolous and vexatious. Because res judicata goes to the jurisdiction of the court, the objection on the ground of res judicata shall first be determined.

The preliminary objection of the Defendant is that the Plaintiff's suit as currently framed is res judicata because it ought to have been determined in High Court Civil Suit Number 750 of 2013.

The basic response of the Plaintiff is that the subject matter of the current suit is different from that of the former suit. Secondly there was a default judgment in the former suit and an application to have it set aside was refused and the matter is now on appeal. The suit was not determined on the merits. The subject matter of the current suit is different from that in the former suit. The Plaintiff's Counsel asked the court to apply certain tests to consider whether section 7 of the Civil Procedure Act Cap 71 applies to the facts and circumstances of this case. The first test is whether the matter was in issue in the former suit? Secondly whether the parties were the same or their representatives in the former suit? Thirdly whether the matter was before a court of competent jurisdiction? And whether the matter was heard and finally determined?

I have carefully considered the submissions of both Counsel and would first establish what the former suit was about and what the current suit is about.

The former suit HCCS 750 of 2013 was brought by Imperial Bank (Uganda) Ltd against Kaika Investco Ltd, Mugisha Justus and Mugisha Rachel. In the Plaintiff's written statement of defence, Imperial Bank (Uganda) Ltd prayed that the Court should strike out the defence for being frivolous and vexatious. The Court found that the defence was not frivolous and vexatious and allowed it to stand. The Court then found in favour of the Plaintiff and granted summary judgment against the Defendant. The Court's decision was based on the finding that the Defendant had failed to establish that the matter was in issue in the former suit. The Court also found that the parties were the same or their representatives in the former suit. The Court further found that the matter was before a court of competent jurisdiction and that the matter was heard and finally determined. The Court's decision was based on the finding that the Defendant had failed to establish that the matter was in issue in the former suit. The Court also found that the parties were the same or their representatives in the former suit. The Court further found that the matter was before a court of competent jurisdiction and that the matter was heard and finally determined.

sued Kaika Investco Ltd and the guarantors of the loan advanced to the first Defendant Company. The claim was for US\$ 82,012.45 being a claim for outstanding monies owing as a result of the loan facility extended to the first Defendant together with a claim for interest, general damages for breach of contract and costs of the suit. It was alleged in that suit that on 26 March 2012 the Plaintiff extended a loan facility for US\$90,000 at an interest rate of 11% per annum to the first Defendant Company. It was repayable in 48 equal monthly instalments of both principal and interest. The first Defendant defaulted on the loan facility hence the outstanding amount claimed. The purpose of the loan was for the acquisition of a Mercedes-Benz tractor head and one brand-new two axle drop side multipurpose trailer. The vehicles were acquired and had an accident and the insurance company compensated the bank with a sum of Uganda shillings 67,592,000/= without the Plaintiff's consent. The Plaintiff instructed auctioneers to impound the tractor head and the auctioneers reported that it was not on the road.

The second and third Defendants were sued jointly and severally in their personal capacity as guarantors of the loan advanced to the first Defendant Company.

The cause of action pleaded was that the Defendants had without any justifiable cause refused or neglected to pay the outstanding amounts according to demand letters attached to the Plaint. Consequently it was a claim for the outstanding amount, general damages for breach of contract and interest as well as costs of the suit.

The matter proceeded ex parte and according to the judgment there was proof that the Defendants kept house and could not be traced even after resolute efforts of the Plaintiff to have them served through normal process and also through substituted service. The court determined the suit ex parte according to the judgment issued on 13 March 2015. The suit had been filed on 18th of December 2013 while summons to file a defence was issued on 19 December 2013.

Subsequently the Applicants/Defendants filed High Court Miscellaneous Application Number 193 of 2015 to set aside the judgment and decree of the court dated 13th of March 2015. Secondly to set aside the interlocutory judgment entered on 24 August 2014. The Applicant also applied for leave and for extension of time within which to file a written statement of defence out of time. The application was dismissed with costs on the 7th of May 2015. In Miscellaneous

Application Number 255 of 2015 the Applicant/current Plaintiff sought leave to appeal against the decision of the learned judge dismissing the application to set aside the ex parte judgment and interlocutory judgment. The application for leave to appeal was allowed on 26 June 2015. Presumably the appeal is still pending hearing by the Court of Appeal.

The peculiar facts of this matter is that there was no written statement of defence in the former suit and it cannot be said conclusively that there was a controversy between the parties for adjudication by the court though the suit proceeded ex parte and there was formal proof before a judgment. Indeed issues were framed for consideration by the court and judgment was based on the evidence and law on which the court was addressed.

In the very many authorities cited by the parties, there were Plaints and Written Statements of Defence. In terms of Order 15 rule 1 of the Civil Procedure Rules issues between the parties arise when a material proposition of law or fact is affirmed by one party and denied by another. Material propositions are defined as those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Furthermore Order 15 rule 1 (3) of the Civil Procedure Rules provides that each material proposition affirmed by one party and denied by the other shall form the subject matter of a distinct issue. Furthermore issues may be framed by the Court in accordance with Order 15 rule 3 of the Civil Procedure Rules which provides that the court may frame issues from any of the following namely; allegations made on oath by the parties or by any persons present on their behalf or made by the advocates of the parties. Allegations made in the pleadings or in answers to interrogatories delivered in the suit; and the contents of documents produced by either party.

The doctrine of res judicata is a statutory doctrine under section 7 of the Civil Procedure Act which provides that 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 of competent jurisdiction to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by the court. There are some explanatory notes to section 7 of the Civil Procedure Act which provides inter alia that the expression "former suit" denotes a suit which has been decided prior to the suit in question

irrespective of whether it was instituted prior to it. Secondly it provides that the competence of the court shall be determined irrespective of any provisions as to right of appeal from the decision of that court. Thirdly it is provided that the matter referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other. Finally for purposes of the facts and circumstances of this case explanation four provides 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.

A matter in controversy in a former suit was considered in the case of **Kamunye and others v The Pioneer General Assurance Society Ltd [1971] 1 EA 263** by the East African Court of Appeal sitting in Kampala. In that case the matter had not proceeded ex parte and in fact both parties were heard and the Court of Appeal referred to the pleadings of both parties. Law Ag VP held with the concurrence of the rest of the panel that the test of whether a suit is barred by the legal bar of res judicata is:

“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 adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time... The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...”

In the suit before this court, there was no defence to the former suit which proceeded ex parte. The court cannot effectively decide that the Defendant in the former suit who is the Plaintiff in the current suit would have put in a defence or even raised a counterclaim. In fact the Plaintiff in the current suit had attached a draft written statement of defence and the matter is still pending determination of whether leave ought to have been granted and the ex parte judgment set aside to enable the Plaintiff in the current suit file a written statement of defence. If the court is to go by explanation four of section 7, the literal reading thereof means that any matter which might and

ought to have been made a ground of defence or attack in the former suit is deemed to have been a matter directly and substantially in issue in that suit. The matter could not have been made a ground of attack or defence in the former suit because the Plaintiff's application to set aside the interlocutory judgment and ex parte judgment was denied.

Nonetheless the fate of the Plaintiff in the former suit is the subject matter of an appeal which is still pending. In other words there is a potential for the Plaintiff in the suit to raise the same issues in the written statement of defence in the former suit if the judgment in that suit is ever set aside. Explanation 1 of section 7 of the Civil Procedure Act makes it clear that: "the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it." In other words it is important that the suit in question should have been decided prior to the suit being challenged on the grounds of *res judicata* and the matter must have been in controversy in the former suit. The former suit was not defended and for that matter nothing in controversy in terms of issues arising from the pleadings of both parties has been decided. In the premises can the current Plaintiff be precluded from filing any suit in respect of any cause of action which ought to have been properly the subject matter of the former suit?

Before concluding the matter I have carefully considered the pleadings in the application to set aside the judgment in the former suit namely HCCS No. 750 of 2013. It is of interest that the Applicant in High Court Miscellaneous Application Number 193 of 2015 arising out of the former suit High Court civil suit number 750 of 2013 among other grounds averred in the application as follows and I quote:

1. That unknown to the Applicants the Respondent sometime in November 2013 recalled the loan instituted civil suit and paid its lawyers on 12 December 2013 from the company's account without consent or notice. The suit was instituted without sending a demand notice to the company or the guarantors.
2. That despite recalling the loan, the Respondent bank continued to charge default and penal interest which is illegal in an attempt to unjustly enrich themselves by deliberately concealing the right amount to court. That the compensation/payment from Jubilee

Insurance Company cleared the instalments unpaid earlier on and made the account regular and the suit filed a month later was in bad faith, malicious and premature.

3. That the Respondent has never served the Applicants with court summons at its office/company office located in Kazinga Namanve Kampala and the summons advertised by the Respondent was obtained in an irregular manner as well as advertised out of time.
4. That sometime in August 2014, I approached the Respondent bank in my capacity as a director of the first Applicant company and requested the bank to open its accounts numbers 81 0000 0953 – 82100000995 to enable the company clear the outstanding balance but the Respondent bank declined to open the bank accounts and only give a suspense account number LI20601 (BR 001) where I made a deposit.
5. That despite numerous reminders the Respondent has remained adamant, declined to furnish information requested or reply to the letters despite making regular payments a fact which was concealed from the trial judge thus the figure claimed and awarded by the Respondent is illegal, misleading and intended to unjustly enrich the bank.
6. That the Applicants have a good defence and counterclaim to the suit which has already been filed out of time and more so intended written statement of defence raises important matters of law on which is one on travesty of Cardinal positions of the law on the breach of banker customer relationship with a high likelihood of success.
7. That the honourable court has entered final judgment in the suit and execution process is about to commence.
8. The Applicant has made an application to set aside the interlocutory judgment in Miscellaneous Application Number 165 of 2015 but the same has at the date of filing this application not been considered.
9. The Applicants stand to suffer substantial loss or irreparable loss, if the final judgment/decreed set aside, the interlocutory judgment set aside, time is not enlarged and leave granted to file a written statement of defence out of time.
10. The court has delivered final judgment in High Court Civil Suit No. 750 of 2013 and the Applicant will be occasioned injustice if execution is commenced and the Respondent recovers an unjust amount.

11. It is just and equitable and the interest of substantive and natural justice will be best served in allowing the application.

The affidavit in support is that of a director of the Plaintiff Mr Justus Mugisha. It also attaches the written statement of defence. The grounds disclosed in that application are broadly part of the intended written statement of defence and counterclaim. The Plaintiff's answer inter alia to the preliminary objection of res judicata is that the current civil suit number 341 of 2015 is different from the former suit High Court civil suit number 750 of 2013. The reasoning is that in HCCS 750 of 2013 the Defendant in the current suit claimed US\$82,012 against the Plaintiffs being outstanding monies owing as a result of the loan agreement, general damages for breach of the loan agreement and costs. On the other hand the claim in the current suit is for breach/violation of banker/customer relationship or agreement, breach of duty of trust, breach of fiduciary duty, illegal closure of bank accounts, breach of constitutional rights, injury of reputation, and or defamation, aggravated and exemplary damages, costs and interest. It is in respect of the shillings account number 8100000953. He further submitted that the subject matter in the former suit concerned a different account and a loan agreement. Secondly it proceeded ex parte. The Plaintiff's Counsel admits that there is a pending appeal after the Defendant objected to an application to set aside the interlocutory judgment upon dismissal of the application. Furthermore Counsel submitted that the issues raised in HCCS 750 of 2013 were whether there was a valid loan agreement/contract between the parties and secondly whether the Defendant breached the loan contract/agreement. On the other hand the issues in the current suit HCCS 341 of 2015 are whether there was a breach and violation of the rights of the Plaintiff as the customer of the Defendant (the breach of a banker/customer relationship and or contract), whether there was a lawful overdraft of Uganda shillings 197,555,162/= issued to the Plaintiff and whether the said sum was lawfully debited from the Plaintiffs account 8100000953 by the Defendant bank.

From the above factors in the dismissed application it can be discerned that the current Plaintiff intended to raise some of the issues in the current suit in the former suit. What is peculiar about this objection is that the court judicially considered the application to set aside the ex parte judgment in the former suit and dismissed it. It is now the subject matter of an appeal. It is true that the intended matters in controversy or issues were not decided between the parties. However

the Plaintiff intended to raise issues of customer/bank relationship and the entire contract between the parties. The Plaintiff in the current suit also intended to defend the suit as well as raise a counterclaim.

Finally I have considered the provisions of section 6 of the Civil Procedure Act which provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where the suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

Technically the issues raised in the current suit are not pending in any court in terms of pleadings. However it is the potential subject matter of the former suit which is the subject pending on appeal. To decide this preliminary objection one way or other has a direct impact on the appeal between the parties in which the Plaintiff in the current suit intended to file a written statement of defence as well as a counterclaim.

While the preliminary objection itself on the ground of res judicata cannot be sustained on the basis of the facts presented because the matter in controversy was only intended to be raised and that intention is still the subject matter of an appeal, it would be improper to proceed with the determination of the current suit because of the judicial decision dismissing an application in which substantial issues which have been raised in the current suit were intended in the former suit now the subject matter of an appeal. The substance is that the appeal has the potential of terminating in permitting the current Plaintiff an opportunity to defend the suit, the subject matter of the objection on the ground of res judicata as well as raise the counterclaim which was intended in the application that was dismissed namely in High Court Miscellaneous Application Number 193 of 2015.

In the premises the only just conclusion is to stay proceedings in this application as well as the main suit on the ground that there is a prior instituted suit which is now pending appeal where the issues to be raised therein were dismissed but the dismissal is the subject matter of an appeal

leaving open the potential to raise the same issues the subject matter of the current suit in the former suit.

In the premises High Court Civil Suit Number 341 of 2015 is stayed pending the determination of an intended appeal in the Court of Appeal arising from HCCS 750 of 2013.

Each party will bear its own costs of the proceedings thus far. The stay order is without prejudice to the intended appeal.

Ruling delivered on 22 April 2016 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Raymond Ndyagambaki Counsel for the Defendant

Plaintiff's Counsel and the Plaintiff are absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

22 April 2016