

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 477 OF 2015

1. NEW ICON INVESTMENT LTD}
2. YUSUF KARMALI}PLAINTIFFS
3. FARIDA KARMALI}

VERSUS

UGANDA LAND COMMISSION}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The first Plaintiff is a limited liability company and the second and third Plaintiffs who are natural persons jointly and severally filed this action against the Defendant for recovery and the grant of vacant possession of a parcel of land comprised under Kyaggwe Block 113, Plot 487, LRV 4384 Folio 1 measuring approximately 4.293 ha, For breach of trust and confidence, breach of leasehold agreement, loss of money for want of title and for loss of economic and financial prospects, mesne profits, special and general damages, interests and costs of the suit.

The Plaintiffs aver in the plaint that the first Plaintiff is an investment vehicle established in Uganda to participate in a range of opportunities including the acquisition of land for commercial, residential and industrial development. In November 2010 the first Plaintiff formally requested the Ministry of Lands, Housing and Urban Development to allocate it land with a view to fulfilling its commercial interests and the request was channelled to the Defendant for valuation and consideration. The Defendant approved and granted land to the first Plaintiff. The first and second Plaintiff's were persuaded by the former shareholders/directors of the first Plaintiff to acquire shares and interests in the first Plaintiff Company owing to their ability to meet the costs of the intended developments. The second and third Plaintiffs invested in the first

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

Plaintiff on account of the location of the land leased to it. The Plaintiffs share purchase agreement is in excess of US\$705,250. On 13 September 2011 the Defendant made a lease offer to the first Plaintiff for land comprised in Kyaggwe Block 113 Plot 487, being land at Namanve and measuring approximately 4.293 ha and the lease offer is dated 13th of September 2011. The first Plaintiff accepted the lease offer from the Defendant and proceeded to fulfil its obligations there under. Accordingly the first Plaintiffs paid all the necessary fees. Having fulfilled the terms and conditions of the lease offer, the first Plaintiff executed a lease agreement with the Defendant for an initial period of five years and agreed that upon compliance with the terms thereof, it would be granted the remainder of the 49 years full term. The first Plaintiff was issued with a certificate of title on 4 September 2012. The first Plaintiff then sought to take possession of the suit property and was shocked to learn that the same land was claimed by a third party who prevented it from acquiring vacant possession. Messieurs Wash and Wills Company Resort Ltd have since gone into possession of the suit property. Upon enquiry it was established that the said Wash and Wills Company Resort Ltd had acquired a lease title from Uganda Investment Authority who claims ownership to the same property. The lease title was issued by Uganda Investment Authority. The grievance of the Plaintiffs is that the Defendant ought to have had and should have been possessed of all the technical and professional competence to have inquired and established the actual status of the land before leasing it to the Plaintiff. As a consequence thereof, the Plaintiff remains alienated from the suit property and was unable to get vacant possession contrary to the intention expressed in the lease offer agreement which has been breached by the Defendant. The Plaintiffs allege fundamental breach and fraud against the Defendant particulars of which are averred in the plaint. The Plaintiffs also claim misrepresentations of the Defendant leading to acquiring shares in the first Plaintiff. Consequently on account of failure to take vacant possession to commercially exploit, develop and take full benefit of its investment, the Plaintiffs claim US\$705,250 for the purchase of shares in the first Plaintiff; Uganda shillings 47,375,000/= being premium, preparation of lease, assurance of title, ground rent, registration of lease and bank charges. Structural and architectural plans amounting to Uganda shillings 9,400,000/=; submission, inspection and approval fees for commercial residential and industrial building plans amounting to Uganda shillings 5,973,750; costs of environmental impact assessment Uganda shillings 3,000,000/=; costs for procuring loan

to finance the project worth US\$1,500,000 amounting to US\$30,000; loss of profits and earnings for a three-year period amounting to US\$2 million; legal fees amounting to US\$35,000; miscellaneous expenses towards the processes and procedures amounting to US\$50,000; damages for breach of trust and confidence amounting to US\$500,000. The Plaintiffs seek a declaration that all the transactions carried out by the Defendant in respect of the suit land was intended to cause the Plaintiffs loss or damage for which the Plaintiffs must be fully compensated or in the alternative granted suitable land available to the first Plaintiff and costs of the suit to the values claimed; a declaratory order that the Defendant breached the agreement and confidence and trust of the Plaintiffs; an order for the grant of special and general damages for breach of trust and confidence; mesne profits; punitive and exemplary damages; costs of the suit; and interests at the rate of 12% per annum from the date of payment by the Plaintiff till payment in full.

The Plaintiff is represented by Counsels Brian Kaggwa assisted by Evelyn Atim of Messieurs Impala Legal Advocates and Consultants.

The Defendant did not file a written statement of defence. The matter was first mentioned before me on 11 January 2016 when the Plaintiffs sought to proceed for hearing but there was no formal interlocutory judgment entered by the registrar of this court and the matter was fixed for mention on 16 February 2016. The matter however did not proceed and next appeared on 16 March 2016. Interlocutory judgment was entered by the registrar on 28 January 2016. The matter proceeded for formal proof under Order 9 rule 10 of the Civil Procedure Rules.

The Plaintiff called two witnesses and the court was addressed in written submissions. The witnesses were not cross examined and relied on their filed written witness statements. I directed that the Plaintiff files and serves written submissions on the Defendant to give it an opportunity to reply. All the hearing dates were served on the Defendant and the Defendant took no action and no one appeared in court at anyone time to provide any explanation as to the absence of the Defendant. The suit proceeded in default of a defence ex parte.

I have carefully considered the Plaintiffs suit and particularly the averments in the plaint and the documentary exhibits. The documentary exhibits show that by an agreement dated 1st of

September 2011 between one Robert Kayira and Nasser Musosi of P.O. Box 373 Kampala and the Mr Yusuf Karmali and Farida Karmali it is disclosed that the first Plaintiff had a share capital of Uganda shillings 5,000,000/= divided into 100 ordinary shares of Uganda shillings 50,000/= each which had been issued and were fully paid-up. The sellers were the beneficial owners of the number of shares allotted and indicated against their names. Each of the sellers sold to the buyers all the shares they had. The total consideration for the shares was Uganda shillings 5,000,000/=. Secondly the buyers were additionally required to pay a sum of US\$705,250 as good will. The sellers of all the shares in the first Plaintiff undertook to transfer all their shares to the second and third Plaintiffs.

Secondly by lease offer form addressed to the first Plaintiff dated 13th of September 2011 the Commissioner of lands Mr Paul Idude with reference to an application of the first Plaintiff for Plot 487 Kyaggwe Block 113 Mukono granted subject to terms a lease for an initial period of five years from 1 September 2011 to the first Plaintiff and upon completion of the building covenant it was agreed that an extension would be granted for a period of 49 years. Fees were calculated at 47,375,000/= Uganda shillings. The lease was granted by the Uganda Land Commission for a term of five years from 1 September 2011 according to a copy of the lease document attached. It was signed by Uganda Land Commission by J.S. Mayanja Nkangi as the Chairman of the Commission and H.I Kaweesa as the Secretary.

The land became the bone of contention between Uganda Land Commission and Uganda Investment Authority. I have carefully examined the documentary evidence and it is apparent both from the pleading wherein documents are attached and the evidence that there are some basic facts which seemed not to be controversial. First of all the first Plaintiff obtained a lease from Uganda Land Commission. Over the same piece of land, Uganda Investment Authority claims title. It issued a lease to another company Wash and Wills Country Resort Ltd. It is not disclosed who granted Uganda Investment Authority title over the same piece of land. The title of Wash and Wills Country Home Ltd was issued with effect from 7 October 2010. On the other hand the title of New Icon Investment Limited was granted with effect from 1 November 2011 and registered on 30 August 2012. It is in respect to Plot 487 Kyaggwe Block 113 and measures approximately 4.393 hectares. On the other hand the title of Messrs Wash and Wills Country

Home Ltd could have been issued in 2012 although the exact month is unclear from the pleading. It is in respect of plot 439 Block 113 and concerns approximately 1.785 hectares. There are two descriptions of land which are distinct. The only common denominator is that the Block number is 113.

The evidence so far adduced by Mr Imran Karmali demonstrates that there is a problem not only of description of land but conflict between titles describing the land as between Uganda Land Commission and Uganda Investment Authority. In a report submitted by the Permanent Secretary Ministry of lands, Housing and Urban Development to the Secretary of Uganda Land Commission dated 16th of April 2012 and adduced in evidence, there is a report on three pieces of land under contention. It is a technical service report on the correct boundaries on three pieces of land. The Ministry of lands using various departmental standard maps of the former forestland, cadastral sheets where the three pieces of land are located were able to access the land on the ground. The land in question was originally identified by Uganda Land Commission as residential areas to serve industrial areas of Namanve and when field surveys were done in 1997 the surveyors included three portions in the Uganda Investment Authority land which was subsequently surveyed and certificate of title issued without noticing an anomaly. Uganda Land Commission went ahead and parcelled these residential portions into various plots which were all surveyed and deed plans issued. It was found out that Uganda Investment Authority had overshot its correct boundaries into the land of Uganda Land Commission. The total area allocated by Uganda Land Commission to various developers is 48 acres and is for residential purposes. On the other hand Uganda Investment Authority had encroached on the land marked "A" by 13 acres, portion of land marked "B" by 8 acres, and portions of land marked "C" by 7 acres. In total this is a total of 48 acres. The Ministry of land recommended that Uganda Investment Authority and Uganda Land Commission make recommendations for the way forward by agreement. The encroached area is about 3.96 acres in plot 487 Block 113.

Furthermore Uganda Land Commission wrote on 11 April 2012 to the Commissioner Surveys Land Mapping Entebbe on the question of duplication of ownership of three pieces of land claimed by the Uganda Investment Authority and Uganda Land Commission. They sought technical opinions on the matter. Additionally in a letter dated 9th of March 2012 Uganda

Investment Authority wrote to the Managing Director Wash and Wills Country Resort Ltd advising them that they had controversies about the boundaries with Uganda Land Commission where the land leased to them is located. They were advised to halt the ongoing development on the land until the procedural approvals were concluded. Several other correspondences indicated that Uganda Land Commission stood by its application and was awaiting a technical resolution of the boundary dispute. On 10 June 2015 the Plaintiffs filed a notice of intention to sue against Uganda Land Commission.

Uganda Land Commission is the only Defendant. Yet the technical problem had not been resolved. It cannot be established by this court whether the lease granted to the first Plaintiff is not valid. In the premises the other parties involved in the controversy ought to be heard. Uganda Investment Authority is a proper Defendant for there to be effectual resolution of the dispute. If the property properly falls within the jurisdiction of Uganda Land Commission, the Plaintiff would not have any cause of action against it except to pray to be given vacant possession. In other words the Plaintiff assumes that it got a title which is a nullity. Order 1 rule 7 of the Civil Procedure Rules provides that where the Plaintiff is in doubt as to who is the right person from whom redress is sought, he or she may join two or more Defendants for the question to be determined between all the parties. The problem is that in this case, the Plaintiff had not joined Uganda Investment Authority so as to determine the issue as to whether Uganda Land Commission properly issued a lease title to it as the Landlord. The problem is compounded by the fact that Uganda Land Commission has not filed any written statement of defence and has not deemed it fit to appear in the suit as a Defendant. The suit proceeded under Order 9 rule 10 of the Civil Procedure Rules which provides that any case the party does not file a defence on or before the date fixed and upon compliance with the requirement to file an affidavit of service as proof that the Defendant had been served, the suit may proceed as if that party had filed a defence.

Notwithstanding the fact that Uganda Land Commission has not filed a defence and the Plaintiff has not deemed it fit or has not considered the addition of Uganda Investment Authority under the provisions of Order 1 rule 7 of the Civil Procedure Rules, the question is whether the jurisdiction granted by Order 1 rule 10 (2) is wide enough to enable the court on its own motion to add a Defendant. Order 1 rule 10 (2) of the Civil Procedure Rules gives the court jurisdiction

at any stage of the proceedings *either upon or without the application* of either party and on such terms as may appear to the court to be just, to order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

The rule on the face of it allows the court on its own motion to add a Defendant at any stage of the proceedings. This suit proceeded in default of a defence of Uganda Land Commission and was coming for judgment today. Does the court have jurisdiction to add a party at this stage? I think so if it will serve the ends of justice. Furthermore section 33 of the Judicature Act Cap 13 provides that in the exercise of the jurisdiction vested in the High Court by the Constitution, the Judicature Act or any other law, the High Court may grant absolutely or on such terms and conditions as it thinks just:

“... all such remedies as any of the parties to the cause or matter is entitled to in respect of any legal or equitable claim properly brought before it so that as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided”.

In addition to the general jurisdiction of the High Court to make orders which are necessary for the ends of justice under section 33 of the Judicature Act, the High Court under Order 1 rule 10 (2) of the Civil Procedure Rules has specific jurisdiction to add a Defendant on its own motion at any stage of the proceedings. A similar rule is discussed by **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition London Stevens & Sons 1981 at page 181**. The learned author writes that the court may joint any person between whom any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with an relief or remedy claimed in the cause or matter which in the opinion of the court would be just and convenient to determine as between him and that party as well as between the parties to the same cause or matter.

In the case of **Gurtner v Circuit [1968] 1 All ER 328**, the Court of Appeal Civil Division of the UK Considered a rule in *pari materia* with the Ugandan Order 1 rule 10 (2) of the Civil Procedure Rules.

The relevant rule is RSC, Order 15 rule 6 (2) (b) which provides inter alia as follows:

“(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application ... (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party ... ”

Lord Denning MR at 332 held that the rule is substantially the same terms as the old RSC, Order 16 rule 11 and nothing turns on the difference in wording and many cases were decided on it. He said:

“That was done by Devlin J in *Amon v Raphael Tuck & Sons Ltd*. He thought that the rule should be given a narrow construction, and his views were followed by John Stephenson J in *Fire, Auto and Marine Insurance Co Ltd v Greene*. I am afraid that I do not agree with them. I prefer to give a wide interpretation to the rule, as Lord Esher MR did in *Byrne v Brown*. It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute “to be effectually and completely determined and adjudicated upon” between all those directly concerned in the outcome.”

Lord Diplock agreed at page 336 after citing the rules and various authorities which gave it either a narrower or wider construction of the rule and he held as follows:

“Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the Plaintiff on

the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely *adjudicated upon* (my italics) unless the rules of natural justice are observed, and all those who will be liable to satisfy the judgment are given an opportunity to be heard.”

The case **Amon v Raphael Tuck & Sons Ltd [1956] 1 All ER 273** was considered in **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55** by the Supreme Court of Uganda in considering Order 1 rule 10 (2) of the Civil Procedure Rules. The case is distinguishable because the court dealt with the question of whether a party was a necessary party for purposes of addition to the suit. Hon Mr. Justice Kanyeihamba JSC held at page 63 that:

“a clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit”.

Furthermore Mulenga JSC concurred and considered at pages 67 – 68 the grounds for holding that a person may be added on the ground that his presence is necessary.

In this case the question is not whether other parties may be added as necessary parties but as parties i.e. as Defendant. Coming to the facts of this suit if the Plaintiff obtains judgment against Uganda Land Commission, can it not be said that it lawfully issued title because it has the right to do so and the first Plaintiff got a good title? The question of boundaries between Uganda Land Commission and Uganda Investment Authority goes deeper than any problem that Uganda Land Commission has alone. First of all the title is issued by the Government after a survey is done. Secondly two plot numbers are named. In the reports attached to the testimony of PW2 it is another Authority which encroached on the so called Uganda Land Commission land. It is my considered opinion that granting of an order of vacant possession would be against the party who encroached on the first Plaintiff’s Plot. It is proper that this question is determined between the first Plaintiff and Uganda Investment Authority in addition to the matter being considered between Uganda Land Commission and Uganda Investment Authority as to the proper landlord

with authority to issue a lease on the alleged encroached portion of Kyaggwe Block 113, Plot 487 LRV Folio 4380 Folio 1 measuring approximately 4.293 Hectares, the subject matter of the suit.

The circumstances of this dispute involve other persons who are directly concerned with the problem of the Plaintiff obtaining of vacant possession of the lease granted to it by Uganda Land Commission. These are Uganda Investment Authority and any person to whom the disputed land has been leased by Uganda Investment Authority. The Plaintiffs were issued a lease which is not in dispute by Uganda Land Commission. In other words from the documentary exhibits I have read, the Uganda Land Commission has not contested the right of the first Plaintiff to obtain vacant possession of the suit land. There happens to be a boundary dispute between the two authorities namely Uganda Land Commission and Uganda Investment Authority affecting the lease granted to the Plaintiff. There is a boundary dispute which affects a portion of land leased to the Plaintiff which dispute ought to be resolved between Uganda Investment Authority and Uganda Land Commission who will be considered in their various capacities as conflicting landlords.

In the premises Order 1 rule 7 of the Civil Procedure Rules ought to have been applied. The Plaintiff cannot prove breach of contract, fraud or misrepresentation without establishing that Uganda Land Commission had no jurisdiction or mandate to lease the land to it. Moreover the documents I have referred to above on the face of it suggest that the encroachment was done by the Uganda Investment Authority. Lastly any order that is made in the suit directly or indirectly depends on who is the lawful proprietor of the suit property in terms of who is the right landlord of the alleged encroached part leased to the Plaintiff.

Halsbury's laws of England 4th Edition Reissue Para 256 interprets a similar rule to Order 1 rule 7 of the Civil Procedure Rules and provides that where the Plaintiff is in doubt as to which of two or more persons from whom the Plaintiff entitled to redress, he may join two or more Defendants so that questions as to which, if any, of the Defendant is liable, and to what extent, may be determined as between all the parties. Where judgment is entered against one of the Defendants, the unsuccessful Defendant may be ordered to pay to the Plaintiff the costs payable

by him to the successful Defendant or to pay the costs of the successful Defendant direct to the Defendant.

In the premises Uganda Investment Authority is hereby added to the suit as a Defendant to avoid a multiplicity of suits and to effectually resolve all matters in controversy between all the parties.

The Plaint shall be amended as prescribed by Order 1 rule 10 (4) to add Uganda Investment Authority as a party and summons will be issued and served on them before the suit is resolved.

Secondly amendment of the Plaint should capture the issue of the dispute between Uganda Investment Authority and Uganda Land Commission in so far as Uganda Investment Authority allegedly leased out a portion of Plot 487 Kyaggwe Block 113 in a title described as Plot 439 Kyaggwe Block 113.

The question of Landlord ownership shall be resolved as between Uganda Land Commission and Uganda Investment Authority by technical persons concerned with surveys and mapping and for that reason proceeding in this suit by way of judgment as between the Plaintiff and Uganda Land Commission is stayed pending addition of Uganda Investment Authority and the taking of evidence on the issue.

An interim injunction issues restraining the Uganda Land Commission from any further dealing in Kyaggwe Block 113, Plot 487 LRV 4380 Folio 1 measuring approximately 4.293 Hectares until the final resolution of this suit

The costs thus far occasioned to the Plaintiff are costs in the cause

Ruling delivered in open court on the 24th of June 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Hosea Lwanga for the Plaintiffs

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

Director of First Plaintiff Imran Karmali

Second Plaintiff Yusuf Karmali in Court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

24th June 2016