THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 103 OF 2015

[Arising From Civil Suit No. 423 of 2014]

THREEWAYS SHIPPING
SERVICES (GROUP) LIMITED :::::::::::::::::::::::: APPLICANT/ 1ST DEFENDANT

VERSUS

MTN UGANDA LTD :::::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicants brought this application by Notice of Motion under Sections 7 and 98 of the CPA, Order 6 rule 30 of the CPR and Order 52 rule 1, 2 and 3 of the CPR seeking orders that; (a) the respondent/plaintiff's suit H.C.C.S No. 423 of 2014 be struck out as it is barred by ***res judicata*** and is an abuse of court process, (b) costs of this application be provided for.

The grounds of the application are set out in the affidavit in support of the application deposed by Oscar Baitwa a Director and Chairman of the applicant and are briefly that;

The respondent commenced H.C.C.S No. 503 of 2012 in this court against the applicant for failing and / or refusing to pay the sums amounting to USD 3,827,820.71.

In an amended written statement of defence filed on the 31st October 2013, the applicant, in its defence to the respondent's claim, stated that the suit was a nullity since the action was based on an illegality and that court could not entertain the same.

In the Joint Scheduling Memorandum dated 28th February 2014, and the record of proceedings in H.C.C.S No. 503 of 2012, both the applicant and respondent agreed that the issue of illegality,

raised in the Amended Written Statement of Defence, could be determined without calling evidence and that, if determined in the applicant's favour, would dispose the entire suit. The parties called upon court to try that issue.

Background

The applicant's case as set out in the Notice of Motion and supporting affidavit deponed by Osca Bailwa is that;-

By ruling delivered on the 23rd May 2014, the Trail Judge held that the respondent's suit was founded on or arose out of an illegality and the same could not be entertained by court. Court struck out the respondent's action with costs.

On the 28th May 2014, the respondent commenced an appeal to the Court of Appeal against the decision of the court which is still pending.

The respondent went ahead and filed another suit H.C.C.S No. 423 of 2014 in this court against the applicant and 2 others for recovery of USD 3,761,993.46.

The applicant filed a defence on the 14th July 2014, wherein it gave notice that it would file an application to strike out the suit for being barred by ***res judicata*** and an abuse of court process.

The subject matter in H.C.C.S No. 423 of 2014 is the same as that which was brought or ought to have been properly brought before this court in the former suit vide H.C.C.S No. 503 of 2012 which was finally determined by this court.

The claim in H.C.C.S No. 423 of 2014 is the subject of a pending Appeal in the Court of Appeal between ***Mtn (U) Ltd Vs Threeways Shipping Services (Group) Ltd*** arising from H.C.C.S No. 503 of 2012.

By maintaining H.C.C.S No. 423 of 2014 and at the same time pursuing the Appeal against the decision in H.C.C.S No. 503 of 2012, the respondents are abusing the process of this court and as such H.C.C.S No. 423 should be struck out with costs.

Further that the agreed mode of dispute resolution between the parties is arbitration and as such H.C.C.S No. 423 of 2014 is premature and an abuse of court process.

The respondent filed an affidavit in reply deponed by Anthony Katamba who deposed that;

On the 1st April 2004, the applicant and respondent entered into an agreement for the supply of customs clearing and forwarding services which gave the parties an option of either pursuing disputes through arbitration or through litigation in Ugandan courts.

During the period between 15th of March 2009 to 1st April 2012, the applicant raised for payment a total of 132 invoices against the respondent, for various assorted services but the alleged services had never been provided.

The applicant knowingly and in the course of its dealings with the respondent wrongfully issued out invoices and unjustly enriched itself at the expense of the respondent.

The parties entered into a Memorandum of Understanding wherein the applicant agreed to refund the sum of USD 4,000,000 which had been wrongfully paid on the fictitious invoices. The parties agreed that a joint reconciliation should be carried out between them to determine the actual extent of the loss suffered by the plaintiff/ respondent.

On 18th September, 2012 the parties concluded the reconciliation of their accounts and it was discovered that the respondent lost USD 4,027,820.71 on account of the fictitious and/ or fraudulent invoices.

The defendant/applicant paid only USD 330,000 out of the total of USD 4,027,820.71 and a series of meetings were held to try to resolve the dispute but the applicant deliberately and willfully refused to pay the amounts owed.

On 28th October, 2012 the respondent instituted a suit against the applicant for breach of contract between the parties constituted in the Memorandum of Understanding by failing to pay USD 3,827,820.71.

At the scheduling conference, the applicant/ defendant raised a preliminary point of law; whether the Memorandum of Understanding was illegal and unenforceable which court found so on the 23rd of May 2014 without delving into the merits of the main suit and therefore disposed the action by striking it off the record.

Following the ruling, the respondent immediately lodged a Notice of Appeal against the decision of court and filed a stay on the taxation of costs.

On 23rd June 2014 the respondent filed a fresh suit against the applicant for money had and received for no consideration or in the alternative for recovery of the respondent's money fraudulently obtained by the applicant. The suit is not based on, and does not seek to enforce the Memorandum of Understanding but seeks to prove that the fictitious invoices were raised for no services rendered, and or fraudulently.

The issues in H.C.C.S No. 423 of 2014 are substantially different from the issues in H.C.C.S No. 503 of 2012 and therefore not barred by ***res judicata***. H.C.C.S No. 423 of 2014 has more defendants; Naphtal Were and John Basabose who the respondent contends colluded with the applicant to cause the loss suffered by the respondent.

In H.C.C.S No. 503 of 2012 court only pronounced itself on the legality of the Memorandum of Understanding.

The respondent is pursuing different remedies in both suits and therefore the existence of both the appeal and main suit is not an abuse of the court process.

The arbitration clause is optional and applies with the agreement of parties, and the parties never agreed to refer the present dispute to arbitration.

The respondent filed an affidavit in rejoinder deposed by Oscar Baitwa who stated that;

The averments in paragraph 5 and 6 of the respondent's affidavit are false and there is no admission made thereto.

The Memorandum of Understanding was signed without admitting liability and with a no fault clause.

The applicant operating under a mistake of law paid to the respondent the sum of USD 330,000.00.

That every suit shall include the whole claim which the plaintiff is entitled to make in respect of a particular set of facts and where the plaintiff omits to sue in respect of any portion of the claim he or she shall not afterwards sue in respect of the portion omitted.

The two suits are premised on the same facts and that it is an abuse of court process.

The remedy sought in both suits is the same being payment of money and court cannot allow a party to claim the same relief twice on the same set of facts.

Applicant's submissions

Counsel for the applicant submitted that both suits; H.C.C.S No. 423 of 2014 and H.C.C.S No. 503 of 2012 that was decided and is being appealed against arise from the same transaction and set of facts. Counsel further stated that both suits are for recovery of money arising out of a single transaction being approximately USD 4,027,820.7 less the actual payments of USD 330,000. Counsel relied on the case of ***Silver Springs International Hotel Vs Hotel Diplomat Ltd & Boney M Katatumba Civil Suit No. 227 of 2011*** in which court held that there would be a danger of arriving at different and perhaps conflicting decisions in cases of the same facts and inconsistency in the court decisions. Counsel prayed that the application be allowed and H.C.C.S No. 432 of 2014 should be struck out and /or dismissed with costs for abuse of court process and for being ***res judicata.***

Respondent's Submissions

Counsel for the respondent submitted that for ***res judicata*** to apply, the matter ought to have been heard and determined and where the merits of the matter was not heard and determined, the doctrine of ***res judicata*** does not apply. Counsel submitted that the only issue that was heard in the former suit was whether the Memorandum of Understanding was illegal. Counsel argued that it is not correct that the subsequent suit is barred by the decision in the former suit. Counsel added that it is imperative to add that the claim in the present suit accrued before the Memorandum of Understanding was signed and is independent of the claim for breach of Memorandum of Understanding which formed the basis for the former suit. Counsel further argued the issues in the Court of Appeal case C.A No. 31 of 2015 are substantially different from those in H.C.C.S No. 423 of 2014. Counsel submitted that it is not in doubt that the court of

Appeal and the High Court do not have parallel or concurrent jurisdiction. Counsel contended that the facts in the current case are different in that they are before Courts of different jurisdictions. Counsel added that the reliefs sought in the suit and appeal are different. Counsel prayed that the application to dismiss Civil Suit No. 423 of 2014 be dismissed with costs.

Applicant's submissions in rejoinder

Counsel submitted that by the parties in H.C.C.S No. 503 of 2012 agreeing that a decision on the point of law disposes of the whole suit both parties are bound and estopped from arguing otherwise. Counsel submitted that in the pendency of C. A No. 31 of 2015 arising from H.C.C.S No. 503 of 2012, it would be unjust to allow H.C.C.S No. 423 of 2014 to continue since it would and in two judgments arising out of the same transaction. Counsel argued that the subsequent suit be stayed or consolidated. Counsel concluded by reiterating earlier submissions that H.C.C.S No. 423 of 2014 be dismissed with costs to the applicant.

Decision of Court

I have considered the applicants' application and supporting affidavits, and submissions of both Counsel. The application was brought under Section 7 and 98 of the CPA, Order 6 rule 30, Order 52 rule 1, 2 and 3 of the CPR. This application arises from an objection raised regarding H.C.C.S No. 423 of 2014 which was filed by the respondent after reassessing the decision in H.C.C.S No. 503 of 2012, while at the same time an appeal was lodged against the same decision.

Counsel for the applicant submitted that the suit is barred by ***res judicata*** since H.C.C.S No. 423 of 2014 arises from the same facts as H.C.C.S No. 503 of 2012 that was already adjudicated upon.

Counsel for the respondent on the other hand contended that the cases are different in a way that H.C.C.S No. 503 of 2012 was struck out on the basis of the illegality of the Memorandum of Understanding and not on the merits of the case. Counsel also argued that the remedies sought differ as well as the jurisdictions of the courts which is not parallel.

The defence of ***res judicata*** is provided for under ***Section 7 of the CPA*** which provides as follows;

"No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try a subsequent suit or the suit in which the issue has been substantially raised, has been heard and finally heard by court."

The decision in H.C.C.S No. 503 of 2012 clearly connotes the fact that the merits of the case were not heard save the analysis of the Memorandum of Understanding that court declared illegal and therefore struck out the suit. The last paragraph of the ruling is as follows;

…….……However the counterclaim is not before the court for consideration on the basis of issue number one which is whether the Memorandum of Understanding is illegal/ an illegality and unenforceable in law. The correct remedy is not a dismissal of the action of the plaintiff which act would deal with the merits of the claim. The correct remedy is to dispose of the action by striking it off the record. The plaintiff's action is accordingly struck out with costs." **(emphasis mine)**

In the case of ***Isaac Bob Busulwa Vs Ibrahim Kakinda [1979] HCB 179*** court held on a preliminary point of law on ***res judicata*** that the dismissal of a suit on a preliminary point not based on the merits of a case does not bar a subsequent suit on the same facts and issues between the same parties.

Accordingly, based on the above holding it is my considered opinion that although the facts in H.C.C.S No. 503 of 2012 do not differ from those in H.C.C.S No. 423 of 2014, however, the decision in H.C.C.S No. 503 of 2012 was to struck out the case by reason of the illegality of the Memorandum of Understanding between the parties as determined by court on a preliminary point but court did not delve into the merits of the case. The above said, i am also aware of the fact that there is an appeal against the decision still pending in Court of Appeal in H.C.C.S No. 503 of 2012 but in my view this does not bar hearing H.C.C.S No. 423 of 2014. Further I am of the opinion that as Counsel for the respondent argued there are two other parties in H.C.C.S No. 423 of 2014, which all lead me to the conclusion that H.C.C.S No. 423 of 2014 is not is ***res judicature.***

I therefore overrule the preliminary objection that H.C.C.S No. 423 of 2014 ***res judicature.***

Costs will be in the cause.

I so order.

5 **B. Kainamura**

Judge

04.07.2017