THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0627 - 2014

MUDDU AWULIRA NVULE MUHAMMAD :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. **BUYE ABAYITA ABABIRI GROWERS COOP SOCIETY LIMITED**
2. **COOPERATIVE BANK LTD IN LIQUIDATION**
3. **BANK OF UGANDA**
4. **SIL INVESTMENTS LTD :: DEFENDANTS**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This ruling is in respect of preliminary objections raised by Counsel for the defendants, following a suit instituted by the plaintiff for damages and order for the release of title of the suit land to the plaintiff.

Background

The brief background of this suit is that the plaintiff's grandfather, the late Alamanzane Senoga died intestate on the 1st/9/1979 and was buried at Busunju in the current Mityana District. He left 14 children of which only 3 are surviving. In a family meeting held on the 11th/10/2009 the plaintiff was elected as the person to whom the certificate of no objection should be granted to secure letters of administration, which certificate he obtained. On assuming this favored position, the plaintiff conducted a search in the land registry to find out the position of his late grandfather's estate. He discovered that the deceased grandfather had left land comprised in Gomba Block 269 plot 16 and 17 situate at Budugade. Both titles were

however missing upon a search in the deceased's home at Busunju. In the land office, it was also discovered that the suit property plot 17 had been mortgaged by the 1st defendant with the 2nd defendant under Instrument No. KLA 269355 dated 24th/1/2005 by virtue of powers of attorney allegedly granted to the 1st defendant by the deceased. The plaintiff alleged that his grandfather died on 1st/9/1979 and that he could not possibly have given the 1st defendant the Power of Attorney 26 years after his death.

On the 19th/5/1999, the 2nddefendant was put under receivership by the 3rd defendant. The 1st defendant having failed to pay the loan, notice was given by the 4th defendant on the 18th/10/2012 of their intention to foreclose the suit land to recover the loan monies amounting to 306,594,175/= as of March 2011. The plaintiff contending that the mortgage was obtained through fraud lodged a caveat to forestall the intended sale.

The plaintiff on 8th/9/2014 brought this suit against the 1st defendant for fraud, the 2nd defendant for negligence in accepting title for the suit land without due diligence, the 3rd and 4th defendants because they have interest in the suit land as liquidators. He prayed for declarations that the land was illegally and fraudulently mortgaged to the bank; mesne profits; order for release of title to plaintiff free from encumbrances; declaration that the estate is not liable to the defendants for any alleged disbursed monies as loan; and general damages against the defendants jointly and severally.

The 1st defendant did not defend the suit. The 2nd, 3rd and 4th defendants denied all charges against them claiming that they executed a legal mortgage in favor of the 1st defendant upon a power of attorney executed by the registered proprietor of plot 17 Gomba Block 269 to wit Senoga Muhammad which money has accumulated and remains unpaid. The 4th defendant denying liability contended that it was acting in the capacity of an agent to recover debts owing to the 2nd defendant. The 3rd defendant in defense stated that it has the statutory mandate as liquidator of the 2nd defendant and that it is a wrong party being joined in this suit for which it is not liable.

When the matter came up for hearing, the 2nd, 3rd, and 4thdefendants raised preliminary objections are the subject of this ruling. The objections proceeded by way of written submissions. The objections;

a) **The plaintiff has no *locus standi* to bring this action;**

b) **Whether there is any legal bar from suing Bank of Uganda?**

c) **Whether there is need for leave before bank of Uganda can be sued as a statutory liquidator of a financial institution under S. 91 of the Financial Institutions Act of (2004) as amended.**

d) **Whether there was need for consent of Bank of Uganda or leave of court to sue the 2nd defendant**

On the 1st objection as to whether the plaintiff has *locus standi* to sue in this case counsel for the 2nd and 4th defendants submitted that the plaintiff did not have cause of action to bring this suit and they referred to **Order VI rule 30 and Order VII rule 11 of the Civil procedure rules** which are to the effect that a plaint shall be rejected or struck out if it does not disclose a cause of action against the defendant. They also gave the standard of what constitutes a cause of action and referred to the case of **Auto garage and others v. Motorkov (No.3) (1971) EA 514.**

In reply, counsel for the plaintiff argued that the plea lacked a basis and/or merit and prayed that the preliminary objection be dismissed.

It is trite that a cause of action means the fact or a combination of facts which gives rise to a right of action. ***Halsbury's Laws of England, 4th Edition*** (Re-issue). Vol. 37 at p. 24 explains ***'cause of action'*** in these words:

"Cause of action" has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to traverse. ***'cause of action'*** has also been taken to mean the particular act on the part of the defendant which gives the claimant his cause of complaint, or the subject matter or grievance founding the claim, not merely the technical cause of action."

It is such an important aspect of our law that 0.6 r.1 (a) requires all pleadings, generally, to contain a brief statement of the material facts on which the party pleading relies for claim or

defense. Under 0.7 r.1 (e), the plaint must contain the facts constituting the cause of action and when it arose. The consequences of non-compliance are grave. They are set out in 0.7 r.11. Under this Rule, a plaint which discloses no cause of action must be rejected by court.

It is, in my view, settled law that the question whether or not a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true: ***Jeraj Shariff & Co. vs. Chotal Fancy Stores f19607 EA 374 at 375.***

In ***Auto Garage & Others vs. Motokov (No. 3) (19711 EA 514,*** Spry V. P. summarized the test to be applied in determining whether or not a plaint has disclosed a cause of action. He said:

> ***"I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible."***

I will also refer to **prof. Gordon Wavamunno v. Sekyanzi Sempijja Civil Appeal No. 27 of 2010** where Justice Ruby Aweri Opio while referring to the case of **Vincent Tamukadde v. Serunjogi HCCS No. 85 of 1995** held that the case did not preclude or bar a beneficiary who has not taken out Letters of Administration from filing a case for the purpose of preserving the estate or keeping together its property.

From the above, it appears to me that the plaintiff's cause of action against the 2nd 3rd and 4th defendants is based on, allegedly, the general duty of care which the defendants owed to the plaintiff. The issue as to whether the negligence can be proved or if the defendants owed the plaintiff a duty of care is an issue for trial and cannot be resolved at this point. Furthermore the 3rd Defendant is the Liquidator and so has control of the 2nd Defendant and is principal to the 4th Defendant.

It is therefore my finding that the plaintiff by virtue of having obtained a certificate of no objection and having filed for letters of administration has interest in the land and capable of filing this action. It is not contended anywhere that the plaintiff wants to sell the suit property

but rather wants to preserve the estate as a beneficiary. Therefore, I find the argument of the defendants on this point as out of context and should be disregarded.

a) Whether there is any legal bar from suing Bank of Uganda?

Under Section 100 (1) (a) of the Financial Institutions Act (2004) (FIA) the liquidator may defend an action brought under the name of the financial institution. This is what Kiryabwire J (as he then was) found**In Kanyeihamba & 320 Ors v Nzeyi & 2 Ors (HCT - 00 - CC - CS - 361 - 2010) [2013] UGCOMMC 78 (2 May 2013)**. In this case, court found the need to add Bank of Uganda as party to the suit as a nominal defendant, by virtue of its capacity as liquidator.

In the present situation then the liquidator would be obliged to defend the suit on behalf of the financial institution under Section 100 of the FIA.

b) Whether there is need for leave before bank of Uganda can be sued as a statutory liquidator of a financial institution under S. 91 of the Financial Institutions Act of (2004) as amended; and Whether there was need for consent of Bank of Uganda or leave of court to sue the 2nd defendant

Counsel for the defendant objecting submitted that the plaintiff did not seek leave of court as provided by S.91 of the Financial Institutions Act (2004) nor was there written consent of the 3rd defendant before the suit was filed against the 2nd defendant that is under liquidation or management by the 3rd defendant. They prayed that the suit be struck out on the above premises.

Counsel for the plaintiff in reply submitted that this S.91 didn't apply because the bank wasn't under management but under liquidation at the time of the suit. It was further submitted that management control occurs when bank of Uganda appoints a statutory manager to run the banking institution and the existing board of directors are suspended. He referred us to S. 87(3) and 88 (1)(a) & (b) of the Financial Institutions Act which provides for the appointment of a statutory manager. He further contended that a statutory manager is the new managing director of a financial institution on behalf of bank of Uganda and that his term under the law should not exceed 6months. And that it is during this period that S.91 prohibits suits against bank of

Uganda or the managing institution before seeking consent of Bank of Uganda or leave of court.

Counsel for the plaintiff argues that the 2nd defendant was under management when it was taken over and closed by the 3rd defendant, but that it was under liquidation when the suit was filed in court. He referred to **exhibit D** n page 20 which is the liquidation notice that was attached and published in the gazette instituting liquidation and appointing a liquidator.

Counsel for the plaintiff further submitted his concerns about the difficulty in enforcing court orders against the 3rd defendant where a party is successful against the 2nd and 4th defendants, and submitted that it is for ease of enforcement that the 3rd defendant ought to be sued as statutory liquidator.

This issue can best be dealt with by splitting it into two:

1. Suing bank of Uganda and

2. Suing the 2nd defendant as a financial institution under liquidation.

I would say with respect that the parties have confused the two. S. 91 of the FIA as amended does not give protection to the 3rd Defendant; it gives protection to the institution under liquidation. Its wording is very clear. It provides:

> ***S.91 prohibits legal proceedings against a financial institution under management of the Central Bank.***

As to whether this institution was under management shall be dealt with later in this ruling.

So the only party that would run for the protection under S.91 would be the 2nd defendant.

As for the 3rd defendant, the capability of suing and being sued is provided for under Section 99 and 100 of the FIA. Under S.99, the 3rd defendant can become a liquidator or appoint a liquidator. Whoever the liquidator is, S.100 provides that he or she can bring or defend any actions or other legal proceedings in the name and on behalf of the financial institution.

Turning to the 2nd defendant, she could only be availed the protection of S.91 if she was under management.

Management is provided for under sections 88 and 89 of the FIA. Under S.88, the central bank may take over management of a financial institution. Its powers on taking over management of that institution is provided for under S.89 wherein it may continue or discontinue any of its operations as a financial institution. The management is however given a specific time span under S.89(6) which provides that:

> *"Where the financial institution does not comply with prudential standards within six months after its being placed under statutory management, the Central Bank shall close the financial institution and place it under receivership."*

The 3rd defendant took over the management of 2nd defendant in 1999. Management could only have been for 6 months as provided in 89(6). There is no doubt that 6 months after it went under receivership.

In view of the foregoing, by the time this suit was brought, the 2nd defendant was long out of management and therefore outside the protection of S.91. of the FIA. The reasons for the protection under S.91 were long gone because there was no hope of the 2nd defendant waking up and running its own businesses. The objection based on S.91 of the FIA is, I must say with no foundation and is denied.

In conclusion therefore, the need for the consent of the central bank was overtaken by passage of time. The sum total is that the preliminary objections by the defendants have no merit and are denied. Whatever costs have been incurred shall abide the final decision of the suit.

Dated at Kampala this 4th day of July 2017

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David K. Wangutusi

JUDGE