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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISC. APPLICATION NO. 399/2020

(ARISING OUT OF CIVIL SUIT NO. 296/ 2020)

10

THE ATTORNEY GENERAL.....APPLICANT

VERSUS

JACKSON WABYONA.....RESPONDENT

15

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

RULING

a. Background:

This application was brought by notice of motion under sections 6, 7 and 98
20 of the Civil Procedure Act, Order 6 Rule 30, Order 7 Rule 11 (a) and Order 52
Rules 1 and 3 of the Civil Procedure Rules seeking orders that;


- i. The Plaintiff in *Civil Suit No. 296 of 2020, Jackson Wabyona vs Tullow Uganda Limited, Tullow Uganda Operations Pty Limited and Others* be struck out/rejected, as against the Applicant for not disclosing a
25 cause of action and/or being barred by law


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- 5 ii. The Plaintiff has no *locus standi* to challenge the settlement deed by
 way of ordinary suit
- iii. The suit is in breach of the *lis pendens* rule and a blatant abuse of
 court process

The grounds of the application, as set out in the affidavit of Mr. Johnson
10 Natuwhera Kimera are that;

- a) On the 15th May 2020, the Respondent filed *Civil Suit No. 296/2020
Jackson Wabyona vs the Attorney General And 6 Other Defendants*
which suit seeks to impugn/ invalidate the Settlement Deed executed on
18th June 2015 amongst the Tullow Uganda Ltd, Tullow Uganda
15 Operations Property Ltd, Uganda Revenue Authority (URA) and the
Applicant, Government of Uganda
- b) The Respondent was not party to or otherwise privy to the Settlement
Deed and therefore has no *locus standi* to intervene and sue to
invalidate it under the 'public interest suit' exception
- 20 c) The Respondent in its pleaded case in the Complaint has not met the *locus
standi* threshold requirements necessary to permit a public interest suit
pursuant to Article 17 of the Constitution.
- d) The Settlement Deed was given effect by a Decree of the High Court
entered in *High Court Civil Appeal No.19/2014, Tullow Uganda Ltd and
25 Tullow Uganda Operations Pty Ltd vs Uganda Revenue Authority*, which
was signed, issued and sealed by the Court and cannot be revisited by
a Court of equivalent jurisdiction without the Decree being varied
through an Appeal or Review Application in the prior suit.


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5 e) The suit is in breach of the *lis pendens* rule and barred by section 6 of
the Civil Procedure Act as the matters in issue in the suit are directly
and substantially in issue in a previously instituted suit which is
pending determination.

f) It is just and equitable that the Plaintiff be struck out/rejected by the
10 Honourable Court with costs.

In the affidavit in support of the motion, Johnson Natuwhera Kimera deponed
that on the 15th May 2020, the Respondent filed *Civil Suit No. 296/2020
Jackson Wabyona vs Attorney General and 6 Other Defendants* which suit
seeks to impugn/ invalidate the Settlement Deed executed on 18th June 2015
15 amongst Tullow Uganda Ltd, Tullow Uganda Operations Property Ltd, Uganda
Revenue Authority and the Applicant, the Government of Uganda.

That the Respondent was not a party to the Settlement Deed and yet he
founds his *locus standi* under Article 17 of the Constitution of the Republic of
Uganda, that is, relating to his duties as a citizen.

20 Mr. Kimera averred that the Respondent's case is based on allegations of
corruption and consequential loss of public property but this does not meet
the threshold requirements necessary for court to permit a public interest suit
under article 17 of the Constitution.

He also avers that the Settlement Deed was given effect by a Decree of the
25 High Court entered in *High Court Civil Appeal No. 19/ 2014 Tullow Uganda Lt
and Tullow Uganda Operations Pty Ltd vs Uganda Revenue Authority* which
was signed and sealed by the Court; and that the Settlement Deed was
reduced into a Court order and cannot be revisited by a Court of equivalent

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5 jurisdiction without the Decree being varied through an appeal or review application.

That the suit is in breach of the *lis pendens* rule since the matters in issue in the suit arose in a previously instituted suit, *High Court Civil Application No. 137/2017; Jackson Wabyona vs Tullow Uganda Ltd, Tullow Uganda*
10 *Operations Pty Ltd and Uganda Revenue Authority* which is pending determination.

Mr. Wabyona, swore an affidavit in reply. He deponed that HCCS NO. 296/2020 is a public interest suit in exercise of his duty as a citizen of Uganda under Article 8 A and 17(i) of the Constitution which bestows upon him a duty
15 to defend, protect, promote, preserve and uphold the rule of law, good governance, accountability and transparency in the conduct of public affairs in Uganda; as well as to expose, combat and eradicate corruption, abuse and misuse of power in public offices and to protect and preserve public property.

Mr. Wabyona pointed out in his affidavit that he is aggrieved as follows;

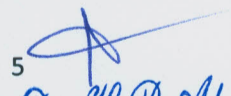
- 20 i. The impugned Settlement Deed was arbitrarily and illegally signed by public officials without authority and mandate and in breach of the law
- ii. The Settlement Deed compromised the tax liability by reducing the taxes payable to the Consolidated Fund from USD 542,793,821 to
25 USD 250,000,000
- iii. As a result of the compromise the taxes payable to the Consolidated Fund and Petroleum Fund were written off.

- 5 iv. Article 152 (2) of the Constitution and section 35 of the Public
Finance Management Act, 2015 which laws relate to waiver of taxes
or public resources were not complied with and as such the
Settlement Deed was illegal and a nullity
- v. The rule of law coupled with the principles of good governance,
10 accountability and transparency were infringed and violated.
- vi. Since the Minister did not seek the approval of Parliament, there was
lack of transparency and accountability

He averred that the suit raises matters of public interest and national
importance which require determination on whether or not there was a waiver
15 by URA and whether the law was complied with. It also raises allegations of
fraud and corruption, which amount to infringement of the rule of law, good
governance, accountability and transparency principles. That it also raises
issues relating to misuse of power and corruption by people in public offices
as well as connivance with multi-national companies.

20 Mr. Wabyona also deponed that the URA had at first placed a tax liability on
the 1st and 2nd Defendants, and even had a judgment in its favour but later
turned the tax liability into a compromise and waiver. This raises questions
various questions relating to whether the Defendants acted within the law,
and whether the execution of the deed was within the mandate of the
25 Government of Uganda and the URA.

He averred that the 3rd and 4th Defendants together with the 1st, 2nd, 5th, 6th
and 7th Defendants in HCCS No. 296/2020 caused loss to the Consolidated
Fund by waiving tax liability without the approval of Parliament under article

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5 152 (2) of the Constitution and section 25 of the Public Finance Management Act, 2015 which was arbitrary and illegal. That the total loss of the tax of USD 1,122,929,097; and the Applicants also committed transactional legal malpractice by misadvising their clients to contravene the laws of Uganda.

His affidavit also pointed out that HCMA NO.137 of 2017, an application for
10 review is different from HCCS No. 296 of 2020 which seeks a declaration that the Settlement Deed executed on 18th June 2015 is illegal, void and a nullity.

That the two matters are different because HCMA No. 197 of 2017 deals with a decree that settled Civil Appeal No.19 of 2014 while HCCS No. 296 of 2020 deals with the illegality in the execution of a Settlement Deed executed on
15 18th June 2015; and the reliefs sought in HCMA NO.17 of 2017 are very different from those sought in HCCS No. 296 of 2020. He added that the issue of illegality of the Settlement Deed has not been tried directly and substantially in any court and neither is pending trial before any Court.

b. Submissions:

20 **i. Applicants' Submissions:**

The Applicant raised the following issues;

- a) Whether the Plaintiff in High Court Civil Suit No. 296 of 2020 Jackson Wabyona vs Tullow Uganda Ltd and 6 Others should be struck out and rejected as against the Applicant for not disclosing a cause of action
25 and/or being barred by law
- b) Whether the Plaintiff has *locus standi* to challenge the settlement deed by way of an ordinary suit

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- 5 c) Whether the suit is in breach of the *lis pendens* rule and a blatant abuse
of court process
- d) What are the remedies available to the parties

On whether the Plaintiff has *locus standi* to challenge the Settlement Deed by
way of ordinary suit, Counsel for the Applicant submitted that the Settlement
10 Deed was signed, issued and sealed by the Court and cannot be revisited by
a Court of equivalent jurisdiction without the Decree being varied through an
Appeal or Review Application in the prior suit. In support to this contention
Counsel cited ***Mohammed Allibhai vs W.E Bukenya Musa and Another***
SCCA No. 56 of 1996 and ***Kiiza Daniel & 16 Others vs Uganda Land***
15 ***Commission & 2 Others Miscellaneous Application NO 1237/2013*** where
it was found that a consent order can only be set aside on grounds of fraud,
collusion or contravention of public policy. That this avenue was already
considered in HCMA No. 197 of 2017 which was filed by the Respondent and
is pending determination and to bring a separate suit over the same matter is
20 a waste of court's time and an abuse of process

On the issue of whether the suit is in breach of the *lis pendens* rule and a
blatant abuse of court process, the Applicant's Counsel objected to the
Respondent's contention that HCCS 296 OF 2020 is not barred by sections 6
and 7 of the Civil Procedure Rules. He submitted that the matter in issue in
25 HCCS No. 296 of 2020 is also directly and substantially in issue in an earlier
suit that was filed for review which contravenes the *lis pendens* rule. Counsel
pointed out that the 2017 review suit has not been disposed of and is still
pending adjudication arguing that in both the 2017 Review Suit and HCCS

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5 No. 296 of 2020 were matters in which the Respondent sought to review and set aside the Consent Decree/ Order which was drawn from the Settlement Deed and to have the tax liability re-opened and determined anew. His argument was that from analysis, the claims in the Review suit and HCCS No. 296 of 2020 are similar.

10 Additionally, counsel for the Applicant argued that the parties to the two matters were the same and it is immaterial that the Respondent has joined additional parties to HCCS No. 296 of 2020 beyond Tullow Uganda and the Uganda Revenue Authority with the test to be applied to that which was pointed in the case of ***Springs International Hotel Ltd vs Hotel Diplomate***
15 ***HCCS No. 227 of 2011***, the test is whether the parties in the previous suit are directly and substantially the same as in the subsequent suit.

He invited the court to find that the suit by the Respondent offends the *lis pendens* rule and prayed that the proceedings in HCCS No. 296 of 2020 be stayed until the review application has been heard and disposed of.

20 **ii. Respondents submissions:**

I note that at the time of preparation of this ruling, the Respondent had not yet filed submissions within time which was allowed by court thus any subsequent submissions is not considered here and thus court having given the parties dates within which to make their input accordingly and the
25 Respondent opted not to comply in time this ruling is thus made accordingly.


c. Decision of Court:


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5 Each of the issues raised by the Applicant's Counsel in submissions are considered as below.

On whether the Plaintiff in **High Court Civil Suit No. 296 of 2020 Jackson Wabyona vs Tullow Uganda Ltd and 6 Others** be struck and rejected as against the Applicant for not disclosing a cause of action and/ or being barred
10 by law. It was the Applicant's counsel submitted that the Respondent action is grounded upon public interest under article 17 of the Constitution but such suits are not meant to satisfy curiosity but rather to give relief to society. (**See Rev. Christopher Mtikila versus The Attorney General of Tanzania Civil Case No. 5 of 1993.** Furthermore, that the Attorney General was using his
15 mandate under Article 119 of the Constitution and the approval of the Parliament was not required in this instance. His contention was the Respondent's suit does not meet the *locus standi* threshold and that the suit does not meet the standards of Order 6 rule 3 of the Civil Procedure Rules which require that allegations of fraud and corruption must be particularized
20 or substantiated under paragraph 10 (b) and 17 of the plaint.

On the issue of *Locus Standi* learned counsel for the applicant submitted that in **Dima Dominic Poro vs Inyani and Another Civil Appeal No.0017 of 2016**, the court aptly defined *locus standi* as meaning "...a place of standing. It means a right a right to appear in court, and conversely, to say that a person
25 has no *locus standi* means that he has no right to appear or be heard in a specified proceeding" with the case of **Njau and Others v. City Council of Nairobi [1976-1985] 1 EA 397 at 407** proceeding to state that "... a person


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5 *has no locus standi means the person cannot be heard, even on whether or not he has a case worth listening to.*"

I associate myself with the definitions above and proceed to add that Osborn's Concise Law Dictionary Eleventh Edition by Sweet and Maxwell *defines Locus standi* as, "*The right to be heard in a court or other proceeding.*"

10 Having defined the term '*locus standi*' I now move to address the question whether the Respondent has a right to commence HCCS No. 296 of 2020. The Applicant professes that the Respondent has no right to bring an action under Article 17 of the Constitution and secondly that the Respondent did not particularize the allegations of fraud or corruption.

15 On the first argument, I have considered the provisions of the Constitution especially Article 17 (1) (d) and (i) which provides for duties of a citizen. I have reproduced the same below;

Article 17 (1) (d) and (i):

17. Duties of a citizen

20 **(1)It is the duty of every citizen of Uganda**

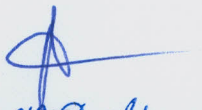
a).....

b).....

c).....

d) to protect and preserve public property

25 e).....


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5 f).....

g).....

h).....

i) to combat corruption and misuse or wastage of public property

The question thus which arise from the above provisions of the Constitution
10 is HCCS No. 296 of 2020 has anything to do with the duty of a citizen , in this
case the respondent in the protection and preservation of public property or
deal with combating of corruption and misuse or wastage of public property
pleaded.

In my assessment of the pleadings filed by the Respondent in HCCS No. 296
15 of 2020 the suggestions therein are relates to the duties to combating
corruption and protecting public property from wastage and also something
to do with the government and government agencies addressing corruption
and maintaining public property and avoiding its wastage. I also note from
the pleadings that the Respondent has brought the matter in his own right as
20 citizen as he states and not as a representative suit under Order 7 rule 4.

In the case of **Hon. Abdu Katuntu and Another vs MTN Uganda and 6
Others HCCS No. 248 of 2012** the court highlighted several principles in
regard to the right to bring an action to include;

- The right to bring an action is wide and goes beyond the rights
25 established under Articles 42, 50 and 137 of the Constitution of
Uganda, among others



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- 5 - The rules of *locus standi* have been relaxed to allow a public taxpayer to bring an action that address matters relating to the rule of law and unlawful conduct.
- A litigant who makes allegations that a government department or authority is transgressing the law has locus standi and seeks to have
10 the law enforced may bring the matter to the Courts' attention as a last resort after other remedies have been exhausted

In **Katuntu vs MTN**(cited above) the learned judge while agreeing with the decision in **Kikungwe Issa and Others vs Standard Bank Investment Corporation and Others HCMA No. 0394/2004** highlighted the following as
15 following as the parameters for considering whether or on a plaintiff has locus standi;

- Granting of *locus standi* is an exercise of judicial discretion
- The Plaintiff must demonstrate that he is a citizen of Uganda.
- The Plaintiff must also demonstrate that he or she sufficient interest
20 and that he is not just a mere busy body
- The issue raised for decision are sufficiently grave and of sufficient public importance
- Lastly the Applicant should demonstrate that the issues brought for consideration of the court involve a matter of a 'High Constitutional
25 principle'.
- The Applicant must also demonstrate what steps he has taken to protect and preserve the public property in question and that the steps did not lead to a remedy.



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5 Taking into account the principles highlighted above, I note that the
Respondent in HCCS No 296 of 2020 through his pleadings is not seeking for
enforcement of the rights listed under Articles 42, 50 and 137 of the
Constitution but those rights under Article 17. I note that the Respondent is
also a citizen of Uganda since he has attached his National Identity Card No.
10 CM66006104YOTH. On record though there is not attached tax payments
normally issued by the Uganda Revenue Authority though it could be
presumed that he is a tax payer. He therefore has sufficient interest.

What I find intriguing, however, is the fact that the Respondent, before
instituting HCCS No. 296 of 2020 has not demonstrated that he has
15 exhausted other remedies including administrative ones and had failed.

I am in full agreement with the Applicant's counsel contentions and the
authorities he cited that the Respondent can challenge the decree cited
therein as an aggrieved party if it contravenes public policy. However, in the
absence of averments by the Respondent that he sought other remedies and
20 failed, I would find that the plaint in HCCS No. 296 of 2020 is premature
making him to have no *locus standi* before this court.

As to whether the suit in breach of the *lis pendens* rule, I would refer to
Section 6 of the Civil Procedure Rules provides that "...no court shall proceed
with any suit or proceeding in which the matter in issue is directly and
25 substantially in issue in a previously instituted suit or proceedings between the
same parties, or between parties under whom they or any of them claim,
litigating under the same title, where that suit or proceeding is pending in the


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5 *same or any other court having jurisdiction in Uganda to grant the relief claimed...*”

A carefully studying of the pleadings in HCMA No. 137 of 2017 and HCCS No. 296 of 2020 shows that both matters refer to the waiver of taxes, and the illegal and fraudulent acts of the respondents and/ or Defendants (Tullow Oil
10 Uganda, Tullow Uganda Operations Pty Limited, Uganda Revenue Authority) which resulted in the loss of taxes estimated over USD 460,000,000. Additionally both matters allude to fraud and corruption on the part of the respondents/ defendants.

Also in both actions, Respondent herein refers and bases the suits on his
15 legitimate interest as a citizen of Uganda who is duty bound to protect and preserve public property. (See paragraph 3 of the affidavit in support of the notice of motion in HCMA No. 137 of 2017 as well as paragraph 10 of the
20 complaint in HCCS no. 296 of 2020). It is also clear, contrary to Mr. Wabyona’s averments, that both actions derive from the Settlement Deed that was executed on 18th June 2015, and a consent order/ decree that was extracted
therefrom on 19th June 2015, which is the same subject matter. In fact, while HCMA No. 137 of 2017 seeks to set aside the consent decree/ order, while in HCCS No. 296 of 2020, the Plaintiff similarly seeks to set aside the Settlement
25 Deed from which the Consent Order was derived. In fact, both suits allude to alleged corruption and fraud, and seek for re-assessment of tax liability and not merely the execution of a deed or decree. (See paragraph 6 and 8, 10 of the affidavit in support of the notice of motion in HCMA No. 137 of 2017 and paragraphs 10 (b), 17 of the complaint). That HCMA No 137 Of 2017, paragraphs


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5 11, 12, 16, 20, also mentions tax waiver by the respondents, which led to loss
of taxes due and payable to the consolidated fund. This is similarly mentioned
in paragraph 10, 11 of the plaint).

In my view, the fact that one action has three parties and the other constitutes
seven is not material, rather what is of importance are the substantive issues.
10 The test in cases of this nature is whether the parties in the previous suit are
directly or substantially the same as in the subsequent suit. I apply this test
to the matter before me.

It is therefore my finding that HCCS No. 296 of 2020 breaches the *lis pendens*
rule. Since HCMA No. 137 of 2017 has not yet been disposed of, and is still
15 pending adjudication before the Court, HCCS NO. 296 of 2020 will be stayed
pending the completion of the former suit.

As to whether the plaint in HCCS No. 296 of 2020 discloses a cause of action,
I would refer to my earlier finding that the Respondent/ Plaintiff in HCCS No.
296 of 2020 does not have *locus standi* and thus I will not go into the
20 determination of this issue.

d. Orders:

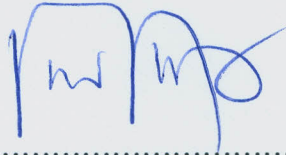
Having found for the Applicant in this matter, I hereby make the following
orders and declarations;

- This Application is allowed.
- 25 - The plaint in HCCS No. 296 of 2020 Jackson Wabyona vs Tullow (U)
Limited & 6 Others is hereby struck out as against the Applicant for not
disclosing a cause of action and is barred in law.

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- Plaintiff in HCCS No. 296 of 2020 has no *locus standi* to challenge the Settlement Deed by way of ordinary suit.
 - HCCS No. 296 of 2020 is in breach of the *lis pendens* rule and is an abuse of the court process thus it is struck out with costs.
 - This Application is allowed with each party to bear own costs.
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HON. JUSTICE DR. HENRY PETER ADONYO

JUDGE

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14TH JULY 2020

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