

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO.126 of 2021**  
**(ARISING OUT OF HIGH COURT CIVIL SUIT NO. 243 OF 2017)**

**BANK OF AFRICA (U) LIMITED ::::::::::: APPLICANT/ COUNTERCLAIMANT**  
**VERSUS**

**1. ABDUL RAJAB KALULE**

**2. HAWA NAKIRYA**

**3. KABUZA MOSES SENSARILE ::::::::::: RESPONDENTS**

**AND**

**GULBERG HIDES & SKINS LIMITED ::::::::::: PLAINTIFF**  
**VERSUS**

**BANK OF AFRICA (U) LIMITED ::::::::::: DEFENDANT**

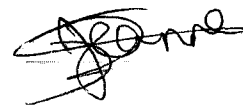
**BEFORE HON. JUSTICE JEANNE RWAKAKOOKO**

**RULING**

**Introduction:**

The Applicant brought this application by way of Chamber Summons under section 7 of the Civil Procedure Act, Cap 7 (CPA), Order 8 rule 13, and Order 36 rule 3 and 4 of the Civil Procedure Rules SI 71-1 (CPR) seeking orders that:

1. The suit is Res Judicata and be dismissed under Section 7 of the CPA and that court proceeds with the Applicant's counterclaim under Order 8 Rule 13 of the CPR.
2. The Applicant/ Counterclaimant be granted leave to amend its counterclaim.
3. The costs of this Application be provided for.



## Background

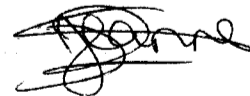
The Respondents in this application are partners of Gulberg Hides and Skins Limited, the Plaintiff in the main suit. The Plaintiff instituted Civil Suit No. 243 of 2017 against the Applicant/ Counterclaimant for the recovery of **USD 151,716 (One Hundred and Fifty-One Thousand Seven Hundred and Sixteen United States Dollars)** and also sought an order that the certificates of title for land comprised in Block 378 Plot 325 at Katale Seguku and Mawokota Block 90 Plot 116 at Kalumba be returned to it. These properties had been pledged as collateral security in a loan transaction.

The Plaintiff claims that it operated a United States Dollars account No. 01146530015 and a Uganda Shillings account No. 01146530002 with the Applicant/ Counterclaimant Bank and that the Applicant/ Counterclaimant Bank had released a fake statement to it with false entries on the account which surpassed the sum of USD 151,716.

On the other hand, the Applicant/ Counterclaimant denied the Plaintiff's allegations in its Written Statement of Defence and contended that the Plaintiff did not operate any account with it rather the Respondents, as partners in Gulberg Hides and Skins Limited, were the account holders and not the Plaintiff.

By way of counterclaim, the Applicant seeks to recover the sum of **USD 71,789 (Seventy-One Thousand, Seven Hundred and Eighty-Nine United States Dollars)** from the Respondents as money due and owing to it under a number of credit facilities advanced to the Respondents plus interest, general damages and costs of the suit.

Civil Suit No.642 of 2014 and Civil Suit No.260 of 2013; Beyendeza Edward v Bank of Africa & Abdul Rajab Kalule and Namalwa Hadija Kalule v Bank of Africa & Abdul Rajab Kalule & others respectively had earlier been instituted in the High Court of Uganda, Land Division against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents regarding the subject matter of the Uganda Shillings account No. 01146530002 and land comprised in Block 378 Plot 325 at Katale Seguku.



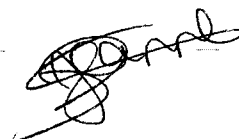
The High Court delivered its judgement in the abovementioned consolidated suits holding that the mortgage transaction in respect of land comprised in Block 378 Plot 325 at Katale Seguku was illegal and ordered inter alia the Applicant/ Counterclaimant refund the Plaintiff in Civil Suit No. 643 of 2014 (Mr Beyendeza Edward) UGX 200,000,000 plus interest thereon.

Mr Beyendeza Edward has subsequently been paid a total sum of UGX 477,000,000 (Four Hundred and Seventy-Seven Million Uganda Shillings) by the Applicant/ Counterclaimant. The Applicant/ Counterclaimant argues that this increased the Respondents' indebtedness to the Bank by the same amount which it (Counterclaimant) now also seeks to recover from the Respondents in the counterclaim in addition to the USD 71,789.

The Applicant/ Counterclaimant argues that the Plaintiff's claim for an order to return the certificate of title in land comprised in Block 378 Plot 325 at Katale Seguku to the Applicant/ Counterclaimant was conclusively determined by the Court in the previous consolidated suits. The land at Seguku was declared by the Court to be belonging to Namala Hadija Kasule, the 1<sup>st</sup> Respondent's spouse. Therefore, the Applicant/ Counterclaimant contends that the instant suit is Res Judicata and ought to be dismissed under section 7 of the Civil Procedure Act and that the court should proceed with the Applicant's counterclaim alone under Order 8 rule 13.

The Applicant also seeks to amend his counterclaim so as to include a claim for the UGX 477,000,000 that was paid to Mr Beyendeza Edward to be recovered from the Plaintiff in the main suit.

On the other hand, the Respondents argue that the two earlier suits, Civil Suit No.634 of 2014 and Civil Suit No. 260 of 2013 were addressing claims which are different from the current suit – that the earlier cases concerned the property in Seguku and the issue was the legality by which that property was attached as security in the transaction considering the lack of spousal consent. The Respondents argue the parties to the current suit differ from those in the earlier suits and the questions in controversy herein are also different.

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### Issues for Determination

1. Whether Civil Suit No. 243 of 2017 between the Plaintiff and the Defendant is Res Judicata.
2. Whether the Applicant/ Counterclaimant should be granted leave to amend the Counterclaim
3. What remedies are available to the parties

### Representation at Hearing

At the hearing on 27<sup>th</sup> April 2021, the Applicant/ Counterclaimant was represented by counsel Paul Kaweesi of Shonoubi Musoke Advocates and the Respondents were represented by counsel Katerega Ronald of Obed Mwebesa & Associated Advocates.

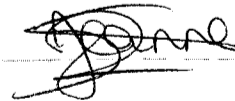
### Resolution

#### ***Issue 1: Whether Civil Suit No.243 of 2017 between the Plaintiff and the Defendant is Res Judicata.***

The doctrine of res judicata is enshrined in section 7 of the Civil Procedure Act Cap 71 as follows;

***‘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 competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.’***

In ***Africa One Tours & Travel Ltd and Anor v The Government of Libya HCCS No.253 of 2012*** the court noted that the above provision outlines the



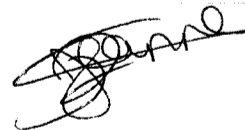
parameters that must be satisfied for the doctrine of res judicata to apply, namely;

- 1. The existence of a former suit that has been finally decided by a competent court.**
- 2. The parties in the former suit should have been the same as those in the latter suit, or parties from whom the parties in the latter suit, or any of them, claim or derive interest.**
- 3. The parties in the latter suit should be litigating under the same title as those in the former suit.**
- 4. The matter in dispute in the former suit should also be directly and substantially in dispute in the latter suit where res judicata has been raised as a bar.**

In *Maria Kevina vs. Kyaterekeru Growers Coop Society* [1996] 1 KALR 160 it was held that for the res judicata to apply to any case, the essential elements which must be fulfilled are that the matter in issue must be similar and must have been directly or substantially in issue in a previous suit; the parties must be the same or other parties, but claiming from the parties in the previous suit; the courts, in either case, must be of competent jurisdiction; and the matters should have been heard on merits and finally determined by the previous competent court.

Having considered the doctrine and the facts herein I am inclined to find that the current claim brought under Civil Suit No. 243 of 2017 is not res judicata for reasons further explained below.

As a starting point, the parties in the suits are different. Civil Suit No. 634 of 2014 was instituted by Beyendeza Edward who had purchased property, land comprised in Block 378 Plot 325 at Katale Seguku, and sued both the Applicant Bank and the 1<sup>st</sup> Respondent herein. Whilst Civil Suit No.260 of 2013 was instituted by Namalwa Hadija Kalule again against the Applicant Bank and 1<sup>st</sup> Respondent herein seeking a declaration that the mortgage transaction had been illegal because the 1<sup>st</sup> Respondent had mortgaged the

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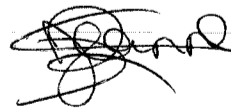
property at Seguku without her spousal consent. Ultimately the two suits were consolidated and the High Court found in favour of the two Plaintiffs holding that the mortgage transaction in respect of the land at Seguku had been illegal. The Applicant/ Counterclaimant was ordered to refund Mr Beyendeza Edward and the property was held as belonging to Namalwa Hadija Kalule.

Secondly, the current suit, Civil Suit No.243 of 2017 instituted by the plaintiff does not just concern the land at Seguku but also Mawokota Block 90 Plot 116 at Kalumba (land at Mpigi) which was not the subject matter of the previous consolidated suits. As I understand it, both properties were used as security for the mortgage transaction which was the subject matter of the consolidated suits, but only one of the properties (the one at Seguku) was declared to be illegally secured under the mortgage agreement for lack of spousal consent.

In the Respondents' Written Submissions counsel for the Respondents mentions that leave has been sought to amend the Plaintiff (Gulberg Hide and Skins Ltd) is making with respect to the land at Seguku, such that that suit progresses on the land at Mpigi alone together with the money amounts claimed. I note that a formal application to amend the plaintiff to this effect has been made but vide **Misc. Application No.773 of 2021** but is yet to be heard.

The sought amendment is understandable considering that the issues surrounding the land at Seguku were already resolved in the consolidated suits, as the Applicant correctly points out in this application and the Respondents concede in their Written Submissions.

The Respondents' counsel also mentions that the Plaintiff in the main suit is seeking leave to amend the claim with respect to the Mpigi property on grounds that the sale of that property was illegal. The Respondents claim in their written submissions is that they only learnt of the sale of the Mpigi property from the Counterclaim. The implication of this is that they were not aware of the sale which occurred in June 2016 at the time Civil Suit

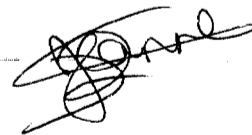


No.643 of 2014 and Civil Suit No. 260 of 2013 were being adjudicated upon or at the time the current Civil Suit No.243 of 2017 was instituted in April 2017. The Respondents' current claim is also with respect to USD 151,716 being monies that they claim were withdrawn from their account by the Applicant Bank.

The above developments are indicative of the fact that, whilst the issues concerning the Seguku property were resolved in the previously consolidated suits, the issues concerning the Mpigi property and the money transactions in accounts no. 01146530015 and account no. 01146530002 are yet to be conclusively resolved and determined.

The Applicant/ Counterclaimant's counsel argues at paragraph 18 of the Applicant's Written Submissions that the claims concerning the Mpigi property and the USD 151, 716 ought to have been brought up in the concluded consolidated suits, as the said claims arise out of the same loan transaction to which the land at Seguku was secured as collateral. I am inclined to disagree with the Applicant/ Counterclaimant on this as the earlier consolidated suits concerned only the legality (or lack thereof) by which the Seguku property had been attached as security in the mortgage. The issues in controversy in those consolidated suits did not concern the broader transaction between the parties, only the aspect of the transaction by which the Seguku property was secured. Thus, the issues being addressed in the present suit as far as the Mpigi property and the USD 151,716 are concerned are different from the issues which were in contention in the earlier suits. For this reason it would have been improper to raise them in the concluded consolidated suits.

In light of this, I find that the current suit under Civil Suit No. 243 of 2017 is not res judicata because it raises new issues and matters of controversy between the Plaintiff (Gulberg Hides & Skins Ltd) and the Defendant/ Counterclaimant (Bank of Africa (U) Ltd) which were not addressed or resolved in Civil Suit No.643 of 2014 and Civil Suit No. 260 of 2013.

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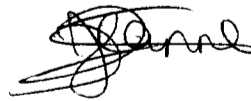
***Issue 2: Whether the Applicant/ Counterclaimant should be granted leave to amend the Counterclaim.***

In light of the fact that the Applicant/ Counterclaimant has had to pay Mr Beyendeza Edward UGX 477,000,000 following the judgement in the consolidated suits, the Applicant/ Counterclaimant now seeks to amend their Counterclaim and add this amount to the USD 71,789 being sought from the Plaintiff under the Counterclaim.

The law concerning the amendment of pleadings has already been stated above and need not be repeated here. The established principle under ***Gaso Transport Services Limited v Matin Adala Obene, SCCA 4 of 1994*** as followed in ***Jas Progressive Investments (U) Ltd v Tropical Africa Bank Ltd HCCS No.78 of 2011*** and other authorities is that leave to amend will be granted where the amendment will not occasion an injury or injustice to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by a court order. Additionally, an application made *mala fide* should not be granted.

In the present application, the Counterclaim was filed on 19<sup>th</sup> April 2017 and as I understand it the payments were made to Mr Beyendeza Edward on 16<sup>th</sup> December 2020 and 5<sup>th</sup> January 2021. Therefore at the time of filing the Counterclaim in April 2017, the Applicant/ Counterclaimant did not have a basis on which to claim the UGX 477,000,000 from the Plaintiff which it now claims to have. In the Respondents' Written Submissions no real claim is made that satisfies me that granting this amendment will occasion an injustice to the Respondents or Plaintiff in the main suit which cannot be compensated for through costs or that the said amendment is brought *mala fide*.

On this basis, I see that to resolve the real issues in controversy between the parties and also to prevent the potential multiplicity of proceedings the Applicant/ Counter claimant should be granted leave to amend the counterclaim. Once the counterclaim is filed and served on the Plaintiff, the Plaintiff shall have 15 days to file a Defence to the Amended Counterclaim.






Decision of the Court

In light of the above, I find that the Applicant/ Counterclaimant's application succeeds in part. With regards to the first issue, High Court Civil Suit No. 243 of 2017 is not *res judicata* and shall proceed to be heard with respect to the land comprised in Private Milo Plot 116 Block 90 at Kalumba (the land in Mpigi) and USD 151,716. The Applicant/ Counterclaimant is otherwise hereby granted leave to amend their Claim to include UGX 477,000,000 as prayed for.

As such the following orders and directions are made;

- a) Civil Suit No. 243 of 2017 is not *res judicata* and shall proceed to be heard.
- b) The Applicant/ Counterclaimant is granted leave to amend the counterclaim which Amended Counterclaim shall be filed and served within 15 days from the date of this Ruling.
- c) Once served the Plaintiff/ Counter Defendant may file and serve their Defence to the Amended Counterclaim within 15 days of being served.
- d) The costs of this application shall abide the outcome of the main suit.

It is so ordered.

  
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**Jeanne Rwakakooko**  
**JUDGE**  
**12/11/2021**

This Ruling was delivered on the 30th day of November, 2021