THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO. 218 OF 2016

KAZOOBA FRANCIS :: PLAINTIFF

VERSUS

1. **M.K CREDITORS LTD**
2. **MALE H. MABIRIZI KIWANUKA**
3. **SISYE BOGERE ROBERT :: DEFENDANTS**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING ON PRELIMINARY OBJECTIONS

Introduction

[1] The Plaintiff brought this suit against the three Defendants for several declarations and orders relating to ownership of the suit land comprised in Kyadondo Block 206 Plot 2576 Land at Mpererwe. The Defendants filed Written Statements of Defence in which they indicated that they intended to raise several preliminary points of objection. When the matter came up before the Court, the Defendants were permitted to raise the objections by way of written submissions to which the Plaintiff replied. The 1st and 2nd Defendants also filed submissions in rejoinder.

The preliminary Objections

[2] The Defendants raised the following objections;

(i) The suit is bad in law because of existence of a valid arbitration agreement.

(ii) The suit is no-existent in law, the Plaintiff having failed to serve the summons within the required 21 days from the date of issue of the summons.

(iii) The suit is unsustainable on account of pendency of earlier suits.

(iv) The 2nd Defendant was wrongly added as a party since he was just an agent of the 1st Defendant, a limited liability company.

(v) The plaint is bad in law and ought to be rejected.

Representation

[3] The 2nd Defendant appeared in person and also on behalf of the 1st Defendant as it Managing Director. Mr. Ssewanonda Isaac appeared on brief for Mr. Wetaka Andrew for the 3rd Defendant. Mr. Kwemara Kafuuzi appeared for the Plaintiff.

Determination by the Court

Point One: The suit is bad in law because of existence of a valid arbitration agreement.

[4] It was submitted by the 2nd Defendant that the agreement in issue herein, under Clause 7 thereof, provides that all disputes arising out of the agreement were to be referred for settlement before an agreed mediator or arbitrator before the same could be taken before a court of law. The 2nd Defendant submitted that under Section 5(1) of the Arbitration and Conciliation Act Cap 4, a judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to arbitration. The 2nd Defendant referred the Court to a number of decided cases to support his prayer to have this matter referred to arbitration; including ***Fulgensius Mungereza vs Africa Central, SCCA No. 18 of 2002; East African Development Bank vs Zziwa Horticultural Exporters Ltd, HCMC No. 048 of 2000; and Mugabo vs Ssaava, HCMC No. 65 of 2012***.

[5] In response, Counsel for the Plaintiff submitted that the dispute between the Plaintiff and the 1st and 2nd Defendants was referred to arbitration by the 1st Defendant's Counsel vide Arbitration Cause No. 15 of 2013. The Plaintiff submitted to arbitration but the 1st Defendant abandoned the proceedings.

Counsel for the Plaintiff submitted that the same party cannot be heard now raising an objection basing on the same process they frustrated. Counsel prayed to Court to overrule this point of objection.

[6] Section 5(1) of the *Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (ACA)* provides as follows:

> ***"Stay of legal proceedings.***
>
> *(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds —*
>
> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
>
> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."* [Emphasis added]

[7] *Section 9 of the ACA* provides for the extent of court intervention in matters within the ambit of the Act. It provides –

> *"Except as provided in this Act, no court shall intervene in matters governed by this Act."*

[8] Whereas it is true that the above stated provisions of the ACA expressly oust the jurisdiction of the court where the matter before the court is the subject of an arbitration agreement, Section 5(1) of the Act expressly sets out exceptional circumstances under which the court may not be obliged to send a particular matter to arbitration. One of the exceptions under paragraph (a) thereof is where the arbitration agreement is null and void, inoperative or incapable of being performed.

[9] On the case before me, the Plaintiff's claim in the main suit is based on allegations of fraud and conspiracy between the defendants. The Plaintiff bears the burden of proving these allegations by leading evidence in the suit. However, for purpose of determining the validity of the arbitration agreement or whether it is operative, the court is enjoined to look at the facts of the matter as are before the court and come to the conclusion as to whether the arbitration agreement is valid or operative. On the facts before me, I am able to see some obvious illegalities disclosed by the money lending agreement executed between the Plaintiff and the 1st Defendant. The most obvious is the absence of a money lending licence by the 1st Defendant, a limited liability company, which purported to lend money on interest. The Plaintiff challenged the 1st Defendant's capacity to do money lender's business and the 2nd Defendant attempted to explain that this transaction was exempted under the Money Lenders Act (then in force) but did not show how the exemption arose. Looking at the copy of the lending agreement itself, Annexture A at page 19 of the WSD of the 1st and 2nd Defendants, its heading is "Credit Agreement (As Required by the Money Lenders Act)". This meant that the agreement had to comply with the provisions under the Money Lenders Act Cap 273.

[10] Section 2(1) of the Money Lenders Act provides that;

> *"Except as provided in subsection (2), every moneylender shall take out annually in respect of every address at which he or she carries on his or her business as moneylender, a licence (in this Act referred to as a "moneylenders licence") which shall expire on the thirty-first day of December in every year, and there shall be charged on every moneylenders licence a licence fee of one thousand shillings, or, if the licence is taken out not more than six months before the expiration of the licence, of five hundred shillings."*

[11] Sub-section (2) is in relation to a situation where more than one partners are carrying out money lending business and one of the partners gets a licence

in his/her name; in which case, every other partner shall be entitled to issuance of a licence free of charge. That exception is, therefore, not relevant to the present case. Under Section 2(4)(b) of the Act, if any person carries on business as a moneylender without having in force a proper moneylenders licence authorising him or her so to do, he or she contravenes this Act and for each offence is liable on conviction to a penalty of two thousand shillings; except that on a second or subsequent conviction of any person, other than a company, for an offence under this subsection, the court may, in lieu of or in addition to ordering the offender to pay the penalty aforesaid, order him or her to be imprisoned for a term not exceeding three months, and an offender being a company on a second or subsequent conviction is liable to a penalty of ten thousand shillings.

[12] Further, under Section 7(1) of the Money Lenders Act, any contract made for the loan of money by a moneylender shall be illegal insofar as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract.

[13] As stated above, the 1st Defendant's capacity to do business as a money lender was challenged and the 1st Defendant adduced no facts or any documentary evidence to prove that it was in possession of a money lender's licence at the time of executing the transaction. This makes the money lenders agreement illegal and void ab initio. Further scrutiny of the loan agreement in issue also shows that the agreement expressly made provision for increasing the rate and amount of interest on account of default in payment of the sums due under the agreement. This, as well, makes the loan agreement illegal in accordance with Section 7(1) of the Money Lenders Act. Once the loan agreement is found to be illegal and void ab initio, the arbitration clause under the same agreement cannot be saved. It goes with the agreement. The effect is that although the 1st Defendant would be entitled to recover the sum actually

lent out as money had and received, it cannot recover any interest accruing out of the illegal transaction.

[14] Accordingly, in view of the above findings, the alleged arbitration agreement was null and void on account of the above stated illegalities. As such, there is no valid arbitration agreement that was binding upon the Plaintiff. The main suit was, therefore, properly brought before this Court as there is nothing to refer to arbitration. This point of objection is therefore overruled.

Point Two: The suit is no-existent in law, the Plaintiff having failed to serve the summons within the required 21 days from the date of issue of the summons.

[15] The 2nd Defendant stated that the summons to file a defence in the main suit were issued on 4th July 2016 but were served upon the 1st and 2nd Defendants on 2nd August 2016 which was beyond the 21 days provided for under Order 5 rule 1(2) of the CPR. He stated that the Plaintiff had also not applied for extension of the summons within 15 days after the expiry of the 21 days. The 2nd Defendant prayed that in accordance with Order 5 rule 1(3) of the CPR, the suit ought to be dismissed by the Court. He relied on ***Makula International vs Cardinal Nsubuga & Another [1982] HCB 11 and Fredrick James Jjunju & Another vs Madhivani Group Ltd & Another, HCMA No. 688 of 2015***. Counsel for the 3rd Defendant also raised the same objection.

[16] In reply, Counsel for the Plaintiff submitted that the summons to file a defence were renewed on 21st July 2016 and were served on 2nd August 2016, which was only 12 days from the date of issue of the summons. In rejoinder, the 2nd Defendant questioned the procedure that was adopted by the court in renewing the summons since under Order 5 rule 32 of the CPR, applications under Order 5 shall be by summons in chambers; which was not complied with

in the instant case. The 2nd Defendant argued that the purported renewal was null and void.

[17] I have seen a letter on record dated 20th July 2016 from the Plaintiff's Counsel requesting for renew of the summons in HCCS No. 218 of 2016, the earlier summons having expired before it was served upon the Defendants. The Court endorsed the request as granted on 21st July 2016, on which date the fresh summons issued. I do not agree with the 2nd Defendant's submission that this course of action was illegal. The court has inherent power to grant any such remedy in the interest of justice. The mere fact that the court ignored the formality of filing a formal application does not invalidate such exercise of inherent jurisdiction in these circumstances. No prejudice was occasioned by the court allowing an informal application to extend summons. No greater benefit would have been achieved in requiring a formal application to be filed especially since the opposite parties in the matter were not yet before the court.

[18] In the circumstances, I find that the summons was lawfully extended by the court and the same was served upon the Defendants within time as prescribed by the law. This point of objection is also overruled.

Point Three: The suit is unsustainable on account of pendency of earlier suits.

[19] The 2nd Defendant submitted that two other suits had earlier been filed in different courts, namely, HCCS No. 778 of 2014 in the Commercial Court: M.K Creditors Ltd vs Kazooba Francis; and Nabweru Chief Magistrates Court Civil Suit No. 115 of 2014: Sisye Bogere Robert vs M.K Creditors Ltd & Kazooba Francis. The 2nd Defendant submitted that the matter in issue in the previously instituted suits is also directly and substantially in issue in the present suit and the same are between the same parties or between parties under whom any of them claim. He further stated that the courts in which the previous suits were instituted had jurisdiction to grant the reliefs claimed in the present

suit. The 2nd Defendant further submitted that the present suit is, therefore, barred by Section 6 of the CPA and the same ought to be dismissed on that ground. The 2nd Defendant relied on ***Mundere vs Pearl of Africa Tours & Travel Ltd, HCCS No. 89 of 2011; and Springs International Hotel Ltd vs Hotel Diplomate Ltd & Another, HCCS No. 227 of 2011***. Counsel for the 3rd Defendant reckoned the same objection.

[20] In reply, Counsel for the Plaintiff submitted that the two earlier suits were entirely different in the sense that the parties were not exactly the same and neither suit could resolve the dispute in the present suit. Counsel submitted that one of the reliefs sought in the present suit is for cancellation of registration of the 3rd Defendant on a certificate of title which could not be granted in either suits. Counsel prayed that the Court finds that the present suit is not *lis pendens*.

[21] According to the ***Black's Law Dictionary (8th Ed)***, *"lis pendens",* is a Latin expression which simply refers to a *"pending suit or action".* The principles that underpin the *lis pendens rule* are encapsulated in the provisions of *Section 6 of the CPA* which provides that;

> *"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding 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 same or any other court having jurisdiction in Uganda to grant the relief claimed."*

[22] On the case before me, it is true that two previously instituted suits were pending before different courts. It is important to note, however, that none of the previous suits was instituted by the present Plaintiff. In the present suit, the Plaintiff sued three defendants. The only common parties to all the suits

are the current Plaintiff and the current 1st Defendant. In the Nabweru Chief Magistrates Court Civil Suit No. 115 of 2014, the current 3rd Defendant was the Plaintiff while the current 1st Defendant and Plaintiff were the defendants. The Plaintiff could not have used that suit to raise his cause of action in the present suit because, being one of the defendants, he could not raise a counterclaim against a fellow defendant (MK Creditors Ltd). Similarly, he could not, as a defendant, introduce another defendant (the current 2nd Defendant) in that suit. Thirdly, he could not seek impeachment of a title and obtain an order of cancellation of an entry on a certificate of title from the Chief Magistrates Court. It was argued by the 2nd Defendant that he could obtain an order and seek for consequence orders from the High Court. In view of the other circumstances of this case already pointed out above, such was both onerous and unnecessary. In the premises therefore, the pendency of Civil Suit No. 115 of 2014 of Nabweru Chief Magistrates Court does not make the present suit *lis pendens*.

[23] Regarding the HCCS No. 778 of 2014 of the Commercial Court, the suit was brought by the current 1st Defendant (MK Creditors Ltd) against the current Plaintiff (Kazooba Francis). Being the defendant, the current Plaintiff could not have introduced two other parties to the suit by way of a counter claim; that is, the current 2nd and 3rd Defendants. The best option was for the Plaintiff to introduce his cause of action by way of a different suit. As such, HCCS No. 778 of 2014 does not make the present suit *lis pendens* either. This point of objection, therefore, also fails.

Point Four: The 2nd Defendant was wrongly added as a party since he was just an agent of the 1st Defendant, a limited liability company.

[24] It was submitted by the 2nd Defendant that he was wrongly added on the present suit since his involvement in the subject matter was only as an agent of a disclosed principal, a limited liability company. The 2nd Defendant argued that the suit in its entirety discloses no cause of action against him as the

Managing Director of the 1st Defendant. He further argued that even with the allegation of misrepresentation or fraud, Section 170(1) of the Contracts Act makes the principal liable for such conduct committed by an agent acting in the course of business for the principal. He prayed that the Court should make an order striking him off the suit.

[25] In reply, Counsel for the Plaintiff stated that under Section 20 of the Companies Act, 2012, the High Court has power, upon an application of a party, to lift the corporate veil where it is shown that the company or its directors are involved in fraud, among others. Counsel submitted that upon the Plaintiff's allegations in the plaint, one of the reliefs sought is for lifting of the corporate veil to make the 2nd Defendant liable for his actions done under the cover of the 1st Defendant. Counsel relied on the decision in ***Stanbic Bank Uganda Ltd vs Ducat Lubricants (U) Ltd & 3 Others, HCMA No. 845 of 2013***.

[26] In rejoinder, the 2nd Defendant submitted that no fraud was attributed to him according to the Plaint. Secondly, the Plaintiff had not secured an order for lifting the veil so as to empower him to bring the suit against the 2nd Defendant. The 2nd Defendant argued that the Plaintiff had to first bring an application before the court formally to prove fraud before he could institute a suit personally against the 2nd Defendant.

[27] It is true that Section 20 of the Companies Act, 2012, permits the Court to lift the corporate veil where it is shown that the company or its directors are involved in fraud, among other conduct. Although the common procedure is that a party seeking the lifting of a corporate veil would have to bring a formal application seeking to secure an order for the same, this procedure has itself raised considerable difficulty. The difficulty has arisen from the fact that such an application would be brought by way of a Notice of Motion supported by an affidavit. Another body of law has expressed the notion that it is difficult, and

at times impossible, to prove fraud by way of affidavit evidence. As such, many applications for lifting of the corporate veil on ground of fraud have vehemently been opposed and at times defeated on account of failure or impossibility to prove fraud by way of affidavit evidence. This has created a considerable degree of confusion in this area of the law.

[28] In my view, there is no rule of the thumb that a party cannot seek for lifting of the veil under the same suit seeking other remedies like in the present suit. It is not a rule of the thumb either that the party has to first formally seek an order for lifting the veil before instituting the suit. It is possible that as he/she proves their cause of action in the suit, the party also proves the ground for lifting the corporate veil within the same proceedings. Similarly, as the defendant is defending themselves against whatever allegations under the given cause of action, they are also capable of opposing the claim for lifting of the corporate veil. As such, I do not find any defect in the procedure adopted by the Plaintiff of bringing the claim for lifting of the corporate veil at the same time with the other claims in his suit. I find sufficient material to indicate that fraud has been pleaded against the 1st and 2nd Defendants. As to whether the alleged fraud shall be proved, is a question to be determined after evidence has been led before the Court.

[29] The above view is in line with the reasoning of **Madrama J.** (as he then was) in ***Stanbic Bank Uganda Ltd Vs Ducat Lubricants (U) Ltd & 3 Others, HCMA No. 845 of 2013 [2013] UGCommC 199***; which decision I have found highly persuasive. The Learned Judge expressed the view that when a party seeks for an order for lifting the corporate veil, it is not necessary at that stage of the proceedings to establish fraud. It is sufficient to indicate that there is a case that the company has been used by its directors or shareholders as a vehicle to indulge in some conduct that is alleged to have injured the Plaintiff/Applicant. Section 20 of the Companies Act 2012 does not indicate at

which stage the High Court may lift the corporate veil. It is silent on that procedural aspect.

[30] The Learned Judge further expressed the view that a suit can be filed against a director/individual who is a member of the company in their own individual capacity and it would be a matter of evidence to prove that the use of the company name was merely a front or vehicle to perpetrate the alleged fraud by the individual. In other words, it is up to the Plaintiff to prove that the company was a mere conduit of the individual. The corporate veil ought to be lifted where there is proof of involvement of the directors in fraud. In the main, there is no bar to filing of a suit against an individual in his or her own individual capacity for using the vehicle of the company name to perpetrate his or her own individual activities. Directors are the minds and brains and limbs of the company. Once the company is alleged as having been involved in fraudulent acts, the minds behind the act alleged to have been committed are the minds which are involved in the alleged acts. The grounds for imposing personal liability on a director have to be established by evidence. In other words, the corporate veil can be lifted where fraud has been established against the company. This is not a bar to suing the director in order to prove that there is alleged fraud of the director for which the plaintiff holds them personally liable. The corporate veil ought to be lifted under the provisions of section 20 of the Companies Act 2012 upon establishing that the directors are involved in fraud.

[31] What comes out of the above reasoning is that there is no need for the Plaintiff to separately demonstrate that it is necessary to sue the directors. If the Plaintiff wants to allege fraud of the directors, he can sue them and prove the case. He can also adopt the option of seeking for an order lifting the veil so as to make them personally liable if the company is proved to be liable. However, such an order would be unnecessary if fraud against the individual is proved directly. On the other hand, upon adducing evidence and establishing

fraud, the corporate veil ought to be lifted. It can be lifted after a suit has been proved against the company. This is what the Plaintiff seeks in the present suit. On the other hand, it is also possible for the Plaintiff to proceed simultaneously against the company and the directors and prove that the directors are personally liable. This is also possible under the present suit. The directors can defend themselves in the suit and claim that they acted on behalf of the company. In other words, the grounds for extending liability to the directors should be proved in the proceedings as there is no bar in law to proceeding directly against a director. As such, it is sufficient to allege that the name of the company was merely used by the individuals as a vehicle for their own ends.

[32] In the circumstances, therefore, it is not true that the 2nd Defendant was improperly joined to the present suit. Given that the Plaintiff has a claim for lifting the corporate veil, or for placing liability directly against the 2nd Defendant (as Managing Director of the 1st Defendant), the Plaintiff rightly added the 2nd Defendant to the suit to enable him prove the grounds for lifting the corporate veil and determining the liability of the 2nd Defendant simultaneously with the other claims in the suit. This point of objection also fails.

Point Five: The plaint is bad in law and ought to be rejected.

[33] It was submitted by the 2nd Defendant that the present suit is barred by law under Section 176 of the Registration of Titles Act which prohibits any action for recovery of any land against a registered proprietor. The 2nd Defendant also sought to rely on Section 29 of the Mortgage Act, 2009. Counsel for the 3rd Defendant reiterated the above submission and added that the 3rd Defendant had since transferred the suit land to a third party who has not been made party to the suit yet the suit will have the effect of affecting his title in the property.

[34] Counsel for the Plaintiff pointed out that both provisions cited by the defence Counsel bear exceptions which have not been taken into consideration by defence Counsel particularly fraud, misrepresentation or other dishonest conduct. Counsel submitted that Section 176 of the RTA allows a person who has been deprived of land through fraud to bring an action against a registered proprietor for cancellation of title. Counsel concluded that the suit is, therefore, not barred by law as alleged.

[35] It is true as submitted by the Plaintiff's Counsel that the Defendants only partially considered the provisions under Section 176 of the RTA and Section 29 of the Mortgage Act. Section 176 (c) of the RTA provides as follows:

> ***"Registered proprietor protected against ejectment except in certain cases.***
> *No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases —*
> *(a) … ;*
> *(b) …;*
> *(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."*

[36] Clearly, a suit for impeachment of a registered interest on land on basis of fraud is not barred by any law. Similarly, Section 29(1) of the Mortgage Act provides that;

> *"A purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice."*

[37] The above provision, as well, only offers protection to a purchaser who acquires good title in absence of fraud, misrepresentation or other dishonest conduct of the mortgagee of which the purchaser has no actual or constructive notice. Where a suit is based on allegations of fraud against the mortgagee and the purchaser, this protection cannot be relied on as a legal bar against such a suit. Lastly, if it is shown as a fact that the suit land has since been transferred from the name of the 3rd Defendant to another third party, such cannot be a ground to defeat the suit. It can only be a ground to occasion an amendment of the plaint to add such a third party to the suit. The fifth and last point of objection has also failed.

[38] In all, therefore, all the points of objection raised by the Defendants have been found to be devoid of merit and have failed. The preliminary objections are accordingly overruled. The hearing and determination of Civil Suit No. 218 of 2016 shall proceed on its merits. The costs of this proceeding shall be paid to the Plaintiff by the Defendants.

It is so ordered.

Dated, signed and delivered by email this 25th day of July, 2022.

Boniface Wamala
JUDGE