

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 0940 OF 2020

(ARISING OUT OF ORIGINATING SUMMONS NO. 6 OF 2018)

MUTANDA AMELIA ::::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

- 1. FINANCE TRUST BANK LTD**
- 2. VALUE LINK LTD**
- 3. KEYYA FRANCIS ::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE HARRIET GRACE MAGALA

RULING

Background

The genesis of this Application is that the Applicant took out a loan facility of **UGX 50,000,000/- (Uganda Shillings Fifty Million only)** from the 1st Respondent and the facility was secured by property comprised in *Kyadondo Block 208 Plot 4226 at Kawempe*.

The facility accumulated to **UGX 73,873,012/- (Uganda Shillings Seventy-Three Million Eight Hundred Seventy-Three Thousand Twelve only)** and the 1st Respondent through the 2nd Respondent sold the property to the 3rd Respondent.

The Applicant filed ***Civil Suit No. 396 of 2017*** before the High Court of Uganda in the Land Division against the Respondents, Saabwe Stephen, Kikabi Sulaiman, and the Commissioner for Land Registration seeking orders for declaration that she is the lawful owner of land comprised in *Kyadondo Block 208 Plot 4226 at Kawempe*, an order for cancellation of the certificate of title in the names of the 5th defendant (herein 3rd Respondent), declaration that the suit property was illegally sold by the 1st defendant (1st Respondent) to the 5th defendant through fraud and with the aid of the 2nd and 3rd defendants, general damages, punitive damages, permanent injunction restraining the defendants from undertaking any further dealings or transactions in the suit land, order compelling the 6th defendant (commissioner for land registration) to cancel the certificate of title derived from illegal sale of the suit land and to register the Plaintiff as the registered owner of the same, an order to reinstate the loan to be serviced by the plaintiff and reschedule the payment schedule since the loan was for 4 years and it was still running before the illegal sale and any other consequential orders necessary in the circumstances and costs of the suit.



The matter was transferred to this honorable court from the land division and it became Civil Suit No. 901 of 2020.

The Respondents applied to this honorable court under Originating Summons No. 0006 of 2018 for determination of whether the Applicants/now Respondents are entitled to delivery of possession of the mortgaged property by the respondent/now applicant and whether the plaintiff is entitled to costs of the suit.

The current application

The Applicant filed this Application No. 940 of 2020 under **Section 6 and 98 of the Civil Procedure Act cap. 71**, and **Order 6 Rule 28 and 29 and Order 52 rule 1 and 3 of the Civil Procedure Rules S.I 71-1 as amended** contesting Originating Summons No. 06 of 2018 that it offended the rule of *lis pendens* and an abuse of court processes on grounds that the Applicant filed Civil Suit No. 396 of 2017 before the Land Division of the High Court now Civil Suit Civil Suit No. 901 of 2020 of the Commercial Division.

That the Respondent filed Originating Summons No. 06 of 2018 during the pendency of Civil Suit 901 of 2020 and the 1st Respondent had already filed a defense to suit No. 901 of 2020. That the Respondents knew that OS No. 0006 of 2018 had been stayed but went ahead and filed Civil Suit No. 957 of 2018 in the Land Division that at the time of this application was pending before the **Hon. Lady Justice Nkonge Alexandra Rugadya**.

Representation

When this matter came up for hearing on the 18th day of October 2022, the Applicant was represented by Mr. Wandera Samuel. The Respondents neither appeared nor sent any of their representatives.

The court gave the parties directives on filing their remaining pleadings and submissions. Despite being notified of these directives as per the Applicant's affidavit of service on the court record, none of the Respondents complied.

Applicants Submissions.

The Applicant's counsel submitted that **section 6 of the Civil Procedure Act** states 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.

It was counsel's argument that the above provision is mandatory and has been termed as the *lis pendens* rule which implies that court cannot entertain a suit based on same facts pending in another court of same jurisdiction and once this is brought to the attention of the court, the



court must dismiss it. He cited the case *of Tindyebwa Stephen vs. Alpha International Investments Ltd Miscellaneous Application 789 of 2005* to support his argument.

The Applicant's counsel submitted that the Respondents were sued in the High Court Land Division vide Civil Suit No. 396 of 2017 but later instituted Originating Summons no. 006 of 2018 and Civil Suit No. 957 of 2018 despite the existence of the former suit where the first Respondent had filed a written statement of defence.

That both Civil Suit No. 901 of 2020 and Civil Suit No. 957 of 2018 relate to the mortgaged suit property and the manner in which it was disposed of thereby giving rise to issues of ownership and occupation. These are the same issues that were raised in the Originating Summons no. 0006 of 2018

Counsel cited the case of *Springs International Hotel Versus Hotel Diplomate Civil Suit no. 227 of 2011* where it was observed that the filing of multiple suits was not just an abuse of court process but potentially exposed judicial officers to danger of arriving at different and perhaps conflicting decisions in cases of the same facts.

Further submission was made that matters in Originating Summons No. 0006 of 2018 are directly and substantially in issue in Civil Suit No. 901 of 2020 and the Respondents by filing the subsequent suit, were in abuse of court process as defined in *Uganda Land Commission Versus James Kamoga and another SCCA No. 008 of 2004* which must be condemned.

Issues

- a) Whether Originating Summons No. 006 of 2018 offends the lis pendens rule
- b) What remedies are available to the parties.

Resolution

Before resolving the framed issues, court noted that the Respondents were aware of this application. They were served and also notified of the time lines given by court for the parties to file their pleadings and submissions. The Respondents did not comply. The Respondents not only chose to lock themselves out of the matter but the Application together with the affidavit in support should be taken as the truth and the Applicant granted the orders sought for. In the case of *Samwiri Massa vs Rose Achen, HCB 1978 at page 297* which was relied on in the case of *Mucunguzi Myers vs Sarah Kulata Basangwa Miscellaneous Application No. 1329 of 2014* where it was held that:

“when facts are sworn to in an affidavit and these are not denied or rebutted by the opposite party; the presumption is that such facts are accepted as the truth. In light of this position of the law, the facts sworn to by the Applicant in the affidavit of support of the instant motion will be taken as the truth”.

Issue No. 1: Whether Originating Summons No. 006 of 2018 offends the lis pendens rule?

The *lis pendens* rule is premised in **Section 6** of the **Civil Procedure Act cap. 71** which states 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.” (Emphasis added)

The **Black’s Law Dictionary 11th Edition** at page 1117 defines *lis pendens* as “a pending lawsuit”.

The principle behind the rule is that courts should not adjudicate on matters which are still pending in the same or any other court. For a plea of *lis pendens* to succeed, according to the court in **Springs International Limited versus Hotel Diplomate Ltd & Bonney M. Katatumba HCCS 227 of 2011**, the party relying on it has to show that:

- a) the matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceeding;
- b) The previously instituted suit or proceeding is between the same parties or parties under whom they or any of them claim; and
- c) The suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.
- d) The “same parties” need not be “all parties”. The Rule would apply even if some of the parties to the earlier suit are not parties to the present suit.
- e) What is important under the test in the Rule though, is the nature of the reliefs (emphasis added) sought in each suit in respect of the subject matter in issue.
- f) The filing of a multiplicity of suits is not just an abuse of the court process but potentially exposes the concerned judicial officers to the danger of arriving at different and perhaps conflicting decisions in cases with the same facts. This would have far reaching consequences as it would create uncertainty and inconsistency in court decisions.

To put matters into context, it is important at this point to give a brief background of the three lawsuits.

1. The cause of action in **HCCS 901 of 2020 (formerly HCCS 0396 of 2017): Ameila Mutanda - vs - Finance Trust Bank, Saabwe Stephen, Kikabi Sulaiman, Value Link Ltd Auctioneers, Francis Keeya & Commissioner Land Registration** is that the Plaintiff was deprived of her land (comprised in Kyadondo Block 208 Plot 4226 land at Kawempe) by the 1st Defendant through fraud . She brought the suit jointly and severally against the 1st to 5th Defendants for the following orders:

- a) a declaration that she is the lawful owner of suit land;



- b) An order for cancellation of title for the 5th Defendant over the suit land;
- c) A declaration that the suit property was illegally sold by the 1st Defendant to the 5th Defendant through fraud and with the aid of the 2nd to 4th Defendants;
- d) A permanent injunction restraining the defendants from undertaking any further dealings/transactions on the suit land;
- e) An order compelling the 6th Defendant to cancel the title derived from the illegal sale of the suit land and registering the plaintiff as the registered proprietor; and
- f) General and punitive damages; and costs.

According to the court records, the 1st, 2nd and 3rd Defendants filed their written statements of defence in the said suit. HCCS 0396 of 2017 and now HCCS 0901 of 2020 was filed in the High Court Land Division on 1st June 2017.

2. The second civil suit, **HCCS 0957 of 2018: Francis Keeya versus Finance Trust Bank and Ameila Mutunda** was filed in the Land Division of the High Court in November 2018. The claim against the Defendants jointly and severally is for:

- a) A declaration that the 1st Defendant is in breach of contract for failure to handover vacant possession of the suit property after selling it to the plaintiff;
- b) A declaration that the 2nd Defendant has no right to continue occupying and utilizing the suit land;
- c) An order of eviction of the 2nd Defendant from the suit land;
- d) An order for survey /boundary opening of the suit land;
- e) A permanent injunction restraining the 2nd Defendant and her agents from trespassing on the suit land and claiming any interest in the same; and
- f) Various heads of damages and costs of the suit.

3. Lastly, **Originating Summons 00006 of 2018: Value Link Limited Auctioneers, Keeya Francis & Finance Trust Bank Limited versus Amelia Mutanda** was filed in this Division on the 24th April 2018 for the determination of the following questions

- a) Whether the applicants are entitled to delivery of possession of the mortgaged property by the Respondent; and
- b) Whether the Plaintiff is entitled to costs of the suit.

HCCS 0901 OF 2020, HCCS 0957 of 2018 and OS 0006 of 2018 are all yet to be heard and determined. The issue in dispute relates to the manner in which the suit property was sold by



Finance Trust Bank and therefore who is the rightful owner of the property. That is, did the Bank through the 2nd Respondent legally sale the suit property to the 3rd Respondent? How the court finds on this issue will determine whether the Applicant stays in occupation of the suit property and her name restored on the title deed to the suit property as the registered proprietor or whether the Applicant gives the 3rd Respondent vacant possession of the suit property. These issues shall be determined and put to rest upon hearing HCCS 0901 of 2020.

I therefore find that OS 0006 of 2018 violated the *lis pendens rule* and was an abuse of the court process which this court is empowered to curtail under section 33 of the Judicature Act and section 98 of the Civil Procedure Act. **OS 0006 of 2018: Value Link Limited Auctioneers, Keeya Francis & Finance Trust Bank Limited versus Amelia Mutanda** is hereby struck out.

Issue No. 2: What remedies are available to the parties?

Costs shall always follow the event and a successful party should not be deprived of them, unless court for good cause orders otherwise.

Section 27 (1) of the Civil Procedure Act states that:

“subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid”.

Since court has found in favour of the Applicant, costs of the Application are awarded to the Applicant.

Delivered electronically this 25 day of September 2023 and uploaded on ECCMIS.



Harriet Grace MAGALA

Judge

25th September 2023