

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

CIVIL SUIT NO. 116 OF 2018

CENTENARY RURAL DEVELOPMENT BANK LTD:PLAINTIFF

VERSUS

RICHARD IVAN MUNGATI

T/A SURVESIS

:DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The defence counsel raised a preliminary objection on points of law challenging the institution of the suit for misjoinder of causes of action and also for *Lis Pendens*. The cause of action in the suit is for breach of contract, professional negligence and fraud occasioning a purported loss of UGX 314,634,094/= It was pleaded that the loss arose out of instructions to survey properties namely Plot No. 871 Block 250 Bunga registered in the names of Arinaitwe Joseph Brian and Plot No. 75 Block 215 Bulemezi registered in the names of Golola David.

The plaintiff Bank engaged the defendant Valuation Surveyor under a service Level Agreement or a retainer agreement dated 14th October, 2011. The Plaintiff retained and engaged the Defendant for payment to act as the Plaintiff's surveyor and/or valuer to survey and value properties belonging to prospective borrowers and/or mortgagors and to report to the Plaintiff on the condition/status of the properties.

In or around January and May 2012, David Golola and Arinaitwe Joseph Bryan applied for credit facilities from the Plaintiff. The persons indicated to the Plaintiff that they were registered proprietors of property comprised in Plot No. 75 Block 215 Mulamba, Bulenzi, Nakaseke District; and Plot No. 871 Block 250 Bunga, Kampala respectively.

On the basis of the retainer agreement, the Plaintiff engaged the services of the Defendant to survey and value, for the benefit of the Plaintiff, the above mentioned properties. The Defendant 'purported' to inspect, survey and value the properties and on the basis of the findings of the Defendant, the Plaintiff lent money to Golola David and Arinaitwe Joseph.

Upon default by the borrowers/mortgagors, the Plaintiff commenced foreclosure proceedings against the said Golola David and Arinaitwe Joseph Brian. Unfortunately, the Plaintiff could not proceed with and/or conclude the foreclosure process because upon further scrutiny and investigation, the Plaintiff noticed that the survey and Valuation reports prepared by the Defendant were misleading, incorrect, negligent and/tainted with fraud.

The three issues that arise out of the preliminary objection are;

1. *Whether there was a misjoinder of causes of action?*
2. *Whether the instant suit offended the lis pendens rule?*
3. *Whether the filing of the instant suit was abuse of court process?*

The plaintiff was represented *Mwebesa Raymond, Joakim Karaarira* and *Patience Akampurira* while the defendant was represented by *Gloria Erimu*.

Determination of the issues

Whether there was a misjoinder of causes of action?

The defendant's counsel submitted that the plaintiff is allowed to unite in the same suit several causes of action against the same defendant under O.2 r 4 of the civil procedure rules. However, certain conditions must be

met i.e there must be a right to relief arising out of the same transaction or series of transactions and a common question of law and fact.

It was the defendant's contention that there is no relationship between the impugned bank customers nor the loans and securities in issue.

The plaintiff's counsel submitted that the bank entered into a retainer agreement with the Defendant on 14th October 2011, wherein the Defendant was to offer survey and valuation services for properties belonging to borrowers and/or mortgagors and to report to the Plaintiff on the conditions or status or suitability of the properties as security.

Pursuant to the retainer agreement, the Defendant was instructed on two occasions to survey and value two properties to wit: Plot No. 871 Block 250 Bunga, Kampala registered in the name of Arinaitwe Bryan Joseph in January 2012 and Plot No. 75 Block 215 Mulamba, Bulenzi, Nakaseke District registered in the names of Golooba David in May 2012. On the strength of the valuation and survey reports, the Plaintiff lent out money to the respective proprietors.

Upon default of the mortgagors, the Plaintiff was unable to recover the sums under the mortgage through foreclosure of the securities because the status of the properties materially differed from the reports prepared by the defendant.

It was their further submission that the survey exercises were a series of similar transactions carried out pursuant to the retainer agreement by the same defendant and raise common questions of law and fact and therefore can be joined in the same cause.

The Plaintiff sued for breach of the retainer agreement, professional negligence and/or fraud and the actions related to the two properties and borrowers stated out in the plaint are a particularization of the actions amounting to breach of the contract, negligence and/or fraud. It is the retainer agreement that created the duty of care, contractual obligation and

the professional liability of the Defendant and as such created a cause of action for the Plaintiff. The questions of law that arise out of the two transactions are similar and warranted a joinder of causes.

Analysis

Joinder of causes of action is provided under Order 2 Rule 4 which provides that:

Joinder of causes of action.

Except as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite those causes of action in the same suit.

Both counsel cited, ***Barclays Bank DCO v CB Patel and Others [1959] EA 214*** , it was held that for cause of action to be joined in one action there must be a right to relief arising out of the *same transaction or series of transactions and a common question of law or fact*. See **Turyamureeba v Justus Rugyegye and Another MA 518 of 2013**.

The plaintiff's cause of action arises from the retainer agreement with the defendant to provide survey services and it is the basis of the suit for professional negligence whether it is one case of professional negligence or whether they are 100 cases of professional negligence. It is the retainer agreement that created the duty of care, contractual obligation and the professional liability of the Defendant and as such created a cause of action for the Plaintiff. The questions of law that arise out of the two transactions are similar and warranted a joinder of causes.

In the circumstances of this case, it is desirable that all matters in dispute should have been resolved in one set of proceedings since there is a sufficient degree of commonality between all the causes of action. Such approach enables the court to adjudicate the whole dispute with finality in

mind, saves the court's and parties resources (especially expenditure) which would have to be allocated to multiple proceedings, avoids the risk of inconsistent decisions by different courts and delay which would necessarily result from a series of actions. Exceptionally, there may be circumstances in which the joinder of one or more actions would not be appropriate, in such circumstances separation may necessary.

I agree with the plaintiff's counsel submission that joinder of causes of action is important to enable courts avoid a multiplicity of suits and to expedite dispensation of justice. In the case of *Mohan Kiwanuka v Asad Chand SCCA 12 of 2002*, the Supreme court held that:

"I am constrained to observe here, that this background demonstrates how undue regard to technicalities can obscure real issues, to the prejudice of substantive justice. It is a cardinal principle in our judicial procedure, that courts must, as much as possible, avoid multiplicity of suits. Thus it is that rules of procedure provide for, and permit where appropriate, joinder of causes of action and consolidation of suits. Related to that, is the courts' duty to expedite dispensation of justice. I have no doubt that the dispute in the instant case would have been resolved expeditiously, but for the erroneous insistence that the competing claims could not be tried together."

Therefore, the defendant's submission and prayer for striking out the suit for misjoinder of causes of action would not be tenable in any event. The court has several remedies in respect of misjoinder joinder or non-joinder i.e consolidation of suits or the court may order the actions to be tried at the same time or one immediately after another or order the split of the cases to be heard separately. **Order 2 rule 8** of Civil Procedure Rules provides on **Objections as to misjoinder states that;**

(1) Any defendant alleging that the plaintiff has united in the same suit several causes of action which cannot be conveniently disposed of together may at any time apply to the court for an order confining the suit to such of the causes of action as may be conveniently disposed of together. (2) If, on the hearing of the application, it appears to the court that the causes of action are such as cannot all be conveniently disposed of together, the court may

order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just.

There is no misjoinder of causes of action in the present case.

Whether the instant suit offended the lis pendens rule?

The defendant's counsel submitted that the instant suit is misguided and should not have been brought to court as it is a repeat of an existing suit that has been tried and is pending judgment before another Judge of the High Court at the Land Division vide Civil Suit No. 129 of 2013 in which the plaintiff (by way of counter-claim) filed a claim against the defendant in negligence over plot 871 block 250 Bunga, Kampala District in the name of Arinaitwe Brian.

The plaintiff's counsel submitted the principle is that the "matters in issue" must be the same in both the cases and this does not mean any matter in issue but the entire subject in controversy.

The facts of this case are that the Plaintiff was sued in Civil Suit No. 129 of 2013 before the High Court Land Division by a one Lotigo Samuel seeking for "*a permanent injunction, general damages and costs of the suit arising out of a fraudulent mortgage transaction.*" Lotigo Samuel claimed to be the registered proprietor of land comprised in Block 250 Plots 870 and 871 and sued the instant Plaintiff together with the borrower Arinaitwe Brian Joseph. The Plaintiff in the current suit counter-claimed in Civil Suit No. 129 of 2013 against the instant Defendant seeking compensation for the outstanding loan amount in regard to the loan disbursed to Arinaitwe Brian.

It was counsel's submission that the current suit, Civil Suit 116 of 2018 pending before is a claim against the Defendant in breach of contract and/or professional negligence, and fraud occasioning loss of more than UGX. 314,634,094/- based on a retainer agreement entered between the

parties. we submit that the subject matter in Civil Suit No. 129 of 2013 does not cover the entire subject matter in Civil Suit No. 116 of 2018 case and it is not enough that one issue is common to render the instant suit offensive to the rule of *lis pendens*. The causes of action are different and the prayers sought materially differ and as such the instant suit is not an abuse of court process.

The plaintiff submitted and prayed that this honourable court finds that the subject matter of Civil Suit No. 116 of 2018 is not directly and substantially in issue in Civil Suit No. 129 of 2013 and as such is neither an abuse of court process nor offends the rule on *lis pendens*.

Analysis

According to *Black's Law dictionary 11th Edition* by Bryan A. Garner page 1117 *lis pendens* means; *A pending suit*.

The *lis pendens* rule is provided for under **Section 6 of the Civil Procedure Act**, thus:

“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. “

The doctrine of *lis pendens* is only an aspect of the rule of *res judicata*. Where a conflict arises between the doctrine of *res judicata* and *lis pendens*, the former will prevail over the latter. In other words, once a judgment is duly pronounced by a competent court in regard to the subject matter of the suit in which the doctrine of *lis pendens* applies, the said decision would operate as *res judicata*.

It is not disputed that the plaintiff sued in civil suit No. 129 of 2013 at the land division and by way of an Amended Defence added a counterclaim against the defendant contending that;

“ 2) The counterclaimant shall aver and state that prior to advancing the loan to the 1st counterclaimant, it relied on the survey and boundary opening report prepared by the 2nd counter-defendant.

(3) *That in the event that the report was not accurate, the counter-claimant is entitled to be compensated by the counter-defendant for negligence.*

Particulars of negligence

a) *Failing to obtain sufficient information to warrant the expression of a professional opinion.”*

The defendant as submitted that indeed there is a pending suit in the land division of the high Court which is pending judgment before Justice Phillip Odoki. The matter in issue in that counter-claim as can be deduced from the pleadings reproduced above are substantially the same and or similar in the instant case.

Secondly, the parties are same and this satisfies the rule of whether the parties in the previous suit are directly and substantially the same as the subsequent suit. To this extent the subsequent filing of the instant suit by the plaintiff herein amounted to gross violation of the *lis pendens* rule; a fact which renders this part of the suit wholly untenable. See ***Springs International Hotel Ltd v Hotel Diplomate Ltd & Boney M. Katatumba HCCS No. 227 of 2011***

This court also notes that there was a joinder of causes of action. The same defendant was sued over another piece of land which had earlier been challenged for being a misjoinder. The claim arising out of the facts pertaining to Plot No. 75 Block 215 Mulamba, Bulenzi, Nakaseke District is hereby saved.

This preliminary objection application is partly successful and the claim against the defendant for negligence arising out survey report on land comprised in Plot 871 Block 250 Bunga, Kampala District in the name of Arinaitwe Brian is struck off.

The plaintiff is directed to amend the plaint within 30 days from the date of this ruling.

I make no order as to costs.

It is so ordered.

SSEKAANA MUSA

JUDGE

15th/07/2021