



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
MISCELLANEOUS APPLICATION 50 OF 2023**

(ARISING FROM HIGH COURT CIVIL SUIT NO 126 OF 2022)

**1. CHARLES MUTASINGWA
2. GRACE TUMUKUNDE MUTASINGWA ----- APPLICANTS**

VERSUS

MARK ENOTH KAMANZI ----- RESPONDENT

BEFORE: Hon. Justice Nshimye Allan Paul M.

RULING

REPRESENTATION

The Applicants were represented by Adv. Diana Kasabiti of Diana K. & co Advocates, while the Respondent was represented Kamanzi & Co Advocates.

BACKGROUND

The Applicants instituted this application by way of a notice of motion under Sections 33 of the Judicature Act, Sections 6 and 98 of the Civil Procedure Act and Order 50 Rules 1 and 3 of the Civil Procedure Rules SI 71-1 seeking orders that.

- 1) The Suit in HCCS 126 of 2022 be dismissed for offending the Lis pendens rule.
- 2) Alternatively, that the proceedings in HCCS 126 of 2022 be stayed pending hearing and determination of HCCS 653 of 2017.
- 3) Costs of the application be provided for.

The application is supported by an affidavit deposed by Charles Mutasingwa, the 1st applicant and was opposed through an affidavit in reply deposed by

Mark Enoth Kamanzi, the respondent. The is applicant, Charles Mutasingwa deponed an affidavit in rejoinder

GROUND

- 5 The grounds of the application as set out in the notice of motion are;
- a) The dispute between the partes arising out of the agreement dated 25th May 2017 is directly in issue in HCCS no 653 of 2017 currently pending before the land division of the High court in Kampala.
 - b) The instruction and trial of HCCS 126 of 2022 is barred by operation of law
 - 10 c) It is in the interest of justice that this application be granted to avoid contradictory decisions of the courts of law.

SUBMISSIONS

The parties filed written submissions. The applicants filed submissions, the
15 Respondent filed submissions in reply and the applicants filed submissions in rejoinder.

APPLICANTS' SUBMISSIONS

Counsel for the applicants framed two issues for determination.

- 20 1. Whether HCCS no 126 of 2022 offends the Lis Pendens rule?
2. Whether the applicants are entitled to the remedies sought?

Counsel for the applicants submitted that section 6 of the Civil procedure Act embodies the spirit of the lis pendens rule and cited the decisions in Springs
25 International Hotel Ltd vs Hotel Diplomate Ltd and Bonny Katatumba by Hon Justice Andrew Basaija , as well as the decision in Krone Uganda Limited Vs Kerilee Investments Limited HCMA 306 of 2019 by Hon Justice Boniface Wamalwa on the principles governing the lis pendens rule.

30 Counsel submitted that the issues in HCCS 653 of 2017 relate to rights of parties in respect of land comprised in Nyabushozi Block Ankole Ranching Scheme LRV MBR 106 Folio 9 plot 23B7 and the adjoining land which is Nyabishozi Ranch 23A4. she contended that the dispute in HCCS no 126 of 2022 is directly related to the same pieces of land and the facts in paragraph 4

of the respondent's plaint clearly relate to the facts in paragraph 4 of the applicant's plaint in HCCS 653 of 2017.

Counsel further stated that both partes are claiming rights emanating from a contract dated 25th May 2017, she then submitted that it is clear that the direct issue in both HCCS 653 of 2017 and HCCS 126 of 2022 relates to ownership and use of land comprised in Nyabushozi Block Ankole Ranching Scheme LRV MBR 106 Folio 9 plot 23B7 and the adjoining land which is Nyabishozi Ranch 23A4.

She concluded that on the face of it HCCS 653 of 2017 and HCCS 126 of 2022 is between the same parties, and the prayers in both suits can only be considered after considering the issue of the ownership of land, which potentially exposes the two courts to the danger of arriving at conflicting decisions.

Counsel then prayed that court be pleased to find that HCCS 126 of 2022 offends the Lis pendens rule.

RESPONDENT'S SUBMISSIONS IN REPLY

Counsel for the respondent first stated that the application is bad in law, frivolous and an abuse of court process. He contended that prior to filing HCCS 653 of 2017 the respondent had refunded the applicants money for 19 acres so he stated that HCCS 653 of 2017 is in relation to land comprised in Nyabushozi Block Ankole Ranching Scheme LRV MBR 106 Folio 9 plot 23B7, while HCCS 126 of 2022 that was filed on 12 October 2022 which is 7 years after the earlier suit was filed is in respect to trespass on land comprised in Nyabushozi Block Ankole Ranching Scheme LRV 3760 Folio 24 plot 23A4

Counsel submitted that the land in issue is different, facts in both cases are different and orders sought are different.

Counsel for the respondent then submitted on the main issues in this application, mainly whether HCCS 126 of 2022 offends the Lis pendens rule. He contended that the facts at hand are disgusting from section 6 of the CPA and the decisions cited by the applicant in relation to the principles governing the lis pendens rule.

Counsel contended that facts in HCCS 653 of 2017 are in respect to an agreement for Nyabushozi Block Ankole Ranching Scheme LRV MBR 106 Folio 9 plot 23B7. He stated that the applicant's counsel's submissions that 19 acres were to be curved out of the land in Ranch 23A4 is false and an unethical attempt by counsel to adduce evidence from the bar.

Counsel referred court to the issues in HCCS 653 of 2017 where the main issue is whether there was breach of agreement for sale of land comprised in Nyabushozi Block Ankole Ranching Scheme LRV MBR 106 Folio 9 plot 23B7 in Kiruhura district, while the main issue in HCCS 126 of 2022 are whether the applicants trespassed on the respondent's land comprised in Nyabushozi Block Ankole Ranching Scheme LRV 3760 Folio 24 Plot 23A4 in Kiruhura district.

Counsel then prayed that the application be dismissed with costs.

APPLICANTS SUBMISSIONS IN REJOINDER

Counsel for the applicants submitted that both suits relate to the legal rights of the applicants emanating from an agreement, executed on 25th May 2017, which provided in clause 5 that the title of the adjoining land (ranch 23A4) will be subdivided to curve out the remaining acres (19 acres). That the applicants in their Written statement of defence clearly stated that their occupation on ranch 23A4 is based on the contract dated 25th May 2017. Counsel then retaliated the applicant's prayers in the application.

DETERMINATION

The Black's Law Dictionary (8th Ed) defines "*lis pendens*", as a Latin expression which simply refers to a "*pending suit or action*".

It is trite that no court will proceed with a suit that offends the *lis pendens* rule as is provided in **Section 6 of the Civil Procedure Act** (Cap.71) that states

"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 mine)

The test to be applied when determining whether a suit offends the *lis pendens* rule was well laid out in the case of **SPRINGS INTERNATIONAL HOTEL LTD V HOTEL DIPLOMATE LTD AND ANOTHER HIGH COURT CIVIL SUIT NO. 227 OF 2011** that it has to be determined;

- a) whether the parties in the previous suit are directly or substantially the same as in the subsequent suit;
- b) whether the matter(s) in issue in the instant suit are directly and substantially the same as the matters in issue in a previously instituted suit;
- c) whether the suit is proceeding or pending in the same or any other court having jurisdiction to grant the reliefs claimed.

I will now proceed to resolve the issues together; the issues are; whether HCCS no 126 of 2022 offends the Lis Pendens rule? And any remedies available to the parties. I am going to use the three-way test laid down **SPRINGS INTERNATIONAL HOTEL LTD V HOTEL DIPLOMATE LTD AND ANOTHER HIGH COURT CIVIL SUIT NO. 227 OF 2011** as a guide.

TEST 1

whether the parties in the previous suit are directly or substantially the same as in the subsequent suit.

The parties agree by their evidence in paragraph 9 of the applicant's affidavit in support and paragraph 5 of the respondent's affidavit in reply that there are two suits HCCS 653 of 2017 and HCCS 126 of 2022 before the High Court for determination. The evidence in Annexure C to the affidavit in support, is the plaint in HCCS 653 of 2017 before the Land division of the High Court, which shows that the applicants in this application are the plaintiffs and the respondent herein as the defendant. On the other hand, a perusal of the plaint on court record shows that HCCS 126 of 2022 is a suit that was filed by the

respondent in the Mbarara High Court against the applicants herein as defendants.

I find that the evidence on court record confirms that the parties in the previous suit (HCCS 653 of 2017) are directly or substantially the same as in the subsequent suit (HCCS 126 of 2022).

TEST 2

whether the matter(s) in issue in the instant suit are directly and substantially the same as the matters in issue in a previously instituted suit.

I have read the pleadings and submissions and find that both parties arguments are based on land.

The evidence in the plaint in HCCS 653 of 2017 that is attached as Annexure C to the affidavit in support states in paragraph 3 of the plaint that the plaintiffs (applicants herein) claim against the defendant (respondent herein) is for breach of contract and specific performance among others. In paragraph 4 (A) of the same plaint, the plaintiffs (applicants herein) claim that the parties in this application executed a land sale agreement, whereby the defendant (respondent herein) sold 60 acres to the plaintiffs (applicants) for a consideration of 330 million shillings that was paid. That the respondent herein only gave them 41 acres and has refused to give them the remaining 19 acres.

On the other hand, the plaint in HCCS 126 of 2017 from which this application arises outlines the cause of action and orders sought by the plaintiff (respondent herein) in paragraph 3 (i)(ii) and (iii) of the plaint as follows:

“ 3) the plaintiffs cause of action against the defendants jointly and severely is for the following declarations and orders:

- i) A declaration that the plaintiff is the registered **legal owner of the land comprised in Nyabushozi Ranch 23A4** Ankole Ranching Scheme.....*
- ii) A declaration that the plaintiff is the registered **legal owner of the land comprised in Nyabushozi Ranch 23B7** Ankole Ranching Scheme.....*

iii) *A declarations that the actions and or omissions of the defendants jointly and severely to illegally and or forceful enter the plaintiffs land comprised in Nyabushozi Ranch 23A4 Ankole Ranching Scheme... **amounts to trespass**, malicious damage and theft of the gate doors” (emphasis mine)*

The written statement of defendants of the defendants (applicants herein) in HCCS 126 of 2022, that is attached as annexure MK3 to the respondent’s affidavit in reply states in paragraph 5 (b) of that defence that the parties in this application executed an agreement dated 25th May 2017 whereby the defendant (respondent herein) sold 60 acres of land to the applicants herein.

The land agreement executed on 25th May 2017 between the respondent herein as the vendor and the applicants herein as purchasers, is admitted by both parties herein. The applicants attached it as annexure B to the affidavit in support and the respondent attaching it as annexure A to his plaint in HCCS 126 of 2022. Paragraph 1 and 2 of this non-contested land agreement states that:

*“1. The vendor is the lawful owner of land comprised in LRV MBR 106 Folio 9 plot 23B7 Nyabushozi Ranching scheme land situate at Karengo village, Kiruhura District measuring approximately 16.5800 hectares and is desirous of **selling the said land and additional fifteen (15) acres from the vendor’s neighbouring and adjoining land** to the purchasers*

*2. the purchasers are able and desirous of buying **the said land and fifteen additional land from the vendors neighbouring land** to make a total of sixty (60) acres” (emphasis mine)*

I note that the respondent herein submitted at line 12 to 14 on page 3 of his submissions in reply that *“the subject matter in HCCS 653 of 2017 relates to agreement for sale of land comprised in Nyabushozi Ankole Ranching Scheme LRV MBR 106 Folio 9 **plot 23B7**”* yet at the same time in his pleadings filed in the Mbarara High Court in HCCS 126 of 2022 he states in paragraph 3 (ii) of that plaint and seeks orders that *“A declaration that the plaintiff is the registered **legal owner of the land comprised in Nyabushozi Ranch 23B7 Ankole Ranching Scheme.....**”* . I find that the plaint in HCCS 126 of 2022 is seeking orders as to the **ownership of land in Plot 23B7, which is a simar matter for consideration**

in HCCS 653 of 2017 by the respondent's own submissions on court record. I therefore find that the ownership of land comprised in LRV MBR 106 Folio 9 plot 23B7 Nyabushozi Ranching scheme is a matter is before two courts for consideration, with the earlier matter being the HCCS 653 of 2017 before the Land Division of the High Court in Kampala and the latter being HCCS 126 of 2022 filed at the Mbarara High Court. This means that to this extent this offends the lis pendens rule.

I also note that the plaintiffs (applicants herein) in HCCS 653 of 2017 are seeking for specific performance of the purchased 60 acres in the agreement of 25th May 2017 as stated in paragraph 3 and 4 of the plaint in HCCS 653 of 2017, that is attached as annexture C to the affidavit in support. This evidence ought to be read hand in hand with the wording in paragraph 1 and 2 of the non-contested agreement of 25th May 2017 that states that

*"1. The vendor is the lawful owner of land comprised in LRV MBR 106 Folio 9 plot 23B7 Nyabushozi Ranching scheme land situate at Karengo village, Kiruhura District measuring approximately 16.5800 hectares and is desirous of **selling the said land and additional fifteen (15) acres from the vendor's neighbouring and adjoining land** to the purchasers*

*2. the purchasers are able and desirous of **buying the said land and fifteen additional land from the vendors neighbouring land to make a total of sixty (60) acres**" (emphasis mine)*

It is clear from the terms of the agreement above that the respondent sold 60 acres of land that were to come from the land in plot 23B7 and more land would come from the vendors own neighbouring land. The vendor, who in this case is the respondent, by his evidence on record states that he owns plot 23A4, that he claims was trespassed upon by the applicant (*see paragraph 5 and 6 of the affidavit in reply*). This is the same land that the applicants claim they are entitled to survey off their additional land in the agreement to make 60 acres (*see paragraph 5 of the affidavit in support, and paragraph 5 (b) of the written statement of defence in HCCS 126 of 2022 attached as annexture MK3 to the respondents affidavit in reply*). Counsel for the applicants has submitted that in HCCS 653 of 2017 they prayed for specific performance of additional 19 acres from plot 23A4.

This Court cannot determine whether the High Court land division will in determining HCCS 653 of 2017 order for specific performance of the extra land mentioned in the agreement between the parties that was executed on 25th May 2017, that is the duty of that Court at the Land Division. What is clear from this court's perspective is that the agreement of 25th May 2017 that is admitted by all the parties talks about sale of land in plot 23B7 and additional land, so since the respondents other land in the neighbourhood is plot 23A4, it then follows that determination of rights as between the parties herein in respect to land on plot 23A4 is currently before two courts for consideration, with the earlier matter being the HCCS 653 of 2017 before the Land Division of the High Court in Kampala and the latter being HCCS 126 of 2022 filed at the Mbarara High Court. This means that to this extent this offends the lis pendens rule.

Lastly on this TEST 2, I have to interrogate the respondent's submission that HCCS 126 of 2022 is in respect to trespass on land comprised in Nyabushozi Block Ankole Ranching Scheme LRV 3760 Folio 24 plot 23A4, and as such it is different from the earlier suit HCCS 653 of 2017 in respect to facts and reliefs.

Firstly, I don't agree that the relief sought in HCCS 126 of 2022 are entirely different considering that in orders 1 and 2 seek a declaration that the respondent is the owner of plots 23A4 and 23B7, yet HCC 653 of 2017 is by the respondent's own admission states as shown above that HCCS 653 of 2017 is concerned with PLOT 23B7.

Secondly, in **OMER FARMING COMPANY LIMITED V REHOBOTH AGRICULTURAL MANAGEMENT SERVICES LIMITED HCMA (COMMERCIAL DIVISION)1869 OF 2022** Hon Lady Justice Magala J, when dealing with an application about the Lis Pendens rule, held that;

"My view is that whether matters in issue are directly and substantially similar is not only an issue of framing or construction. The Court must also consider the likely outcome of the matters"

In applying the spirit of holding by Hon Lady Justice Magala to the scenario in this application, I ask, if the High Court in Mbarara declares that the respondent is the owner of plots 23A4 and 23B7 as prayed in the plaint in HCCS

126 of 2022 and proceeds to declare the applicant's trespassers, where would that leave the determination of HCCS 653 of 2017 before the High Court in the Land Division in Kampala. Asking yourself what the likely outcome of one court's decision would have on a case in another court brings out the absurdity that may arise. It would certainly mean that the decision of the Court in HCCS 126 of 2022 would have the effect of determining rights that are also under consideration in HCCS 653 of 2017. I am therefore convinced that the spirit of the Lis pendens rule is meant to deter absurdities that would occur when two courts are handling different cases that are substantially the same or determining the same rights. I find that HCCS 126 of 2022 offends the Lis Pendens Rule.

TEST 3

whether the suit is proceeding or pending in the same or any other court having jurisdiction to grant the reliefs claimed.

It is trite law that the High Court has unlimited Jurisdiction and is empowered by section 33 of the Judicature Act and Section 98 of the Civil Procedure Act to give relieves for the ends of justice.

The evidence on court record as stated above shows that HCCS 653 of 2017 and HCCS 126 of 2022 are all pending before the High Court. I have no doubt that the High Court Land division can in handling HCCS 653 of 2017 grant any other orders to either party in the interest of justice.

In conclusion, I find that HCCS 126 of 2022 offends the Lis pendens Rule and is an abuse of the court process. I therefore order that

1. HCCS 126 of 2022 is hereby struck out with costs under section 98 of the Civil Procedure Act and section 17(2) of the Judicature Act.
2. The respondent will pay the applicants costs of this application.


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NSHIMYE ALLAN PAUL M.
JUDGE
14-06-2024