

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 636 OF 2016

GODFREY MAGEZI ::::::::::::::::::::::::::::::::::: PLAINTIFF

Versus

1. NATIONAL MEDICAL STORES

2. CIPLA QUALITY CHEMICAL INDUSTRIES

LIMITED (Formerly QUALITY CHEMICAL INDUSTRIES LTD)

3. THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING:

The brief facts of this case are that the 2nd defendant (Cipla QCIL) on 14th December 2005 entered into a memorandum, of understanding (MOU) with the Government of Uganda (GOU) for the supply of drugs particularly ARVs (HIV drugs) and ACT (malaria drugs). That from the financial year 2009/2010 all GOU funds for the purchase of medicines were transferred to the 1st defendant (NMS) who were directed by the Ministry of Health to start making purchases from Cipla QCIL the 2nd defendant, in accordance with the terms of the MOU dated 14th December 2005.

That NMS and Cipla QCIL between 2009 and 2010 executed four contracts with QCIL to wit contract No./ NMS/SPLS/09-10/040001/25 for USD 7,638,068.00 EXECUTED ON 21ST June 2010 – Exh. No. 5; contract No. NMS/SPLS/09-10/04001/04 for USD 11,273,622.60 dated 23rd December 2009 – Exh. No. 4; contract NMS/SUPLS/09-10/04001/28 for USD 2,850,004.92

executed on 21st June 2010 – Exh No. 6 and contract No. NMS/SPLS/10-11/04001/07 for USD 26,496,792.66 dated 25th October 2010 – Exh No. 7.

That by letter dated 9th August 2010 the plaintiff raised complaints to the Inspector General of Government contending that the drugs supplied were overpriced. That on 25th July 2013 the plaintiff filed a reference in the East African Court of Justice (EACJ) and subsequently filed an amended statement of reference seeking *inter alia* for orders directing the Government of Uganda to recover USD 17,826,038.94 from Cipla QCIL being money allegedly lost under the contracts above mentioned.

That the matter was fixed for hearing before the EACJ and issues for determination by the EACJ were agreed upon at a scheduling conference held on 3rd June 2014. That the reference filed before the first instance Division of EACJ was dismissed with costs whereupon the plaintiff filed an appeal to the appellate division of the EACJ which was also dismissed with costs. That both the first instance and appellate divisions of the court found and held that the Government of Uganda acted in accordance with the law and declined to make any orders for recovery of amounts alleged by the plaintiff to have been lost.

The plaintiff has now commenced this suit against the same defendants before the High court in Uganda and the defendant raised a preliminary objection that the suit is caught up by limitation.

The issues to be considered by this court as raised by both counsel are that:

- a) Whether the plaintiff's suit is barred by resjudicata and is an abuse of the court process, scandalous, frivolous and vexatious.
- b) Whether the suit or any part thereof is barred by limitation.

RESOLUTION OF ISSUES:

Issue 1:

It was the case of the 1st and 2nd defendants that the case that has been brought by the plaintiff is *res judicata*. Counsel defined what *res judicata* is according to Section 7 of the Civil Procedure Act which provides that:

“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 had been heard and finally decided by the court”

Counsel cited the case of *Boutique Shazim Ltd Vs Norattan Bhatia & another CA No. 36 of 2007* where it was held that :

“Essentially the test to be applied by court to determine the question of res judicata is this;

“is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time”

It is the defendant's case that they are privies to the Attorney General against whom the reference at the East African Court of Justice was brought as they have a common interest in the subject matter of the suit. Counsel for the defendant argued that the suit is based on the same alleged loss earlier presented before the East African Court of Justice and this can be ascertained by looking at the plaint. That the plaint at pages 3 and 4 gives a summary of financial loss and it was the same basis of financial loss as alleged in the reference at the EACJ.

It is also asserted by counsel that the prayers sought by the plaintiff in the current suit are the same prayers made in the reference to the EACJ. Counsel simplified this court's work by drawing a comparison table showing the similarities in the actions currently before the High Court and the one that was decided in the East African Court of Justice.

To this, counsel contended that the Judgment of the courts at both the first instance Division and the appellate Division of the East African Court of Justice were Judgments in rem, binding on all parties. Counsel cited Halsbury's Laws of England, Volume 12 (2009) 5th Edition, Para it stated that;

“The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute”

That it is the 1st and 2nd defendant's cases that the instant suit is frivolous, vexatious and an abuse of the process of court and ought to be struck out on that ground.

Further still, the 3rd defendant's counsel contended that the matters arising in the plaint are the ones already expressly alleged by one party (plaintiff) in the East African Court of Justice and denied by the defendant and the plaintiff is therefore barred from bringing up these matter again in a fresh suit.

Counsel asserted that the doctrine of res judicata is a method of preventing injustice to the parties of a case supposedly finished, but perhaps also or mostly a way of avoiding unnecessary waste of resources in the court system. That the third defendant thus contends that the plaintiff chose to pursue remedies in the East African Court of Justice over the same subject matter and it was conclusively dismissed and he is estopped from further harassing the defendants with new suits on the same matters.

On the other hand, counsel for the plaintiff in a detailed submission asserted that it is very clear that the East African Court of Justice only handles matters of interpretation and application of the treaty. That whereas national court have unlimited jurisdiction to determine all issues concerning contract, land, family and employment in one suit, the East African Court of Justice has limited Jurisdiction to only interpret and apply the treaty provisions.

That issues that require treaty interpretation are referred to the East African Court of Justice leaving other issues to be determined by the National Courts. Counsel for the plaintiff further stated that applying the decisions of res judicata it is very clear that the issue before the East African Court of Justice was stated in the judgment of the East African Court of Justice at page 466 of the trial bundle under para 47 thus:

***“Issue No. 3 Whether the content and the implications of the inspectorate of Government’s letter dated 8th July 2013 was in breach of principles of Good governance, Rule of law, Accountability and Transparency contrary to the provisions of Articles 6(d), 7(2) and 8(1)(c) of the treaty.*”**

Counsel stated that from the outset, we hasten to state that the gist of the reference gravitates around the above issue. It is indeed, the respective letters of the Attorney General of Uganda and the IGG that are the bone of contention between the parties in the reference”.

That as regards the issue of loss of USD 17,826,038.94 that was framed as issue No. 4 reading as Whether there was any loss of USD 17,826,038.94 by the Government of Uganda and Quality Chemical Limited the court stated under para 94 at page 481 of the trial bundle that; in any event, we have no jurisdiction to determine such a matter.

Having carefully considered the submissions of both counsel, this court will go ahead to resolve this matter.

As already mentioned by counsel for the defendant, Section 7 of the Civil Procedure Act provides that:

“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 had been heard and finally decided by the court”

Counsel for the 2nd and 3rd defendants have given an explanation which I will allude to, that the expression former suit shall denote a suit which has been decided prior to the suit in question whether or not was instituted prior to it.

The doctrine was well summarised in the case of James Katabazi & 21 others where the court stated that for the doctrine to apply;

- i) *The matter must be directly and substantially in issue in the two suits.*
- ii) *The parties must be the same or the same the parties under whom any of them claim, litigating under the same title.*
- iii) *The matter must have been finally decided in the previous suit.*

Further still, the case of Kamunye & others vS the Pioneer General Assurance Society Ltdd (1971 E. A 263 gives the test to be applied by court to determine the question of res judicata. It state:

“The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another was and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply”.

According to the facts at hand, the plaintiff’s complaint before the EACJ was that the acts of the Attorney General, NMS and Cipla OCIL were unlawful and as such the money lost should be recovered. The suit presently before the High Court relates to loss and recovery of amounts from the same transactions carried out between December 2009 and October 2010.

To illustrate this matter further, one of the issues for determination in the EACJ was whether there was any loss of USD 17,826,038.94 by the Government of Uganda and Quality Chemicals Ltd. This is the same declaration sought for in the current suit because the plaintiff seeks a declaration that there was a financial loss of USD 18,082,739.30 in the execution and/or

implementation of the four contracts by and between the NMS and QCIL. The EACJ held the following in its judgment of the above.

Issue 1: The court held that the reference was properly before court.

Issue 2: The court held that to make any adverse order against QCIL without affording them a hearing would be against the principle of Natural Justice and decline to do so.

Issue 3: The court found that the Attorney General acted within the legal framework and his actions were not inconsistent with the rule of law as argued by the applicant. The court also found that the IGG's actions were within her powers and were consistent with the rule of law.

Issue 4: The court held that this issue is not a standalone question; rather it has to be read and understood in the context of issues No. 3. That is to say that, once we have determined issues No. 3 in the negative, issue No. 4 is no longer alive to the extent that those two issues are intertwined.

Issue 5: The court found that this issue is a corollary of issues 3 & 4 in so far as it cannot be read and interpreted in isolation. Court held that once it has determined that there was no violation of Articles 6(d), 7(2) and 8(1)(c), then issue No. 5 was untenable.

All these matter were directly and substantially in the former suit before the EACJ and this makes this suit to be Res judicata. For emphasis, issue No. 4 in the EACJ which is also a substantial matter of contention in this court stated that; ***Whether there was any loss of USD 17,826,038.94 by the Government of Uganda and Quality Chemicals Limited.***

The EACJ found that this issue is not a standalone question it has to be read and understood in the context of issues No. 3. It held that, ***“once we have determined issues No. 3 in the negative, issue No. 4 is no longer alive to the extent that those two issues are intertwined”***. Based on these findings, it is very clear that court tackled all the issues which are being re-awakened in the present suit.

As submitted by counsel for the defendant, and according to Halsbury’s Laws of England, the doctrine of re judicata is not a doctrine applicable only to records. It is a fundamental doctrine of all court that the above matter was already decided upon and determining it will amount to res judicata. All matters raised in the instant case belonged to the subject of litigation in the EACJ. This court answers this issue in the affirmative.

Issue 2: Whether the suit or any part thereof is barred by limitation.

The defendant’s counsel asserted that the suit is barred by limitation. That this is because National Medical Stores is a statutory corporation created under the National Medical Stores Act and is an agent of the Government and is pleaded in the suit in its capacity as the agency that procures medical supplies on behalf of the Government of Uganda.

The Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 provides that:

“No action founded on contract shall be brought against the Government or against a local authority after expiration of three years from the date on which the cause of action arose.”

That it is clear that this action is barred by limitation since the plaint was filed in court on the 11th October 2016 beyond the three years limitation period.

On the other hand, counsel for the plaintiff argued that the plaintiff's suit is founded and premised of Article 17 of the Constitution which provide for the duties of a citizen one of which is to combat corruption and misuse or wastage of public property. Counsel state that the cause of action under Article 17 is for vindication of constitutional grievance to preserve, protect and recover public properties that are allegedly lost and that the limitation act does not provide for a limitation period for such causes and claims founded under the constitution.

Counsel for the plaintiff further argues that the reliefs claimed in the plaint are declarations and the law of limitation does not apply to declaratory reliefs and that moreover, declarations whose import is to declare acts that the constitution enjoins the citizens to combat.

From the pleadings, the dispute is one between the plaintiff and the 2rd defendant who is the Attorney General. It is also noticeable that National Medical Stores is a statutory Corporation created under the National Medical Stores Act Cap 207 and as such is an agent of the Government of Uganda which procures medical supplies on behalf of Government.

This court finds that since the 1st and 3rd defendants are agents of the Government, this barred by limitation. It is also noticeable that the plaintiff is seeking to compel the Government to recover from the 2nd defendant amounts allegedly lost under the contracts. This puts the Government in picture and unless Government is compelled, no recovery can be made.

This is contrary to Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 which provides that:

“No action founded on contract shall be brought against the Government or against a local authority after expiration of three years from the date on which the cause of action arose.”

In the case ***Uganda Railways Corporation Vs Ekwere D.O 92008) HCB 61***, it was held that if a suit is brought after the expiration of the period of limitation and no ground of exemption from the law of limitation is pleaded in the plaint, the plaint must be rejected.

In the present case, this court finds that the suit having been commenced after the limitation period of three years as against the Government and there is no exemption pleaded. The plaint is rejected by this court for being barred by limitation.

Even if the above defendant parties do not envisage the Government Section 3(1) of the Limitation Act provides that the following actions shall not be brought after the expiration of six years from the date on which the cause of action arose.

a) Actions founded on contract or on tort.

In this case, the contracts in issue upon which the plaintiff has filed this case were executed between the 1st and 2nd defendants on 23rd December 2009, 21st June 2010, and 29th October 2010 respectively. These contracts emanated from an agreement executed between Government of Uganda and 2nd defendant on the 14th December 2005 relating to the off take purchase of Anti-retroviral and Anti-malarial drugs. The plaintiff raised a complaint with the IGG on 9th August 2010. It is therefore observed in this case that the suit was brought six years after the dates of the

first three contracts of the subject matter of the suit which is contrary to Section 3(1) of the Limitation Act. Owing to this, this suit is barred by limitation.

This suit is therefore dismissed with costs to the defendants

Stephen Musota

J U D G E

09.11.2017

R U L I N G