

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

**CIVIL SUIT NO. 039 OF 2016**

**PATRICK MAYANJA ::: PLAINTIFF**

*Versus*

**UGANDA NATIONAL ROADS AUTHORITY :::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING:**

The brief facts of this case are that about 2009, the defendant’s agents were constructing the Gayaza Zirobwe Road and at Gayaza B LC1 Nangabo, Wakiso District. The plaintiff by then owned a Kibanja at Gayaza where the road was supposed to pass. That the plaintiff was compensated by the defendant for a small portion of land because the defendant was making a “Linear Compensation.” In order to channel all the storm water in Gayaza Town, the defendant built two very large culverts under the road allowing heavy volumes of storm water and effluent to flow into the plaintiff’s land thus degrading a significant portion of it.

The plaintiff intended to build apartments on the said land but could not get planning permission over his land due to the fact that the defendant turned it into a confluence of effluent and storm water. The plaintiff sought for an order of compensation, general damages and costs of the suit.

On the other hand, the defendant denied all the plaintiff’s claims and stated that it is not liable in law or in fact or responsible for the alleged improper manner in which the independent contractor performed his or her duty.

The following issues were raised by the parties for court's determination:

1. Whether the plaintiff is entitled to compensation for the part of his land constructively taken over by the defendant for public use?
2. Whether the plaintiff is entitled to the remedies sought?

The plaintiff's suit was however dismissed under order 9 rule 22 of the Civil Procedure Rules for non appearance of the plaintiff.

The plaintiff then filed Miscellaneous Application No. 43 of 2015 under provisions of Section 98 of the Civil Procedure Act Cap. 71, Order 52 rules 1, 2 & 3 of the Civil Procedure Rules SI seeking to set aside the dismissal order in respect of **HCCS No. 20 of 2011, Patrick Mayanja Versus Energo Project.**

The plaintiff then sought among others to stay execution of the ruling and orders made in HCCS No. 20 of 2011 and sought a reinstatement of the suit by praying that the matter be heard on its merits. The said application was also dismissed with costs on the 26<sup>th</sup> day of October 2016 on grounds that the applicant had no justifiable cause to set aside the dismissal of Civil Suit No. 20 of 2011.

However, the defendant's counsel raised a preliminary objection stating that Civil Suit No. 20 of 2011 are one and the same as Civil Suit No. 39 of 2016 because the plaintiff lays the same claims as was in Civil Suit No. 20 of 2011 which was dismissed under order 9 rule 22 of the Civil Procedure Rules by this court.

The defendant's counsel stated that the terms of Order 9 rule 23 clearly point to the fact that when an order to set aside is not granted by the court, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action.

On the other hand, the plaintiff replied that a party who intends to raise a preliminary objection must plead the same and must raise it in his or her pleadings as a point of law. That the defendants should have pleaded the facts giving rise to the preliminary objection in its defence. And that the defence does not at all allude to any earlier suit filed by the plaintiff and was dismissed by court. That in the present case, neither the plaintiff nor the defendant pleaded the existence and dismissal of a prior suit.

Counsel for the plaintiff asserted that the defendant's submission that Order 7 rule 11 (d) of the Civil Procedure Rules provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by law. That what the defendant is seeking in the preliminary objection is to have the plaint rejected yet it does not on the face of the record "appear from the statement in the plaint barred by the law."

I have considered the submissions and the law cited by both counsel. It is trite to note that Order 6 rule 28 provides for preliminary objection. It states that;

***“any party shall be entitled to raise by his or her pleading any point of law and any point so raised shall be disposed of by the court at or after the hearing.....”***

Counsel for the plaintiff has stated that the party who intends to raise a preliminary objection must plead the same and must raise it by his or her pleading as a point of law. I do not agree with this submission because order 6 rule 28 of the Civil Procedure Rules provides that any party shall be entitled to raise by his or her pleading any point of law. As stated by counsel for the defendant, the said provision merely imposes a right on the party who wishes to raise a preliminary point of law to do so in his/her pleadings.

In the case of ***Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd (1969)*** ***EA 696***, Law JA stated that;

***“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration.”***

New Bold P. stated thus at page 701 that;

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”***

It is noticeable from the record that after dismissal of HCCS No. 20 of 2011, the plaintiff brought a fresh suit under Civil Suit No. 39 of 2016 for the same cause of action. This is an abuse of court process. Where a suit was dismissed under Order 9 rule 22, a fresh suit cannot be brought as provided under Order 9 rule 23 of the Civil Procedure rules. It states:

***“Where a suit is wholly or partly dismissed under order 9 rule 22 of this order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action but he may apply for an order to set the dismissal aside and if he or she satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.”*** (Emphasis mine).

This is the correct position of the law. It is clear from the above Order that the plaintiff was precluded from bring a fresh suit of C.S. No. 39 of 2016 in respect of the same cause of action.

On that basis and for offending Order 9 rule 23 of the Civil Procedure Rules this suit is dismissed with costs to the defendant. I so order.

**Stephen Musota**

**J U D G E**

**23.02.2017**

**23.02.2017:-**

Ms. Katami Lydia for the respondent.

applicant absent.

Milton Court Clerk.

**Ms. Katami:-**

I am ready to receive the ruling.

**Court:-**

Ruling read and delivered.

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**Ajiji Alex Mackay**

**DEPUTY REGISTRAR**

**23.02.2017.**

