

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

CIVIL SUIT No. 073 OF 2016

JAPAN AUTO WORLD LIMITED :::::::::::::::::::::::::::::: PLAINTIFF

Versus

- 1. HAJJI BATTE MAGALA**
- 2. MEMBERSHIP INVESTORS LIMITED DBA ::::::: DEFENDANTS**
- 3. GODFREY KISEMBO**

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:-

At the commencement of the hearing of this suit Mr. Mawampa Elly learned counsel for the 3rd defendant raised a preliminary objection that this suit is res judicata having been decided in the Execution Division. Ms. Diana Nabuuso learned counsel for the plaintiff opposed the objection maintaining that the suit is not res judicata and is properly before court.

I allowed learned counsel to file written submissions to support their respective cases which they did.

I have considered the respective submissions by counsel. I have considered the Law applicable.

In their submission, learned counsel for the 3rd defendant averred that the present suit: Japan Auto World Ltd Vs Godfrey Kisembo & 2 Ors is res judicata on the grounds that the plaintiff instituted a suit against the 3rd defendant in MA No. 1832 of 2015 and MA No. 2870 of 2015 which related to the same suit property namely Plot 1 Katalina Road and Plot 51 Naguru Road

and sought for an injunction (objector proceedings) and stay of execution against the 3rd defendant over the same property due to the existence of a Tenancy Agreement.

In his holding, Justice E.K. Muhanguzi found thus:

“ ... I find and hold that both the applicant and the respondent are in physical and constructive/possession of the attached property. Rule 57 referred to above therefore cannot apply to the instant application because the attached property has been and continues to be in the applicant’s possession in respect of which the applicant has been paying rent and holding the property under or on account of or in trust for the respondent/judgment debtor....”

The ruling goes on to hold that:

“At any rate the applicant/objector being a lawful tenant with a valid Tenancy Agreement, ought to have a reliable claim to secure its tenure in the premises even if any new buyer takes over as a proprietor of the property. The new owner of the property would automatically become the new Landlord against whom all the terms of the existing lease are enforceable. The new Landlord would also be liable to refund any unutilized rentals and any claims for damages in case the tenant has to vacate the property prematurely.”

The doctrine of res judicata is founded under S.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, under whom they or any of them, litigating under the same title, in a court competent to try the subsequent suit or the

suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

As rightly submitted by respective counsel, conditions that must be satisfied for res judicata to be established are:

1. *That there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings was litigated.*
2. *That the matter in issue in the later suit must have been directly and substantially in issue in the later suit.*
3. *That a court competent to try it had heard and finally decided the matters in controversy between the parties in the former suit.*

See: **Mansukhalal Ramji Karia & Anor Vs Attorney General & Ors SCCA No. 20 of 2002.**

I will go ahead and consider the issues raised in the arguments by learned counsel for the 3rd defendant.

Issue: *There has to be a former suit or issue decided by a competent court.*

Relying on the case of **Matco Stores Ltd & 2 Ors Vs Muhwezi CA No. 9 of 2012**, Ms. Nabuuso contended that the matters before the Execution Division were not suits within the meaning of section 2 of the Civil Procedure Act because they could not result in a decree, but only in an order. Therefore, their determination could not result into the application of the doctrine of res judicata. Learned counsel for the 3rd defendant submitted to the contrary.

I do not agree with the submissions by Ms. Nabuuso. My considered view is that all Miscellaneous Applications are indeed suits within the meaning of section 2 of the Civil Procedure Act. This is in fact the position that the Court of Appeal in Uganda has taken and pronounced itself upon.

A suit means all Civil Proceedings commenced in a manner prescribed. Section 2(x) of the Civil Procedure Act defines a suit to mean all Civil Proceedings commenced in a manner prescribed. This implies and means any form of action a party may institute against another in a Civil Court of Law. Therefore a suit means all Civil Proceedings (proceedings concerning all ancillary or provisional steps, all motions in the action and proceedings supplementary to the execution) commenced in a prescribed manner.

Therefore, the application for objector proceedings and stay of execution like the ones brought by the plaintiff herein in MA No. 1834 and No. 2870 of 2015 respectively were Civil Proceedings supplementary to execution or motions made in an action. They fell within the meaning of “all Civil Proceedings” as stated in the definition of a suit under section 2(x) of the Civil Procedure Act.

Ground 2:

From my above finding, I have to determine whether the parties in the former suit in the Execution Division are the same parties or the parties under whom they or any of them claim, litigating under the same title.

According to Mr. Mawampa, there is no doubt that the plaintiff brings this suit in the same capacity as it did in the previous suits and against the same party Godfrey Kisembo the defendant.

I do not agree with the submissions by learned counsel for the 3rd defendant. In the matters which were in the Execution Division, the parties were two to wit: Japan Auto World Ltd Vs Godfrey Kisémbó.

However, in the current suit Japan Auto World Ltd is suing three people to wit:

1. Hajji Batte Magala
2. Membership Investors Limited DBA
3. Godfrey Kisémbó

both defendants 1 and 2 are new parties just brought on board.

Ground 3:

The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded.

I have studied the submissions by respective counsel on this ground. I agree with learned counsel for the plaintiff. The matters in dispute in the present suit were not directly or substantially in dispute in MA No. 1832 and No. 2870. MA No. 1832 was in respect of objector proceedings and MA No. 2870 was an application by the plaintiff for stay of execution. Unlike in the present suit, in none of the two applications were the issues of breach of contract, conspiracy to defraud, unlawful interference with business, champerty and entering of contracts or arrangements contrary to Public Policy on the part of the defendant's herein were in issue in the said applications.

In my considered view the issues in controversy in HCCS No. 73 of 2016 have not yet been duly adjudicated upon because the said suit is still pending.

Therefore, on the face of it, the bar of res judicata is inapplicable to the present suit.

There is a need to delve into the merits of this suit in light of the issue of fraud pleaded by the plaintiff in the instant suit.

When I perused the judgment of the Execution Division, I found that the judgment did not deal exhaustively or at all with the issues raised in the instant suit. The learned Judge did not adjudicate upon the matters in issue in the instant suit and the application was rejected and dismissed on preliminary objection on the premise that the applicant (plaintiff herein) was neither a plaintiff or defendant and/or Judgment Creditor or Judgment Debtor in HSSC No. 70 of 2015 and hence had no locus standi to apply for stay of execution of the decree in that suit.

For the reasons I have given herein, I will overrule the 3rd defendant's objection since there is no reasonable basis for me to uphold the same.

Before I take leave of this matter, I will quote the holding by Tsekooko JSC in *Karia & Anor Vs Attorney General & Ors (2005) 1 EA 83 at 95*.

“ ... In my opinion, the proper practice normally is that where res judicata is pleaded as a defence, a trial court should, where the issue is contested, try that issue and receive some evidence to establish that the subject matter of the dispute between the parties has been litigated upon between the same parties, or parties through whom they claim.”

The preliminary objections are consequently overruled. Costs will be in the cause.

Stephen Musota

J U D G E

13.03.2017

13.03.2017

Ms. Diana Nabuso together with Mr. Dennis Sembuya for the plaintiff

Plaintiff's representative MD in Court

Mr. Mawampa Elly for 3rd Defendant and on brief for 1st and 2nd Defendants

3rd Defendant absent

1st Defendant in Court

Ms. Kauma Court Clerk

Ms Nabuuso: Ready for the Ruling

Court: Ruling delivered

Stephen Musota

J U D G E

13.03.2017