THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 717 OF 2021

(Arising from Consolidated Suits HCCS No. 66/2017; HCCS No. 678/2017; HCCS No. 330/2013; HCCS No. 351/2018; HCCS No. 134/2017; HCCS No. 822/2017)

1. **HAM ENTERPRISES (U) LTD.**
2. **HAMIS KIGUNDU**
3. **THE BOARD OF TRUSTEES NAKIVUBO WAR MEMORIAL STADIUM TRUST**

:::::::::::::::::: APPLICANTS

VERSUS

1. **KATENDE STEVEN & 2 OTHERS**
2. **MUKWAYA JIMMY & 245 OTHERS**
3. **LUGYA MOSES & 85 OTHERS**
4. **KABEERA EZRA & 4 OTHERS**
5. **KAKANDE BERNARD**
6. **MBIDDE AHMED & 7 OTHERS**

:::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicants brought this application under Sec. 7 and 33 of the Judicature Act Cap 13, Sec 98 of the Civil Procedure Act Cap 71, as well as under O.6 Rr. 2, 28, 29 and 30, O.7 Rr. 11, O. 1 Rr.8 and O. 52 Rr 1 of the CPR S.I 71-1, against the respondents jointly and severally for declarations and orders striking out pleadings and dismissing Consolidated Suits HCCS No. 66/2017, HCCS No.

678/2017, HCCS No. 330/2013, HCCS No. 351/2018, HCCS No. 134/2017 and HCCS No. 822/2017;

The background of this matter, as can be read from the pleadings in the consolidated suits is that the 3rd Applicant, an entity created under the Nakivubo War Memorial Stadium Trust Act Cap. 47, is a registered proprietor of the suit land comprised in FRV 3 Folio 24 Plot 28 at Nakivubo. According to the said statute, the land in issue was gazetted to be used in the development of sports and other related activities. However, in the years past, the land was subject of land heavy encroachment by all sorts of people, engaging in several kinds of personal activities contrary to the user purpose contained in the Nakivubo War Memorial Stadium Trust Act Cap. 47;

Nakivubo Stadium which sits on an adjacent plot, also got dilapidated due to poor management and was condemned by FUFA from hosting any sports related activities. Sports related activities were the principal source of income for management and maintenance of Nakivubo Stadium and activities of the Board of Trustees. The stadium accumulated several tax and utility debts and at some point, it was under receivership by Uganda Revenue Authority (URA). The 3rd Applicant in a bid to revamp the Stadium and redeem the suit land from encroachers, executed a Memorandum of Understanding with the 1st Applicant to redevelop the Stadium. The 3rd Applicant then granted the 1st Applicant leases on the suit land for construction of lock-up shops. The re-development of the Stadium is currently at an advanced stage;

The 1st, 5th and 6th Respondents jointly with others instituted HCCS No. 66/2017, HCCS No. 822/2017 and HCCS No. 330/2013 respectively, against the Applicants challenging the validity of the leases created on the suit land, by the 3rd Applicant in favor of the 1st Applicant. The pleadings state that the suits were brought in

public interest under Article 50 of the 1995 Constitution of the Republic of Uganda. On the other hand, the 2nd, 3rd and 4th Respondents, jointly with others, filed HCCS No. 678/ 2017, HCCS No. 351/2018 and HCCS No. 134/2017 claiming as former market vendors who were displaced or evicted from the suit land, allegedly without prior notice. In the suits, they claim that they were entitled to be re-allocated and fault the Applicants for not relocating them. They claim compensatory damages for merchandises lost.

The suits were consolidated by Court on 18th December, 2018, following an order of Her Lordship Hon. Justice Lydia Mugambe Ssali, the trial Judge at the time, for appropriate management and determination. The Applicants challenge the competence of the suits and have brought this application, seeking the following reliefs;

(1) A declaration issues, that the Respondents' / Plaintiffs' pleadings and claims in HCCS No. 678/2017, HCCS No. 134/2017 and HCCS No. 351/2018 are founded on illegalities, they fail to raise any reasonable cause of action, are devoid of merit and are incompetent before this court.

(2) A declaration issues that the Respondents / Plaintiffs in HCCS No. 678/2017, HCCS No. 134/2017 and in HCCS No. 351/2018 do not have legal capacity and or locus stand to sue the Applicants/Defendants on the claims set out in their Plaints.

(3) The Respondents'/ Plaintiffs' suits and/or claims in HCCS No. 66/2017, HCCS No. 822/2017 and in HCCS No. 330/2013 are barred in law for being res judicata and are incompetent and/or premature for failure to adhere to remedies under the Public Procurement and Disposal of Public Assets Act, 2003.

(4) An Order striking out the pleadings and/or dismissing consolidated suits in HCCS No. 66/2017, HCCS No. 678/2017, HCCS No. 330/2013, HCCS No. 351/2018, HCCS No. 134/2017 and HCCS No. 822/2017;

(5) Costs of the suit.

The application was supported by the Affidavits of Mr. Hamis Kiggundu, affirmed on behalf of the 1st and 2nd Applicants, while the Supporting Affidavit of the 3rd Applicant was deponed by Mr. Oluka David Okia, an Advocate working with the firm of M/s Kimara Advocates & Consultants, retained as Counsel for 3rd Applicant;

The 1st Respondents, who are Plaintiffs in HCCS No. 66/2017 did not file Affidavits in Reply despite being served at the known address of their lawyers, M/s Tebusweke & Co. Advocates. An Affidavit of Service demonstrating that they were served is on record. The 2nd, 3rd, 4th, 5th and 6th Respondents filed Affidavits in Reply, which were deponed by Bukenya Abdallah, Ssengoba Philip, Kabeera Ezra and Ibrahim B. Mukalazi respectively;

The Applicants were represented by the firms, M/s Baraka Legal Associated Advocates, M/s Kimara Advocates & Consultants, and M/s Ssemambo & Ssemambo Advocates. On the other hand, the 2nd and 3rd Respondents were represented by M/s Tuhimbise & Co. Advocates, the 4th Respondent was represented by M/s Zawedde Lubwama & Co. Advocates, while the 6th Respondent was represented by M/s Tebusweke Mayinja, Okello & Co. Advocates;

HCCS No. 822/2017 Withdrawn:

On record, I note that the 5th Respondent, Kakande Bernard who filed HCCS No. 822/2017 and had filed an Affidavit in Reply opposing this application, filed a Notice of Withdrawal of his suit against the Applicants/Defendants in HCCS No. 822/2017. The 5th Respondent and the Applicants appeared before this honourable court and confirmed the withdrawal. In the circumstances HCCS No. 822/2017 therefore stands withdrawn and I shall not dwell on it in this Ruling;

At the hearing of the application, court directed the parties to file written submissions in support of the application and those in opposition of the same, within stipulated timelines. The Applicants filed their Submissions as directed. I note that only the 2nd, 3rd and 4th Respondents filed Submissions in Reply. Despite the 6th Respondents not filing their submissions in reply, this Court shall consider their case on the basis of their Affidavit in Reply.

LEGAL ISSUES:

The parties raised the following issues in their submissions, which this court adopts with modifications and shall address in determination of this matter;

(1) Whether the suits or claims in HCCS No. 66/2017, and HCCS No. 330/ 2013 are Res Judicata;

(2) Whether the pleadings in HCCS No. 678/ 2017, HCCS No. 134/2017 and in HCCS No. 351/2018 fail to raise any reasonable cause of action;

(3) Whether the Respondents'/Plaintiff's pleadings and or claims in HCCS No. 678/2017, HCCS No. 134/2017, and HCCS No. 351/2018 have legal

capacity or locus standi to sue the Applicants on the claims set out in their plaints;

(4) Whether the Respondents'/Plaintiffs' suits and or claims in HCCS No. 66/ 2017 and HCCS No. 330/2013 are incompetent and or premature for failure to adhere to remedies under the Public, Procurement and Disposal of Public Assets Act, 2003 (as amended);

(5) Remedies available to the parties;

Before I proceed to the determination of the issues raised, I will address the point of law which was raised by the 2nd Respondent.

***2nd Respondents' Preliminary Objections*:**

The 2nd Respondent raised a preliminary objection challenging the tenability of the Supporting Affidavit of the 3rd Applicant, sworn by Mr. Oluka David Okia on behalf of the 3rd Applicant. It was the 2nd Respondent's legal argument that the said Affidavit is incurably defective and barred at law on account that it is sworn on behalf of the 3rd Applicant but the deponent thereto does not attach proof of authorization to swear the Affidavit on behalf of the 3rd Applicant;

Analysis

I have carefully addressed my mind to the Affidavit in issue, and the submissions of the parties in respect of the objection. As raised by the 2nd Respondent, Mr. David Oluka Okia, an advocate working with the firm of M/s Kimara Advocates & Consultants, the law firm retained by the 3rd Applicant, deponed an Affidavit on behalf of the 3rd Applicant. In his Affidavit, the deponent states that he deposes the affidavit as a person conversant with the facts of the case. I have addressed my mind to the different authorities cited by the parties.

The underlying question arising in the circumstances, is whether Mr. David Oluka Okia, an advocate of the High Court of Uganda, who deposed an Affidavit on behalf of his client, required to attach an instrument of authorization to his affidavit. This question has arisen in several decisions, and I must add, in each case, court has determined the issue depending on the circumstances of the case. **Order 3 Rule 1 CPR S.I 71-1** provides as follows;

> ***"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person."***

The import of the above provision is that, any application to, or appearance, or act in any court, required or authorized by the law to be made or done by a party in such court, may either be done by the *party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf*.

The above provision therefore does not bar an advocate from entering appearance in a matter before court, including the swearing of an affidavit in a matter before court, if the advocate is duly appointed to act on behalf of the client. In the instant case, Mr. Oluka David Okia deposed that he is an advocate employed with the firm of M/s Kimara Advocates & Consultants, a firm retained by the 3rd Applicant. By his employment with the said firm retained by the 3rd Applicant, he is by extension, an advocate appointed by the 3rd Applicant.

Secondly, an affidavit sworn by an advocate on behalf of their client, may not be barred at law, if it is sworn purely on the basis of their knowledge of the facts giving rise to the matter before court. **Order 19 Rule 3(1) of the Civil Procedure Rules** provides that

> ***"Affidavits shall be confined to such facts as the deponent is able of his or her knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."***

An advocate may therefore depone an affidavit on matters as are within their knowledge, if the affidavit is purely based on facts within their knowledge. As noted above, Mr. Oluka David Okia deposed his Affidavit purely on the basis of facts within his knowledge. He did not state that he swore the affidavit as a person duly authorized to swear the affidavit, in which case he would have been required to attach proof of authorization. ***(See: Three ways Shipping Services Group Ltd v MTN (U) Ltd (Miscellaneous Application 584 of 2013) [2013] UGCommC 165 (27 September 2013)***;

Thirdly, an advocate may give evidence by Affidavit on matters of mixed law and fact, which a client is incapable of deposing to within their knowledge. I have addressed my mind to the contents of the affidavit of Mr. Oluka David Okia and it is clear that the matters stated in his affidavit constitute the contents of pleadings already filed before court by the Respondents vide HCCS No. 678/2017, HCCS No. 351/2018, HCCS No. 134/2017, et al, a record of a Judgment of this Court in HCCS No. 544/2019: Migadde Gonzaga & Another vs. The Trustees of Nakivubo Memorial Stadium & Another, and matters pertaining provisions of law under the Nakivubo War Memorial Stadium Act Cap. 47, The Market Act Cap. 94, The Local Government Act Cap. 243 and The Local Government (Kampala City Council)

(Markets) Ordinance, 2006. These are matters well within the knowledge of Counsel, and upon which an Advocate is better placed to depose. ***See: Oriental Commercial Bank Ltd vs. Shreeji Contractors Ltd & Ors, HCCA (Kenya) No. 81/2017; Bank of Uganda vs. Banco Arabe Espanol [2002] 2 EA 293;***

Premised on the foregoing reasons, I am inclined to overrule the 2nd Respondent's objection. The objection to the admissibility of the 3rd Applicant's affidavit in support of the application is accordingly dismissed with costs. I now address the merits of the application, on the issues as raised by the parties;

Determination

I have addressed my mind to, and considered the pleadings in the consolidated suits, the grounds of this application, the Affidavits of the 2nd 3rd 4th and 6th Respondents in Reply, the Affidavit in Rejoinder, and the submissions on record filed by counsel for the parties to this application.

Issues 1 and 4:

I find *Issues 1 and 4* related. A resolution of issue 1 has a bearing on *Issue 4*. I will deal with Issue 1 first;

Whether the suits or claims in HCCS No. 66/2017, and HCCS No. 330/ 2013 are Res Judicata; &

Whether the Respondents'/Plaintiffs' suits and or claims in HCCS No. 66/ 2017 and HCCS No. 330/2013 are incompetent and or premature for failure to adhere to remedies under the Public, Procurement and Disposal of Public Assets Act, 2003 (as amended);

From the pleadings in HCCS No. 66/ 2017 and HCCS No. 330/2013, it is imperative to comment that these suits were brought under Article 50 of the 1995 Constitution of the Republic of Uganda, as suits in public interest. The 1st and 6th Respondents filed these two suits against the Applicants, raising questions over the legality of the leasehold titles issued by the 3rd Applicant to the 1st Applicant. In the said suits, it is the common claim by the Respondents, that the leasehold titles of the 1st Applicant are allegedly invalid at law, on account that they were created out of land vested in the 3rd Applicant under the Nakivubo War Memorial Stadium Trust Act Cap. 47, and that the Act allegedly bars the creation of leases on land vested in the 3rd Applicant under the Act;

As I noted earlier, the 1st Respondents, though sufficiently served with a copy of the Notice of Motion and Supporting Affidavit in this application, elected not to file any reply or response thereto. The legal implication of this failure to file a reply, is that the 1st Respondents are deemed to have conceded to this application. It is a settled position of the law, *that once allegations in an affidavit are made against a party, he/ she has a duty to deny and or rebut the allegations, or else they are presumed to be admitted* (see: ***Basajjabalaba Hides & Skins Ltd. vs. Bank of Uganda & Anor M.A No. 738/2011; Samwiri Massa vs. Rose Achen (1978) HCB 279; Kalyesubula Fenekansi vs. Luwero District Land Board & 2 Ors M.A No. 367/2011; Makerere University vs. St. Mark Education Institute Ltd. & Ors (1994) KALR 26)***;

Res Judicata:

The terms ***Res*** means ***"subject matter"*** and ***judicata*** means ***"adjudged"*** or decided. Read together, it means ***"a matter adjudged"***. In simpler terms, *Res judicata* means an issue previously judged by a court of competent jurisdiction. The principle on *Res Judicata* is contained under ***Section 7 Civil Procedure Act Cap 71*** which provides;

> ***"No court shall try any suit or issue in which <u>the matter directly and substantially in issue</u> has been directly and substantially in issue in a <u>former suit</u> between the <u>same parties, or between parties under whom they or any of them claim</u>, 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 has been heard and finally decided by that court".***

Further guidance can be obtained from the explanatory notes of the above section. The expressions *"former suit"* and *"matter directly and substantially in issue"* are explained in *Explanations 1 and 3* to mean the following;

> ***"Explanation 1. — The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it."***

> ***"Explanation 3. — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."***

In respect to the question on *"same parties, or between parties under whom they or any of them claim"*, *Explanation 6* guides as follows;

> ***"Explanation 6.— Where persons litigate bona fide in respect of a <u>public right</u> or <u>of a private right claimed in common for themselves and others</u>, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating."***

As raised by the Applicants, the question over legality of the leases issued by the 3rd Applicant to the 1st Applicant has been previously tried and determined before this court in ***HCCS No. 544 /2019: Migadde Gonzaga & Baryomunsi Charles vs The Trustees of Nakivubo War Memorial Stadium and Ham Enterprises (U) Ltd***, which was heard and judgment was rendered in the matter on 4th December 2020. Just as it is with HCCS No. 66/ 2017 and HCCS No. 330/2013, the plaintiffs in the determined suit brought their claim under Article 50 of the 1995 Constitution of the Republic of Uganda, impeaching the legality of the suit leases for having been issued allegedly in violation of *Sec. 8(e) Nakivubo War Memorial Stadium Trust Act;*

This court in determining the above question, considered the fact that the land in issue is registered land under the operation of the *Registration of Titles Act Cap. 230. Sec. 2(1)* thereof addresses the supremacy of the Registration of Titles Act on all issues pertaining land under the operation of the Act, in cases where there is a conflict of laws. It reads;

> ***2. Conflicting laws***
>
> > ***(1) Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act.***

The import of the above provision on the supremacy of the Registration of Titles Act over all other laws as regards land under the operation of the Registration of Titles Act was affirmed by the Court of Appeal in the case of ***David Sejjaka Nalima vs Rebecca Musoke, CACA No. 12/1985*** in the judgment of his Lordship Benjamin Odoki, J.A (as he then was). Under *Sec. 101 RTA* permits the proprietor of a

freehold title to create leases thereon in favor of any person. The sections provides as follows;

> ***101. Leases of land***
>
> > ***The proprietor of any freehold or mailo land under the operation of this Act may, subject to any law or agreement for the time being in force, lease that land for any term exceeding three years by signing a lease of it in the form in the Eighth Schedule to this Act; but no lease subject to a mortgage shall be valid or binding against the mortgagee unless he or she has consented in writing to the lease prior to it being registered.***

A reading of *Sec. 101* Registration of Titles Act indicates that it was made subject only to the laws for the time being in force, at the time it came into force. The Registration of Titles Act came into force in 1924. *The Nakivubo War Memorial Stadium Trust Act* on the other hand, came into force in 1953. The *Nakivubo War Memorial Stadium Trust Act* is therefore subject to the Registration of Titles Act in as far as land under the operation of the Registration of Titles Act is concerned. Not vise-versa.

On account of the above provisions of the law, this court in *HCCS No. 544 /2019: Migadde Gonzaga & Baryomunsi Charles vs The Trustees of Nakivubo War Memorial Stadium and Ham Enterprises (U) Ltd*, consequently held that the suit leases are valid, as they were created under the RTA, which has supremacy over the provisions of *Nakivubo War Memorial Stadium Trust Act*.

The Court of Appeal in the case of ***General Industries (U) Limited vs NPART & 3 Ors, Civil Appeal No. 51/2007,*** held that;

"Res judicata includes two related concepts: claim preclusion and issue preclusion. The former focuses on barring a suit from being brought again, and again, on a legal cause of action that has already been finally decided between the parties or sometimes those in privity with a party; while the latter bars the re-litigation of factual issues that have already been necessarily determined by a Judge or jury as part of an earlier claim. It presupposes that;

a) There are two opposing parties;
b) There is a definite issue between them;
c) There is a tribunal competent to decide the same; and
d) Within the competence, the tribunal has done so..."

I have read the pleadings in *HCCS No. 66/2017 and HCCS No. 330/2013* and observed that the subject matter in those suits is directly and substantially similar to the one in *HCCS .NO. 544/2019* which was determined by this court, and qualifies as a former suit within the meaning of *Explanation 1 under Sec. 7 CPA Cap. 71*;

The 1st Respondents' claim in HCCS No. 66/2017 against the Applicants in Paragraphs 5(a) – (k) of their plaint is for declarations that the leases entered between the 1st Applicant with the 3rd Applicants on the property comprised in LRV 3 Folio 24 and LRV 247 Folio 3 is illegal, null and avoid. Similarly, the 6th Respondents claim in HCCS No. 330/2013 against the same Applicants is for among others a declaration that the leases entered into by the Applicants are illegal and void. These claims are on all-fours, with the subject matter of the determined suit in *HCCS .NO. 544/2019;*

As espoused in Halsbury's Laws of England, Volume 12 (2009) 5th Edition, "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"

The 1st and 6th Respondents were not parties to *HCCS No. 544/2019.* However, the said suit was brought under *Article 50 of the Constitution* and was brought in public interest premised on the same claim. Therefore, because the 1st and 6th Respondents also brought their suits under the same premise, the law under *Explanatory Note 3* of *Sec. 7 CPA*, renders their claims bound by the decision in *HCCS No. 544/2019*, which provides that *"where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating."*

This honorable court already held *HCCS .NO. 544/2019* that the suit leases created out of the registered freehold land under the operation of the registration of Titles Act Cap 230 are lawful and valid. Hearing these consolidated suits will be to re-investigate a subject matter already heard and determined that by this court.

Accordingly Issue 1 is answered in the affirmative. The claims in *HCCS No. 66/2017 and HCCS No. 330/2013* are *res judicata*, on account of the judgment of this court in a former suit. Having found so, I do not deem it necessary to resolve Issue 4. The question raised therein is subsumed under Issue 1 in my opinion;

Issues 2 and 3:

I will address Issues 2 and 3 concurrently. The question arising in respect of these issues is whether or not the pleadings in *HCCS No. 678/2017, HCCS No. 134/2017, and HCCS No. 351/2018* raise causes of action, and whether the Plaintiffs have locus to bring the claims therein;

Whether the pleadings in HCCS No. 678/ 2017, HCCS No. 134/2017 and in HCCS No. 351/2018 fail to raise any reasonable cause of action; and

Whether the Respondents'/Plaintiff's pleadings and or claims in HCCS No. 678/2017, HCCS No. 134/2017, and HCCS No. 351/2018 have legal capacity or locus standi to sue the Applicants on the claims set out in their plaints;

From the onset, I must state that the general rule is that whenever the court is called upon to evaluate and determine, whether or not a plaint raises a reasonable cause of action, the court looks at the plaint and its annexures - See: ***Serugo Ismael vs. Kampala City Council & Anor (Constitutional Appeal 2 of 1998) [1999] UGSC 23 (11 June 1999); Kampala Rugby Union Football Club v Capital ventures International Ltd (M.A No. 523/2011) [2012] UGCommC 8; Maximov Oleg Petrovich vs Premchandra Shenoi & Anor(1998)I KALR 52;***

Where questions of whether a plaint discloses a cause of action arise, court is obligated to peruse the plaint itself together with its annexures in order to answer this question. ***Kapeka Coffee Works Ltd v NPART CACA No. 3 of 2000***. Court does not have to consider any other information save for what is laid out in the plaint to ascertain the cause of action.

A cause of action refers to a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.

A cause of action means the cause of complaint or a right or obligation or a dispute which a court of law would use its adjudicatory or jurisdictional powers to determine and resolve. It also consists of or includes all material facts a plaintiff is

saddled with the responsibility of proving if traversed in order to obtain judgment in his/her favour.

The Supreme Court defined what a *cause of action* is in the case of ***Major General David Tinyefunza vs. Attorney General Const. Appeal No. 1/1997*** where the court cited with approval the definition of a *case of action* by Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206:

> ***"A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. ... It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."***

The term *"reasonable cause of action"* on the other hand was defined by Lord Pearson in the case of ***Drummond Jackson vs British Medical Association [1970] 1 All England Law Reports*** *page* ***1094*** per Lord Pearson at page 1101

> ***"In my opinion the traditional and hitherto accepted view—that the power should only be used in plain and obvious cases—is correct according to the evident intention of the rule for several reasons. ... No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when***

> ***(as required by r 19(2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."***

It is a settled position of the law that for a Plaintiff to establish a sustainable cause of action in their pleadings, the plaint must show *(a) that the plaintiff had a right (b) that the right was violated or breached, and (c) that the Defendant is liable – See:* ***Auto Garage vs Motokov [1971] EA 514; Tororo Cement Co Ltd v Frokina International Ltd (Civil Appeal 2 of 2001) [2002] UGSC 24 (24 April 2002);***

Locus Standi

Where a right exists or is established, the Plaintiff is said to bear "*locus standi"* to bring an action or suit. *Locus Standi* has been defined as the *"right to bring an action or to be heard in a given forum".* This was rightly defined in the case of ***Namayega vs Etot & 2 Ors HCCS No. 939/2019*** sighting the case of ***Dima Dominic Poro vs Inyani Godfrey Civil Appeal No.17/2016*** where court stated that;

> **"*The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding.*** *(See. Njau & Ors v. City Council of Nairobi [1976 –1985] 1 EA 397 at 407).***"**

I have addressed my mind to the averments in the plaints in *HCCS No. 678/2017, HCCS No. 134/2017, and HCCS No. 351/*2018 as lodged by the 2nd, 3rd and 4th Respondents. The Respondents sued the Applicants generally for declarations that they were illegally evicted from Nakivubo Park Yard Market and that the actions of the Applicants evicting the Respondents without relocating them to

another market facility were unlawful. By and large, the 2nd, 3rd and 4th Respondents assert that they were Vendors in Nakivubo Park Yard Market, and they were members of Associations which operated in the market. The plaints have copies of documents that were attached in support of these assertions in the plaints;

Whereas the Respondents alleged that the Applicants had a duty to relocate them to another location, the pleadings do not provide anything premise or basis upon which the Respondents found this claim. There is no document attached to the pleadings or statutory duty referred from the Respondents derived this claim. I observe that this particular claim was made generally against the Applicants jointly. However, there was nothing to the pleadings of the Respondents to suggest for-instance, that the 1st and 2nd Applicants had a duty to relocate the 2nd, 3rd and 4th Respondents;

The 2nd Respondent for instance was sued in his individual capacity, jointly with his private company, the 1st Respondent. He seemed to have been sued over the developments carried out on the suit land by the 1st Applicant, who has a Memorandum of Understanding with the 3rd Applicant. The doctrine of corporate personality that a company is separate and distinct from its members protects members of company from liability save after lifting of the corporate veil - See: ***Lee v. Lee Air Farming Ltd. (1961) A.C. 12****;*

The nature of averments in the Plaint presupposes an alleged claim by the Respondents founded on an alleged existence of a market on the land, and lawful occupation. The said Respondents were quite specific on where their claim for unlawful eviction arose. The cardinal issue to be addressed therefore is whether a Market lawfully existed on the suit land. This issue will guide, whether the Respondents were in lawful occupation of the suit land. This would then establish

the locus standi to institute an action for the claims of unlawful eviction contained in the plaints in HCCS No. 678 /2017, HCCS No. 134/2017, and HCCS No. 351/2018. In my view, this requires the Plaintiff to go beyond mere allegations but present a plausible claim that prima facie lays out the existence of a legal market in no uncertain terms;

Attached to the plaints, are correspondences between the Respondents, and KCCA. It appears evident from the correspondences that the Respondents operated a market on the suit land in collaboration with the former City Council of Kampala, and not the 3rd Respondent, who is trustee and vested proprietor of the suit land, under the *Nakivubo War Memorial Stadium Trust Act*. In particular, I do note that a by a letter dated 16th February, 2012, Ref. No. Rev/KCCA/1104/05, Kampala Capital City Authority (the successor body of City Council of Kampala) wrote to the Management of the 3rd Applicant informing the latter that Nakivubo Park Yard Market operated on the suit property was an illegal market;

Sec. 1(1) and (2) of the Markets Act Cap. 94 regulates the creation and operation of markets in Uganda. It provides that;

> ***(1) "No person or authority other than (a) the administration of a district; (b) a municipal council; (c) a town council, shall establish or maintain a market."***
>
> ***(2) The administration of a district may establish and maintain markets within the area of its jurisdiction and shall control and manage such markets or shall vest their control and management in such person or authority as it may deem fit; except that in the urban areas mentioned in the Schedule to this Act, markets shall be established, maintained, controlled and managed by the municipal council or town council, as the case may be, established in the area.***

In the case of Kampala City, the town council in issue would be the former Kampala City Council (now KCCA - Kampala Capital City Authority). ***Paragraph 4*** of ***The Local Governments (Kampala City Council) (Markets) Ordinance 2006*** prohibits any person from establishing or maintaining a market within the jurisdiction of the Council without a market license. The import of the above provisions of law therefore would presuppose that in the absence of a Market License, the operation of any market in any area within the jurisdiction of KCCA would be illegal under the law. The suit land is clearly within the jurisdiction of KCCA. The Respondents did not attach any Market License to their pleadings, justifying the legal operation of a market on the suit land. The correspondences attached by the Respondents do not comprise a Market License;

For a Plaintiff to sustain a valid claim for unlawful eviction, it is incumbent that he or she establishes that they were in occupation of the land issue, lawfully and not in trespass. The Respondents claim for compensatory and general damages, however, even with these claims, the genesis of the claim must be lawful and valid. In the case of ***Takya Kushwahiri & Anor vs Kajonyu Denis CACA 85/2011*** it was held that general damages should be compensatory in nature in that they should restore some satisfaction as far as money can do it to the injured Plaintiff. In ***Uganda Commercial Bank vs Kigozi [2002]1 EA 35***, Court gave guidance on how to assess the quantum of damages that "*the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered*";

Without existence of a valid or lawful right, it would be unsustainable to make a claim for compensatory or general damages. A legal claim cannot be founded upon commission or occurrence of an illegal activity. In ***Mistry Amar Singh vs***

Serwano Wofunira Kulubya [1963] E.A page **408** at 414, the Privy Council quoted with approval the principle in ***Scott v. Brown, Doering, McNab & Co. (3)[1892] 2 Q.B. 724 at 728*** *that no court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a transaction which is illegal;* The courts cannot be invited to condone that which is illegal – See: ***Makula International Ltd vs. His Eminence Cardinal Nsubuga And Anor. Civil Appeal 4/1981) [1982] UGSC 2);***

I agree with the Applicants' submission therefore that the claims of the existence of a market without a Market License presuppose that there were illegal and unlicensed activities on the suit land, which cannot form the basis of a valid and tenable cause of action. A party cannot derive locus to institute an action, from engaging in a prohibited activity, restricted under the law;

In the circumstances, I find in the negative on Issues 2 and 3.

Remedies:

For the fore-going reasons therefore, this applications succeeds and it is ordered as follows;

(1) A declaration hereby issues, that the Respondents' / Plaintiffs' pleadings and claims in HCCS No. 678/2017, HCCS No. 134/2017 and HCCS No. 351/2018 are founded on illegalities, and fail to raise any reasonable cause of action, are devoid of merit and are incompetent before this court;

(2) The Respondents'/Plaintiffs' suits and claims in HCCS No. 66/2017, and in HCCS No. 330/2013 are barred in law for being res judicata;

(3) An Order issues striking out the pleadings and/or dismissing the consolidated suits in HCCS No. 66/2017, HCCS No. 678/2017, HCCS No. 330/2013, HCCS No. 351/2018, and HCCS No. 134/2017;

(4) Costs to the Applicants.

It is so ordered

SSEKAANA MUSA
JUDGE
31ST OCTOBER 2022