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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO. 221 OF 2016
(ARISING FROM HCCS NOS. 188 AND 192 OF 2015)**

10 **FALCON ESTATES LTD ::: APPLICANT**
VERSUS
BISMILLAH TRADING LTD ::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

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R U L I N G:

The Applicant herein brought this application under Order 6 r.30 CPR and Section 98 CPA seeking orders that;

- (a) HCCS No. 192 of 2015 *Bismillah Trading Ltd vs. Falcon Estates Ltd* be struck off.
- (b) Costs be provided for; and
- 20 (c) For any other or further relief as this court may deem fit to grant.

The grounds of the application are set out in the affidavit of Mr. Alwi Hassan, the Director of the Applicant Company, but briefly are that;

- (1) Issues of right of access to a main road are provided for under the Access to Roads Act (Cap. 350).
- 25 (2) The procedure provided under the said Act has not been followed.
- (3) This Honourable Court cannot grant the orders prayed for as to do so would amount to breaches of the relevant laws.
- (4) The suit is frivolous and vexatious.

30 The main issue concerns access to the main road by the Respondent from its plot of land comprised in Block 244 Plot 3344 through the Applicant’s plot of land in Block 244 Plot 3542. The two plots are adjacent to each other.

In the main suit HCCS No. 192 of 2015 the Respondent sued the Applicant jointly with Kampala Capital City Authority (KCCA) seeking, inter alia, an order of cancellation of the Applicant’s approved plan by KCCA vide *Plan No. PPC 95* for the construction of a perimeter wall fence on
35 the plot of land of the Applicant mentioned above. The Respondent’s main contention in the

main suit is that such a construction would effectively and completely block the access road to its plot in Block 244 Plot 3344.

To that end, that the Respondent orders in the main suit that the Applicant's certificate of title be re-surveyed so as to give part of it as an access road to Respondent's adjacent plot of land.

The Applicant for its part maintains that there has never existed an access road through its land to the main road. That therefore the Respondent's prayer in the main suit that the Applicant's certificate of title be re-surveyed so as to give part of it as an access road to the Respondent is unsustainable. The Applicant strongly maintains that there is no right of ownership of an access road; which is a public right, and not an individual right.

In support of the applicant's contentions, Mr. Peter Mulira, learned Counsel for the Applicant submitted that the Respondent seeks an order of court to cause exclusion of mutation of land which constitutes access road to the Respondent's land, and that the same be included as an easement. Learned Counsel argued that such is untenable as the issue of access road to the main road is not an issue of easement but a matter of law under the Access to Roads Act (Cap 350). That the law provides for a specific procedure by which a private owner who has no reasonable means of access to a public high way may apply for leave to construct a road access on private land to a public highway. That the Respondent has not followed the stipulated procedure but rather wrongly filed a suit in court. Mr. Mulira argued that no order with such an effect can be made by court giving away somebody's land without compensation as stipulated in the Access to Roads Act (supra) or without following the procedure under the Act.

Mr. Mulira further submitted that the power to grant access to road under the Act is vested in the Magistrate's Court and not the High Court, and that Parliament had a purpose for that.

Regarding the prayer for an order for a joint re - surveying of Plot 3542 and Plot 3344 to exclude land therein constituting the access road to Plot 3344, Mr. Mulira submitted that such a prayer is also unsustainable as such a responsibility does not fall with court but with the Registrar of Titles under Section 91 of the Land Act (Cap.227). Counsel pointed out that the law, under sub-section (2) thereof, gives the Registrar of Titles power to take steps, including endorsement, cancellation or alteration of a certificate of title, and issuance of fresh titles to give effect to the provisions of the Act. Mr. Mulira opined that if there was any misdescription as appears to be the allegation of

the Respondent, recourse should have been had to the Registrar of Titles but not filing a substantive suit.

In reply Mr. Andrew Kahuma, learned Counsel for the Responded, submitted that the Respondent in the main suit seeks, inter alia, an order of permanent injunction against the Applicant from doing any act that contravenes the Respondent's right of access by blocking its right of access on the Applicant's land to the Respondent's land. He argued that the Respondent is not seeking to create an access road because it has existed there since the 1960s and that as such provisions of the Access to Roads Act (supra) do not apply. Mr. Kahuma further argued that the Respondent is not seeking to establish an access road but to enforce the existing rights of an access over the Applicant's land. To fortify his submissions Mr. Kahuma relied on the case of *Paddy Musoke vs. Joan Agabi & Others, HCCA No. 36 of 2012 (Nakawa High Court)* per Musene J, that where there is an existing access road the provisions of the Access to Roads Act do not apply.

On the point that only the Magistrate's court is the court has the power under the Access to Roads Act (supra) Mr. Kahuma submitted that the High Court is vested with both original and appellate jurisdiction conferred by Article 139(1) of the Constitution and Section 14(1) of the Judicature Act to grant remedies to the parties.

Mr. Seninde supplemented the submissions for the Respondent that the orders sought in the instant application to strike out HCCS No. 192 of 2015 cannot be granted because the suit was consolidated with HCCS No. 188 of 2015. That HCCS No. 192 of 2015 ceased to exist as an independent suit and that court cannot strike out something that does not exist before it.

Mr. Seninde further argued that Order 6 r.30 CPR under which this application is brought to strike out any pleadings for disclosing no reasonable cause of action or answer does not apply. That the Respondent has a cause of action because it has pleaded facts showing that the Applicant blocked off and graded the only access to the Respondent's property. Counsel prayed that the application be dismissed with costs.

Consideration:

There is primarily one main issue for consideration. That is; whether HCCS No. 192 of 2015 as consolidated with HCCS No. 188 of 2015 disclose no reasonable cause of action. Order 6 r.30 (1) CPR under which the application was brought provides as follows;

100 ***“(1) the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.”***

The term reasonable cause of action is not defined in the rules or the Civil Procedure Act. However, whether or not a pleading discloses a reasonable cause of action has been considered in a number of cases. In almost if not all of them, it comes as a preliminary objection by the opposite party on a point of law. In ‘ODGERS’ Principles of Pleadings and Practice in Civil
105 Actions in the High Court of Justice (12th Edition) at page 147 it is elucidated as follows;

“...Either party may object to the pleadings of the opposite party on the ground that it does not set forth a sufficient ground of action, defence or reply as the case may be....”

Under the English law this is what was formerly termed as a “demurrer) which had its origin in the French term “demorrer” or “to wait or stay”. Understandably the practice was abolished in
110 England in 1883, but has been substituted by “objection on a point of law”.

It is pointed out in ODGERS (supra) at page 147 that an objection on a point of law was preserved largely so that parties might not incur great expenses in trying issues of fact which, when decided, would not determine their rights. At page 148 (supra) it is elucidated as follows;

115 ***“... It is best not to apply to have any point of law argued before the trial, unless the objection is one which will dispose of the whole action...”***

In Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 606, Sir Newbold (President of the Court as he then was) at page 701 held as follows;

120 ***“... A preliminary objection is in the nature of what used to be called a demurrer. It raises a 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...”***

Therefore, it is clear on strength of the above authorities that a preliminary objection should be raised only if the party so raising it is convinced that when raised the objection it will dispose of the whole claim and thus save the parties expenses and embarrassment of trying facts that will
125 not determine the rights of the parties.

In ODGERS (supra) at page 153 it was again elucidated as follows;

130 “...though you may think that your opponent’s pleadings disclose no reasonable cause
of action or defence to your claim, it by no means follows that you should at once apply
to have it struck out or amended. So long as the statement of claim or particulars
served under it discloses some cause of action, or raise some questions fit to be decided
by trial, the mere fact that a case is weak or not likely to succeed is no ground for
striking it out...”

The above principles were well applied in *Eng. Yashwant Sidpra & Anor vs. Sam Ngude
Odaka & 4 Ors HCCS No.365 of 2007* per Kiryabwire J (as he then was) and I am persuaded as
135 well as bound to follow and apply them in the instant application.

The objections on points of law in the instant case were brought by way of a formal application
seeking orders, inter alia, to strike off *HCCS No. 192 of 2015 Bismillah Trading Ltd vs. Falcon
States Ltd*. From the outset, it must be stated that HCCS No. 192 of 2015, which the application
seeks to have struck out was duly consolidated with HCCS No. 188 of 2015 under provisions of
140 Order 11 CPR and hence it effectively ceased to exist as a separate suit. Therefore, it cannot be
struck out because technically it does not exist and an order to that effect would be in vain.

The other point which was raised and argued by both Counsel concerns the applicability of the
provisions of the Access to Roads Act (supra) as they relate to facts of the instant case. The
particular provisions cited by Mr. Mulira relate to the procedure in situations where a party with
145 no reasonable means of access road to the highway may apply to have access. The provisions
basically presuppose that there is no access road to the high way in existence, and a party seeks
to establish it on the private land of another.

In the instant case the Respondent avers in its pleadings that there has always existed an access
road to its land on Applicant’s land which is adjacent to the Respondent’s land. This averment is
150 vehemently denied by the Applicant in its defence. This invariably makes it an issue for trial to
be canvassed by evidence. Order 15 r.1 CPR is instructive as to when issues arise. It provides
that an issue arises when material proposition of law or fact is affirmed by the one party and
denied by the other. Sub-rule (2) (supra) provides that;

155 “**Material propositions are those propositions of law or fact which a plaintiff must
allege in order to show a right to sue or a defendant must allege in order to constitute a
defence**”.

160 It follows that the existence and/or non-existence of the access road on the Applicant's land to the Respondent's land is a material proposition affirmed by the Respondent but denied by the Applicant in the main suit and therefore is an issue for trial. As a matter of fact, it was framed as an issue for determination in the parties' joint scheduling memorandum; which means that it can only be determined after evidence has been fully adduced to canvass it. I hasten to add that it is not purely an issue of law upon which the case could entirely or partially be disposed of as envisaged under Order 15 r.2 CPR which encompass the principle of demurrer discussed above.

165 The applicability of the provisions of the Access to Roads Act (supra) to facts of the instant case would therefore to a great extent depend on the very issue as to whether the access road to the Respondent's land has since the 1960s existed on the Applicant's land. This logically implies that the provisions cannot be invoked at this stage of the suit.

170 Flowing directly from the above, any order of court that has the effect of determining the suit by applying the provisions of in the Access to Roads Act (supra) in the manner sought by the prayers in this application would be grossly premature. Court is at this stage not in possession of sufficient factual or legal material that would support such an order. Until evidence has been adduced on the critical issue as to whether there has always existed an access road or not, this court would be reluctant to draw any conclusion or inferences merely based on pleadings.

175 On the point that only the Magistrate's Court is envisaged as having the power to handle matters arising under the Access to Roads Act (supra) I would respectfully disagree with that submission. Firstly, the High Court is duly seized with both original and appellate jurisdiction vested in it by Article 139(1) of the Constitution and Section 14(1) of the Judicature Act. Such jurisdiction conferred by the Constitution cannot merely be whittled away by provisions of an Act of Parliament. This position was well reflected by the Supreme Court in the case of **David Kayondo vs. Co – operative Bank Ltd SCCA No. 10 of 1991.**

180 Secondly, Section 33 of the Judicature Act (supra) provides as follows in respect to the High Court granting of remedies in matters brought before it;

185 **“The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it...”** (Underlined for emphasis).

HCCS No.192 of 2015 is properly before this court which can grant all and or any such remedies the parties entitled. The application lacks merit and it is dismissed with costs.

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BASHAIJA K. ANDREW

JUDGE

04/11/2016

Ms. Kayemba Aniwah together with Mr. Saad Seninde Counsel for the Respondent present.

195 Mr. Walabyeki Badru representative of the Respondent present.

Applicant and its Counsel absent

Mr. Godfrey Tumwikirize Court Clerk present.

Judgment read in open court.

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BASHAIJA K. ANDREW

JUDGE

04/11/2016