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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 570 OF 2015

1. FAKRUDIN VALLIBHAI KAPASI

10 **2. FAZLEHUSEIN KAPASI ::::::::::::::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

1. KAMPALA DISTRICT LAND BOARD

2. ALLIANCE HOLDINGS LTD. ::::::::::::::::::::::::::::::::::::::: DEFENDANTS

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BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

Fakrudin Vallibhai Kapasi and Fazlehusein Kapasi (*herein after referred to as the 1st and 2nd “plaintiff” respectively*) filed this suit against the Kampala District Land Board and Alliance Holdings Ltd (*hereinafter referred to as the 1st and 2nd “defendant” respectively*) seeking, inter alia, a declaration that the 1st defendant’s grant of a lease on in Plot 1 Wilson Street, Central Division, Kampala District (*the “suit property”*) to the 2nd defendant is null and void for fraud and illegality; a permanent injunction restraining the 1st defendant from leasing the suit property to the 2nd defendant and/or its assignees or agents; a consequential order directing the Registrar of Titles to cancel the 2nd defendant’s title in respect of the suit property; an order directing the 1st defendant to sign a lease agreement in respect of the suit

property in the plaintiffs' names or in the names of the plaintiffs' nominees; a consequential order directing the Registrar of Titles to expeditiously issue the certificate of title for the suit property in the names of the plaintiffs or their
30 nominees; a permanent injunction restraining the 2nd defendant from entering or occupying or issuing or claiming the suit property or any part thereof or otherwise interfering with the plaintiffs' quiet enjoyment of the suit land; general damages; exemplary damages; aggravated damages; interest; and costs of the suit.

35 At the commencement of hearing the suit, learned Counsel for the defendants Mr. Andrew Kibaya and Mr. Ronald Asiimwe led by Mr. Joseph Kyazze jointly raised preliminary objections on points of law. The first one relates to the *locus standi* of the plaintiffs to institute the instant suit. Mr. Kyazze submitted that the plaintiffs have no *locus standi* to institute the instant suit, and owing to that fact have no
40 cause of action against the defendants. Counsel pointed out that the plaintiffs are claiming in two distinctive capacities in respect of the suit property. That in the first one they are bringing the suit in their personal capacity in respect of an interest formerly registered in the names of Rajabali Abdulali. That however, as it is clear from the title to their plaint, the plaintiffs are not suing as Administrators or
45 Executors of the estate of the said late Rajabali Abdulali. That in such a personal capacity the plaintiffs have no *locus standi* to bring a suit where they are not

claiming a personal interest in the described suit property and therefore they have no cause of action; which renders their suit unsustainable.

Mr. Kyazze further submitted that in the second capacity the plaintiffs are suing as
50 representatives of the estate of the late Lukumanji Hassanali Kapasee. That even then the plaintiffs do not plead that they are suing as beneficiaries or Administrator or Executors of the deceased's estate. Mr. Kyazze noted that the plaintiffs attached no authority whatsoever to the plaint giving them the *locus standi* to sue as representatives or beneficiaries. Citing Order 7 r.4 (I) of the Civil Procedure Rules
55 (CPR) Mr. Kyazze argued that a document upon which a plaintiff sues or claims *locus standi* to sue must be filed with the plaint. That where the document upon which a plaintiff sues is not attached or filed together with the plaint, there is no proof of *locus standi* by the plaintiff and hence no substantial cause of action. To support his propositions Mr. Kyazze relied on the cases of *Nile Ways (U) Ltd vs. Kampala Capital City Authority, HCMA No. 470 of 2005 (Commercial Division)*;
60 and *Ugafin Ltd. Vs. Kiwanuka HCMA No. 682 of 2014 (Land Division)*.

Mr. Kyazze went on to submit that if the plaintiffs in this case claim to be representatives of the beneficiaries and sought to bring the suit as such, then Order 1 r.8 CPR would apply and it dictates that they must attach the representative order
65 which would confer *locus standi* on them to sue in the representative capacity. For this proposition Mr. Kyazze relied on the case of *Taremwa Kamishani vs.*

Attorney General, HCMA No. 38 of 2012(Mbarara High Court). Mr. Kyazze noted that since no such a representative order was attached, the suit cannot stand.

Mr. Kyazze also submitted that the claim by the plaintiffs to bring the suit as
70 attorneys/agents of the beneficiaries also cannot stand. That no Power of Attorney was attached to the plaint to support that claim. Further, that even if the documents were to be attached then or thereafter, the suit would not stand because under the law an agent or attorney can only bring an action in the names of the principal or donor of the Power of Attorney, and not in their personal names as was in this
75 case. To buttress this proposition, Mr. Kyazze cited the case of *Fenekansi Kiwanuka vs. Malkit Singh Sondo HCMA No. 163 of 2004(Jinja High Court)*.

Mr. Kyazze maintained that *locus standi* to institute a suit must be established at the time of filing the suit and that where there is no authority conferred upon a plaintiff to commence a suit, it means the suit is illegally commenced and such illegality
80 cannot be cured by any subsequent attempt to create the lacking capacity. Mr. Kyazze buttressed this argument with the case of *John Sebatana vs. Abeinename Yokoramu HCCS No. 99 of 2005*.

Mr. Kyazze noted that the plaintiffs herein having failed to attach proof of capacity to sue, attempts were subsequently to the filing of the suit made as reflected in
85 paragraph 5 of the plaintiffs' reply to the written statement of defence purportedly to cure the illegality. Mr. Kyazze argued that this is untenable as the illegality

override all matters of pleadings and once brought to the attention of court the illegality cannot be ignored. Counsel submitted that the only remedy would have been for the plaintiffs to withdraw the suit rather than proceeding without *locus*
90 *standi*. Further, that court should not waste time to try a suit in respect of strangers to the suit without a sustainable cause of action.

Mr. Andrew Kibaya and Mr. Asiimwe Ronald associated themselves with submissions Mr. Kyazze. Mr. Kibaya added that the timing of this preliminary objection is quite important on the strength of the authority of ***Eng. Yashwant***
95 ***Sidpra & Anor vs. Sam Ngude Odaka & 4 Ors HCCS No.365 of 2007***. That it is essential for a court not to delve into issues in a suit which if decided will not determine the rights of parties. Counsel jointly prayed that the plaint be struck out and the suit dismissed with costs.

Mr. Muzamir Kibedi and Mr. Kenneth Muhangi joint Counsel for the plaintiffs
100 opposed the preliminary objections as having no basis. In particular Mr. Kibedi submitted that *Annexure "A"* to the plaint clearly indicates that the plaintiffs are the surviving Administrators of the estate of the late Rajabali and as such they have the *locus standi* for the staid estate.

Regarding the second capacity and interest in the suit property, Mr. Kibedi
105 submitted that it can be deduced from the certificate of title to the suit property which shows that 50% therein belongs to Abdulalli Sulemanji and Fidehussein

Lukimanji Kapasi as Executors of Lukumanji Hasanali Kapasi. That the Annexures to the plaint (at page 69 of the joint trial bundle) show that Abdulalli Sulemanji is dead and (at page 70 (supra)) that Fidehusssein Lukumanji Kapasi
110 also passed on. That (at page 64(supra)) the two plaintiffs are also the Administrators of the estate of late Lukumanji Hassanali Kapasi the 50% interest holder in the suit property. Furthermore, that possession of probate in respect of Rajabali who owns 50% interest in the suit property gives the plaintiffs *locusstandi*, and possession of Letters of Administration in respect of Lukmanji
115 Hassanali Kapasi gives them completely 50% in the whole property.

Regarding the contention that the grant to the plaintiffs was only obtained on 16th September, 2016, Mr. Kibedi submitted that Letters of Administration relate back to the time of the death of the deceased in respect of whose estate they are granted. To that end Mr. Kibedi submitted that the authorities cited and relied upon by
120 Counsel for the defendants are all distinguishable from facts of the instant case. Mr. Kibedi also observed that pleadings were closed and the key documents are attached as “A” to the plaint and also that the documents have been admitted by consent by all Counsel for the parties as exhibits.

Mr. Kibedi further noted that at (page 64(supra)) Letters of Administration are
125 attached to the plaintiffs’ reply to the written statement of defence of the 3rd

defendant as *Annexure FR9*. Mr. Kibedi prayed that the objection be overruled and dismissed with costs.

Mr. Kenneth Muhangi added by submitting that all issues which were raised in the preliminary objections had earlier been raised before the Deputy Registrar under *HCMA 1106 of 2016* and they were dismissed. That as such Counsel for the defendants are barred from raising them again by virtue of the doctrine of *res judicata* under Section 7 of the Civil Procedure Act (CPA). Mr. Muhangi further submitted that the plaintiffs pleaded fraud and illegality in their plaint and that they attached documents to that effect. That once illegality is brought to the attention of court it cannot be ignored.

Issues;

There are two main issues for determination as follows;

- 1. Whether the plaintiffs have the locus standi to bring this suit.***
- 2. What are the remedies available to the parties?***

Resolution of the issues:

Issue No.1: Whether the plaintiffs have the locus standi to bring this suit.

I will start with submissions of learned Counsel Mr. Muhangi that the issues currently being raised jointly by Counsel for the defendants as preliminary objections were earlier raised in *HCMA No. 1106 of 2015* before the Deputy

145 Registrar who dismissed them, and hence they are *res judicata* and barred under Section 7 CPA.

The reading of the ruling in *HCMA No. 1106 of 2015* easily reveals that it solely concerned an interim order. The Deputy Registrar while dismissing the application was categorical that he was not competent to pronounce on the very issues now
150 being raised as they lay in the exclusive domain of the trial Judge.

The test to apply in determining whether a matter is barred by the principle of *res judicata* was succinctly set in *John Kafero Sentongo vs. Shell (U) Ltd & Uganda Petroleum Co. Ltd CAC Appl. No. 50 of 2003*. The Court of Appeal held that;

155 ***“In determining whether or not a suit barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action, a transaction which has already been presented before a court of a competent jurisdiction in earlier proceedings which have been adjudicated upon.”***

As applicable to the issues raised in the instant preliminary objections in relation to
160 the earlier application under *HCMA No. 1106 of 2015*, it is clear that Section 7 CPA which encapsulates the doctrine of *res judicata* does not apply. The issues raised in the objections are properly before this court.

The other point relates to Mr. Kibedi’s submissions that the documents were agreed upon during the joint scheduling conference by parties’ Counsel, and that

165 they constitute exhibits. It should be stated for emphasis that documents may be
agreed on or consented to by parties or their Counsel, but such documents do not
constitute exhibits until court has pronounced itself on them and made an order
admitting them on the court record. Parties are entitled, and are certainly free, to
consent on the documents to be relied upon during the trial. However, the
170 documents, and indeed any other items sought to be relied upon at the trial are not
exhibits until witnesses testifying upon them have been tested for their veracity.
The court must be satisfied that the documents meet the threshold reliability test of
credibility, cogency, and relevancy under evidentiary rules. Therefore, merely
consenting on documents by parties or their Counsel, whether the documents are
175 attached to pleadings or not, would not par se render them exhibits under the law.
Similarly in the instant case, the documents in the joint trial bundle drawn and filed
by the parties' respective Counsel are not exhibits for the same reasons stated
above. The documents were not or had not yet been admitted as exhibits in
evidence in a trial. The documents cannot "speak for themselves". They require
180 witnesses to "speak through them" as and when the witnesses are testifying during
course of the trial where they are examined, cross – examined and re- examined.
Courts are primarily cautious of parties and /or their Counsel consenting on
documents outside the trial essentially to avoid the possibility of them consenting
to an illegality or inadmissible material. Therefore, the documents in the joint trial

185 bundle in the instant case are not exhibits within the meaning of the law until
tendered and admitted in evidence as such in accordance with the rules of evidence
and procedure during the trial.

Back to the preliminary objections, they mainly hinge on the *locus standi* of the
plaintiffs to institute this suit. By *locus standi* is meant the legal capacity of a
190 person which enables him or her to invoke the jurisdiction of the court in order to
be granted a remedy. *Locus standi* is intrinsically related with the cause of action in
any given suit to enable a plaintiff to move court. In ***Fenekasi Kiwanuka vs.
Malikit Singh Sondh*** case (supra) this court had the occasion to observe that one
of the basic tenets that underpin the principle of *locus standi* is that court's time
195 should not be wasted on hypothetical and /or abstract issues, or at the instance of
mere busy bodies who have no genuine cause.

In the instant case, whereas the defendants' Counsel jointly advanced the view that
the plaintiffs lack the necessary *locus standi* to institute this suit, Counsel for the
plaintiffs jointly maintain the contrary view.

200 It is emphasized that the unfailing requirement is that *locus standi* to institute a suit,
by whatever mode prescribed, and must be established at the time the suit is filed.
This is done by expressly pleading facts that give the plaintiff the legal standing to
institute the suit. It should not be left to the court to guess where a plaintiff derives

the *locus standi* to file the suit. It must be expressly clear on the facts pleaded;
205 particularly those that give rise to the cause of action in the plaint or counterclaim.

In the instant suit, it is evidently clear that the plaintiffs are suing in the first capacity based on the probate. A copy of the probate (at page 7 of the joint trial bundle) clearly shows that it was issued in respect of the Will of late Rajabali Abdulalli on 23rd June, 1970. The plaintiffs, however, never commenced their suit
210 in the capacity as Administrators or Executors of the estate under the probate. They only aver (in paragraph 1 of the plaint) that they;

“....represent the beneficiaries of late Lukmanji Hassanali Kapasi the surviving Executor of the Will of late Rajabali Abdulalli alias Rajabali Abdullali....”

215 It is also noted that the 2nd plaintiff's name Fazlehusein Kapasi, does not even appear in the probate at all. Therefore, when viewed against the plaintiffs' claim, it is quite evident that the probate does not relate at all to the estate of the registered proprietors at the time.

Again the plaintiffs aver in the plaint that they are suing as “representatives of the
220 beneficiaries of late Lukmanji Hassanali Kapasee”, himself the surviving executor of the Will of the late Rajabali Abdullali the deceased registered owner of the suit property. It is known that not just any person can on their own sue on behalf of the beneficiaries to an estate merely because a person is deceased. The *locus standi* in

such circumstances is only legally conferred on the beneficiaries or the
225 Administrators/Executors of the state of the deceased, and these categories of
persons can bring a suit in their respective capacities. Again the *locus standi*,
whether in the capacity as beneficiaries, Administrators or Executors, must be
expressly established at the time when the plaint is filed by attaching proof of it
filed with the plaint. The requirement is intended to enable the court, and of course
230 the defendant, to know with clarity the basis of the plaintiff's authority to bring a
suit in respect of an estate of a deceased person. Omission to file with the plaint the
documents upon which a plaintiff sues renders the plaint fatally defective for
disclosing no cause of action. This position was confirmed in the case of *Nile Ways
Ltd. vs. Kampala Capital City Authority* (supra); and *Ugafin Ltd. vs. Kiwanuka*
235 (supra).

In addition, **Order 7 r.11 (a) CPR** provides that a plaint shall be rejected where it
does not disclose a cause of action. Indeed in the now *locus classicus* case of *Auto
Garage vs. Motokov [1971] EA 314*, it was held, inter alia, that a plaint without a
cause of action is nothing and cannot be amended as there is nothing to amend.
240 There is no basis for a party to be in court in the first place.

The other issue in the preliminary objection relates to the capacity of the plaintiffs
as holders of Letters of Administration (at page 64 of the joint trial bundle)
obtained pursuant to a Power of Attorney (at page 60 (supra)). A copy of the

Special Power of Attorney referred to is dated 1st April, 2016 and the Letters of
245 Administration pursuant to the Special Power of Attorney is dated 16th September,
2016. The instant suit was filed on 20th November, 2015.

Order 7 r.14 (I) CPR provides that;

250 ***“(1) When a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented, and shall at the same time deliver the document or copy of it to be filed with the plaint.* (Underlined for emphasis).**

It is in no doubt that the document upon which the plaintiffs are suing in the second capacity is “Letters of Administration” obtained pursuant to the “Special Power of Attorney”. These two crucial documents which would ordinarily have
255 clothed the plaintiffs with the necessary *locus standi* when the plaint was filed did not exist at the time of filing the plaint. That invariably confirms that the plaintiffs never complied with the mandatory provisions of Order 7 r.14 (1) CPR (supra). The documents which would have vested the plaintiffs with the *locus standi* to sue were not filed with the plaint because they were not in existence at the time.
260 Therefore, the plaintiffs lacked the capacity and could not have sued on the basis of the Letters of Administration pursuant to the Special Power of Attorney for the estate to which the suit property belonged.

The scenario under Order 7 r.14 (1) CPR where a plaintiff is “suing upon” documents is quite distinctive from one under sub rule (2) (supra) where a plaintiff
265 “relies on any other documents”. Sub rule (2) provides that;

“(2) Where a plaintiff relies on any other documents (whether in his or her possession or power or not) as evidence in support of his claim, he shall enter the documents in a list to be added or annexed to the plaint”.

(Underlined for emphasis)

270 Sub rule (1) which provides for where the plaintiff is “suing upon a document” essentially means she or she derives his or her authority and capacity to sue from the very document. Without proof of that authority or capacity the plaintiff lacks the *locus standi*. On the other hand, sub rule (2) (supra) simply provides for proof or evidence of what the plaintiff is claiming in the suit.

275 Therefore, sub rule (1) (supra) is solely concerned with a plaintiff to the extent that he or she must have the *locus standi* at the time of filing the plaint the basis of which must be shown or demonstrated at the time when the plaint is presented in court for filing. Proof of the authority or capacity of the plaintiff to sue must be attached with the plaint. On the other hand sub rule (2) (supra) where a plaintiff
280 “relies on any other documents” envisages all such other documents which a plaintiff intends to rely on as evidence to prove his or her claim. Needless to state, that *locus standi* is primarily a question of law; evidence is purely a matter of fact.

This is the more reason that the two scenarios of where a plaintiff is “suing on a document” and where a plaintiff is “relying on any other document” are provided
285 for quite differently and separately under Order 7 r.14 (1) and (2) CPR respectively.
The other capacity the plaintiffs are suing in is that of “representatives of the beneficiaries of late Lukmanji Hassanali Kapasi the surviving executor of the Will of late Rajabali Abdulalli alias Rajabali Abdullali. The plaintiffs were required to attach with the plaint a representative order or authority from the beneficiaries on
290 whose behalf they claimed to institute the suit. It is noted that the plaintiffs are not suing as beneficiaries of the estate under which the suit property falls. Otherwise, they would have been entitled to sue disclosing all such facts showing that they were in course of obtaining Letters of Administration. It is then that Mr. Kibedi’s argument would hold weight that Letters of Administration granted on 16th
295 September, 2016 relate back to the time of the death of the deceased pursuant to Section 192 of the Succession Act. The section provides as follows;

“Letters of administration entitle the administrator to all rights belonging to the intestate as effectively as if the administrator has been granted at the moment of his or her death.”

300 As the plaint now stands, it was evidently filed by plaintiffs who were not clothed with the necessary *locus standi* to do so. Letters of Administration only relate back to the time of the death of the deceased to validate those acts done by the

Administrator in respect to the estate of an intestate. They cannot relate back to confer the lacking *locus standi* retrospectively on the plaintiffs to institute the suit
305 at the time they did. At the risk of repetition, the settled position is that *locus standi* must exist at the time when the plaint is filed not subsequently. Needless to state, that *locus standi* is what gives the basis for any subsequent pleadings by a plaintiff not vice versa. As was held in ***Fenekasi Kiwanuka*** case (supra) instituting a case without *locus standi* against a defendant is illegal and the plaintiff would have no
310 remedy under the law.

A point was raised by Counsel for the plaintiffs that the documents giving the plaintiffs authority to sue were attached to the plaintiffs' reply to the written statement of defence particularly in paragraph 5. It should, however, be noted that this was merely an attempt made subsequently to the filing of the suit; which
315 cannot cure the illegality once committed.

Mr. Kenneth Muhangi submitted that the plaintiffs pleaded fraud and illegality in their plaint and that these are serious issues and once brought to the attention of court cannot be ignored. I entirely agree only to the extent of the position in the case of ***Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another [1989] HCB 11*** that once an illegality is brought to the attention of court,
320 it cannot be ignored. An illegality supersedes all issues including matters of pleadings and admissions.

As that principle applies to the instant case, it was definitely a serious illegality for the plaintiffs to have commenced a suit without *locus standi* to do so in any of the capacities they purported to sue under. The plaintiffs cannot have any remedy at law. Similar position on similar facts was restated in the case of ***Fenekansi Kiwanuka vs. Malikit Singh Sondh*** (supra) where this court held that *locus standi* determines who should have access to justice, and that it is illegal for a plaintiff to institute a suit in court against another person without *locus standi*. Court further emphasized that where a plaintiff has no *locus standi*, he or she has no remedy under the law.

Before taking leave of this matter, I wish to note that as the case was pending this ruling, Counsel for the plaintiff wrote to this court a letter dated 9/12/2016 to the effect that the defendants were violating the terms of the interim order in HCMA No. 1105 of 2015 by seeking to levy distress for rent from the suit property. Now that court has finally and conclusively pronounced itself on the case, the said interim order lapses and it is vacated.

Issue No.2: What are the remedies available to the parties?

1. ***The plaintiffs have no locus standi to institute this suit.***
2. ***The plaintiffs have no cause of action against the defendants.***
3. ***The interim order lapses and it is vacated.***
4. ***The suit is entirely dismissed with costs.***

BASHAIJA K. ANDREW
JUDGE
19/12/2016

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Mr. Kibedi Muzamiru for the plaintiffs - present.

350 Mr. Joseph Kyazze appearing together with Ronald Asiimwe for the 2nd defendant,
also holding brief for Mr. Kibaya for the 1st defendant - present in court.

The director of the 2nd defendant company – present in court.

2nd plaintiff - present in court

Mr. G. Tumwikirize – Court Clerk - present in court

355 Court:Ruling read in open court.

BASHAIJA K. ANDREW
JUDGE
19/12/2016

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