

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 764 OF 2014

5 **1. KASUMBA BAISA IDI**
 2. EQUITY BANK (U) LTD. :::::::::::::::::::::::::::PLAINTIFFS

VERSUS

1. ANEEZ S.B. JAFFER
 2. ATTORNEY GENERAL:::::::::::::::::::::::::DEFENDANTS

10 **3. DEPARTED ASIANS CUSTODIAN BOARD**

BEFORE: HON. MR JUSTICE BASHAIJA K. ANDREW

RULING.

When the suit came up for hearing, counsel for the 1st defendant raised three preliminary objections that;

- 15 1. *The suit is barred by law under Section 34 of the Civil Procedure Act (CPA).*
2. *The 2nd plaintiff has no cause of action against the 1st defendant.*
3. *There is misjoinder of the 2nd and 3rd defendants without leave of court.*
4. *The suit is res judicata.*

The 1st plaintiff was represented by Mr. Cornelius Mukiibi of *M/s. C. Mukiibi Sentamu & Co.*

20 *Advocates*; Mr. Kyewalabye Denis represented the 2nd plaintiff. Mr. Faizal Mularira and Mr. E.Kasolo of *M/s. Kasolo & Khiddu Advocates* represented the 1st defendant. All counsel

submitted orally on all the preliminary objections. I will resolve the issues in the objections under distinctive heads in which they appear above.

Resolution of the preliminary objections.

25 ***Issue No.1: Whether the suit is barred by law under Section 34 CPA.***

Counsel for the 1st defendant submitted that the suit is barred by law. He premised his submission on provisions of section 34 CPA to the effect that all matters of execution should be considered in same suit and not by a separate one. Counsel pointed out that there exists *HCCS No. 437 of 2004* in which a consent judgment was entered on 20/11/2009. Further, that execution
30 proceedings were conducted and a warrant to deliver vacant possession was issued by the Execution Division of the High Court on 13/6/2014. Counsel also noted that the 1st plaintiff applied for stay of execution by filing an interim and main application. That the interim application was granted but the court ordered both parties to bring their titles in the main application. That, however, only the defendant complied with that order. Counsel submitted that
35 the filing of the present suit is therefore an illegality as it runs contrary to section 34 CPA (supra). Counsel relied on the cases of ***Kizza Walusimbi Brazio & 2 O'rs vs. Senyimba Charles & 3 O'rs HCCS No. 248 of 2011***; and ***Francis Mica vs. Nuwa Walakira SCCA No. 24 of 1994***.

In reply, Counsel for the 1st plaintiff submitted that the 1st plaintiff was not a party to the previous proceedings and only appeared before the Judge who gave directions to determine
40 which of title was superior to the other after the court bailiff went to attach the property.

Further, that the issue raised in this particular objection requires evidence which can only be adduced through a trial. Counsel noted that counsel for the 1st defendant raised evidence at the

bar of what transpired in the previous suits and applications. That for instance he made reference to the consent judgment that had not yet been admitted by the plaintiffs. Counsel submitted that
45 under paragraph 6 (xvii) of the amended plaint the Judge ordered the parties to file a fresh suit and that the particular order has never been challenged. Furthermore, that the preliminary objection touches facts which have not clearly been admitted in court and which are still in controversy.

In rejoinder Counsel for the 1st defendant submitted that there are no new matters in controversy,
50 but that the plaintiffs only want to re-open a matter that was determined by consent and which has never been set aside. Counsel argued that provisions of section 34 CPA (supra) are mandatory, and that the plaintiffs are barred by law.

Opinion:

55 Section 34 (1) CPA (supra) provides that;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

60 In the case of ***Kiiza Walusimbi & 2 Others vs. Senyimba Charles & 3 O’rs*** (supra) the court applied section 34 CPS (supra) and held that;

“Whereas the above provision refers to parties the provision has been interpreted to mean that any person who wishes to contest the process of attachment of his/her properties must proceed under the provisions of Section 34 (1) of the Civil Procedure Act by way of an inquiry by Notice of Motion in the Court which issued the execution and not commence a fresh suit as the plaintiffs did in the current suit.”

As applicable to the instant case, it is observed that the parties in *HCCS No. 437 of 2004* were *Aneez Jaffer vs. Atwooki B. Ndahura and Bernard S. Tumwesigye*. They entered into consent where the defendants gave vacant possession to therein plaintiff (1st defendant herein). A warrant to give vacant possession was issued under *Execution No. 1495 of 2014*. The 1st plaintiff filed an application vide; *HCMA 1802 of 2014* for an interim order against the 1st defendant which maintained the order of attachment with no eviction. In the main application vide; *HCMA 1801 of 2014*, the court ordered that both titles to the suit land held by the parties be deposited in court and execution be stayed pending the institution of a suit in the right court to determine which one was superior.

Therefore, the plaintiff in filing the present suit was duly complying with the court order in *HCMA 1801 of 2014* that emanated from the court which carried out the execution. Since this order was never set aside in any manner whatsoever, regardless of the merits of that order, the plaintiff was right to institute the present suit. In that regard the preliminary point of law lacks merit and it fails.

Issue No.2: Whether the 2nd plaintiff has no cause of action against the 1st defendant.

Counsel for the 1st defendant submitted that the 2nd plaintiff under paragraphs 4(i)-(x) of the
plaint is suing in respect of a mortgage yet it did not enter into a mortgage with the defendants.
Counsel argued that the 2nd plaintiff cannot sue the defendants since he has no contractual
85 obligations with them. For this proposition he relied on Section 33 of the Contracts Act which
essentially encapsulates the principle of privity of a contract.

In reply counsel for the 2nd plaintiff referred to paragraphs 5a-6 of the amended plaint, and
submitted that facts constituting the cause of action were duly set out, and that the 2nd plaintiff
has a cause of action.

90 ***Opinion:***

In the now *locus classicus* case of ***Auto Garage & others Ltd vs. Motokov (No. 3 [1971] E.A 514)***, it was held that for the plaint to disclose a cause of action it must be demonstrated that the
plaintiff enjoyed a right, the right was violated and the defendant is liable. Further, in ***Jeraj Sharif vs. Chotai Fancy [1960] EA 374*** at page 375, it was held that;

95 ***“The question whether a plaint discloses a cause of action must be determined upon
perusal of the plaint alone together with anything attached so as to form part of it and
upon the assumption that any express or implied allegations of fact in it are true.”***

In the instant case, the 2nd plaintiff claims that it is a *bona fide* mortgagee of the suit land having
advanced a loan facility to the 1st plaintiff with the suit land as security. The 2nd plaintiff averred
100 in the amended plaint that the 1st defendant obtained a warrant of vacant possession on the suit
land arising out of a consent judgment and a claim by the 1st defendant from a certificate of
repossession.

These facts clearly show that the 2nd plaintiff as a mortgagee enjoyed a legal interest in the suit land which was violated by the 1st defendant by obtaining a warrant of vacant possession and
105 interest in the suit land. The objection on this preliminary point of law also lacks merit and it fails.

Issue No.3: Whether there is misjoinder of the 2nd and 3rd defendants without leave of court.

Counsel for the 1st defendant submitted that the provisions of Order 1 r.3 CPR require that joinder and service of summons on parties be with leave of court. Counsel noted that since the
110 summons expired, the suit is incompetent and should be dismissed under Order 5 CPR. Counsel also submitted that the counterclaim being a separate suit, the dismissal of the main suit does not affect it.

Counsel for the 2nd plaintiff in reply submitted that Order 1 r.3 CPR allows a plaintiff to join persons against whom he has a claim of right or from whom he can obtain relief. Counsel argued
115 that the plaintiff's cause of action is against all the defendants. Counsel relied on provisions of Order 1 r.9 CPR that no suit shall be defeated by reason of misjoinder.

Opinion:

120 Order 1 r. 3 CPR provides that;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged

to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise.”

125 Further, Order 1 r.9 CPR provides that;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

In the instant case, since the plaintiffs’ cause of action is against all the defendants; in order to
130 avoid a multiplicity of proceedings the misjoinder of the 2nd and 3rd defendants without leave of court would not defeat the present suit. The preliminary point of law on that account therefore lacks merit and it fails.

Issue No.3: Whether the suit is res judicata.

Counsel for the 1st defendant submitted that section 5 CPA allows court only to take on cases
135 unless barred by statute. Counsel noted that the consent judgment determined the proprietary rights of the parties and that a retrial would only serve to defeat the objector proceedings. Counsel also noted that the present suit falls under section 7 CPA and the same is *res judicata*. Counsel relied on the case of ***Habib Kagimu vs. Cairo International Bank HCCS No. 65 of 2012*** to fortify his submissions.

140 In reply counsel for the 1st plaintiff submitted that the 1st plaintiff was not party to the previous proceedings, and therefore, the matter could not have been *res judicata*. For their part, counsel for the 2nd plaintiff in reply submitted that it is not the same property under issue, the latter suit being concerned the mortgage and the parties being different.

Opinion:

145 Section 7 CPA (supra) 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, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue
150 has been subsequently raised, and has been heard and finally decided by that court.”

The conditions for the doctrine of *res judicata* have been expounded upon in many decided cases. The cross – cutting requirement in all of them is that matters directly and substantially in issue in the subsequent suit must have been substantially in issue in a former suit. See: **Posiyano Semakula vs. Susan Namagala & Others, CACA No. 2 of 1977.** Secondly, the present suit is
155 between the same parties or under whom they or any of them claims and the parties are litigating under the same title as in the former suit. See: **Gokaldas Liximidas Tanna vs. Sister Rose Muyinza, HCCS No. 707 of 1987.** Thirdly, the court trying the former suit is competent jurisdiction. See: **John William Kahuka & Others vs. Personal Representative of Rt. Rev. Eric Sabiti (1995) V KALR 79.** Fourthly, the matters directly and substantially in issue were heard
160 and finally determined. See: **Lt. David Kabareebe vs. Maj. Prosy Nalweyioso CACA No.34 of 2003.**

Further expounding on the doctrine, the East African Court of Justice with regard to Section 7 of the Civil Procedure Act, Cap 71, held in the case of **James Katabazi & 21 others vs. Secretary General of the East African Community and another Reference No. 1 of 2007**, as follows;

165 “Three situations appear to us to be essential for the doctrine to apply: one, the matter must be ‘directly and substantially’ in issue in the two suits. Two, parties must be the

same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of res judicata to operate.”

170 The test to apply in determining as to whether a case is barred by *res judicata* was stated in *Ponsiyano Semakula Susan Magala & Others [1979] HCB 89* which was quoted with approval by the Court of Appeal in *Kafeero Sentongo vs. Shell (U) Ltd. & Uganda Petroleum Co. Ltd. CAC Appl. No. 50 of 2003*, that;

175 *“In determining whether or not the suit is 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 a form of a new cause of action, a transaction which he has already been presented before the court of competent jurisdiction in earlier proceedings which have been adjudicated upon.”*

Further in the case of *Omondi vs. National Bank of Kenya Ltd, [2001] I EA 177*, it was held
180 that;

“The doctrine of res judicata would apply not only to situation where a specific matter between the persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been enjoined were not enjoined. Parties cannot evade the doctrine of res
185 *judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in installments.....it cannot be otherwise, if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it desirable that there be end to litigation and that a person should not be vexed twice in respect of the same matter.”*

190 As applicable to the instant case, it is observed that the parties in *HCCS No. 437 of 2004* were
Aneez Jaffer vs. Atwooki B. Ndahura and Bernard S. Tumwesigye. The plaintiff therein was
claiming repossession of the suit property comprised in Plot 16 B Old Kampala Road LRV 2631
Folio 13. The parties entered into a consent and it was resolved that the defendants vacate the
premises and hand over vacant possession of the suit property to the plaintiff. At that point the
195 proprietary rights of the parties were clarified and finally determined.

In the present suit, the 1st plaintiff claims that he is the holder of the genuine title comprised in
Plot 16B LRV 240 Folio 20 having acquired the same from Agnes Mbabazi Kabwisho; who had
acquired the same from Atwooki B. Ndahura (a defendant in *HCCS No. 437 of 2004*). The 2nd
plaintiff is also claiming a legal interest in the suit land as a mortgagee having advanced a loan
200 facility to the 1st plaintiff with the suit land as security.

From the above facts, the suit land which is the subject matter in issue the present suit is the
same in issue in the former. The 1st defendant in the present suit was a party in the former suit
vide; *HCCS No. 437 of 2004*. The 1st plaintiff purchased the suit land from Agnes Mbabazi
Kabwisho who had acquired the same from Atwooki B. Ndahura; a defendant in the former suit.
205 Most importantly, issues of ownership of the suit land were finally determined in a consent
judgment between the parties in the former suit. These facts without a doubt render the present
suit is *res judicata* and it cannot be sustained. On that account alone, the instant is wholly
dismissed with costs to the defendants.

210 **BASHAIJA K. ANDREW**

JUDGE

06/02/2017

Mr. Cornelius Mukiibi Counsel for the 1st plaintiff present.

215 Mr. Richard Mugenyi appearing jointly with Mr. Faizal Mularira Counsel for the 1st defendant
present.

Mr. Kyewalabye Denis Counsel for the 2nd plaintiff present.

Parties all absent.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Ruling read in open Court.

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BASHAIJA K. ANDREW

JUDGE

06/02/2017