

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
[LAND DIVISION]
MISC. APPLIC. 1687 OF 2021
[ARISING FROM CIVIL SUIT NO 074 OF 2021]

1. BHARAT CHANDARANA
2. PHILLIP CURTIN

APPLICANTS

V

1. ANDREW MUGENI NYANGWESO
2. TIMOTHY NYANGWESO
3. MARIE GORRETTI NYANGWESO
(Administrators of the Estate of the
Late Major General Francis Nyangweso)
4. ATTORNEY GENERAL

RESPONDENTS

BEFORE: HON LADY JUSTICE P. BASAZA-WASSWA

R U L I N G

Representation:

1. Mr. Mulindwa Allan for the Applicants
2. Mr. Walubiri Peter and Mr. Kirya Emmanuel for the 1st - 3rd Respondents.
3. None for the 4th Respondent.

Introduction:

- [1] This Ruling is in respect of an application filed by the Applicants, and brought by Chamber Summons under **section 98 of the Civil Procedure Act, Cap 71, (the CPA),**

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and Order 1 Rules 10 (2) and 13, and Order 6 Rules 19 and 31 of the Civil Procedure Rules S.I 71-1 (the CPR).

[2] In their application the Applicants seek for the following Orders:

- i) That they be joined as Defendants in the Head suit: **HCCS NO. 074 OF 2021: ANDREW MUGENI NYANGWESO & 2 ORS V. THE ATTORNEY GENERAL.**
- ii) That the plaint in the Head suit be amended.
- iii) That the costs of this application be provided for.

Background:

- [3] In the Head suit: **HCCS NO. 074 OF 2021: ANDREW MUGENI NYANGWESO & 2 ORS V. THE ATTORNEY GENERAL**, the three (3) Plaintiffs therein, who are also the 1st – 3rd Respondents herein, that contend to be the Administrators of the Estate of their late father: **Major General Francis Nyangweso**, sued the Government of Uganda for alleged infringement of their right to property under **Article 50 of the Constitution**.
- [4] They (the Plaintiffs in the Head suit) contend that without prior payment of fair and adequate compensation, in 1981 the Government compulsorily took over, occupied and utilised their father's land comprised in **Busiro Block 449 Plot 6 at Kasenyi Bendegere in Wakiso District, measuring 61. 0052 Hectares**. (Hereinafter referred to as '**the suit land**'))
- [5] They further contend that the suit land was passed on to the Estate of their late father upon his death in 2011.

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[6] In Defence the Attorney General contends that the suit land was bought by the Government from the late Major General Francis Nyangweso, who received full and final payment, but did not surrender the land title and duly signed transfer forms to Government.

The Applicants' case:

- [7] The gist of the Applicants' present application and affidavit in support sworn by the 2nd Applicant: **Mr. Curtin Phillip**, is:
- i) That the Applicants have an interest in the suit land for which they previously filed **HCCS NO. 167 of 2006** against Major General Francis Nyangweso for an Order for specific performance of a lease agreement.
 - ii) That Judgment in **HCCS NO. 167 of 2006** was passed in favour of Major General Francis Nyangweso, and the Applicants appealed against that judgment to the Court of Appeal **vide Civil Appeal No. 344 of 2019**, wherein they joined the 1st - 3rd Respondents in that appeal, as Respondents.
 - iii) That by filing the Head suit, the 1st – 3rd Respondents have abused Court process to defeat the Applicants' interest in the appeal.
 - iv) That the Head suit violates the *lis pendens* rule as it is based on the same facts and issues which are already up for consideration in the Court of Appeal.
 - v) That the outcome of the Head suit will directly affect the Applicants and will avoid any further suits.

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- vi) That the Applicants are in possession of the Duplicate certificate of title to the suit land and have also applied to the Commissioner Land Registration to cancel the special certificate of title to the 1st – 3rd Respondents.

Answer by the 1st – 3rd Respondents:

- [8] In an affidavit in reply sworn by the 2nd Respondent: **Mr. Nyangweso Timothy**, the 1st – 3rd Respondents oppose the application. They contend (the gist):
- i) That the Application is incompetent, barred in law, and filed in abuse of court process.
 - ii) That in HCCS No. 167 of 2006 the High Court heard and dismissed the Applicants' claims and held that the Applicants have no interest in the suit land. Their presence in the Head suit is therefore totally unnecessary.
 - iii) That the Applicants' appeal to the Court of Appeal vide **Civil Appeal No. 344 of 2019**, filed nine (9) years ago, is incompetent and has no bearing whatsoever on the Head suit.
 - iv) That this court is *functus officio* in determining the Applicants' alleged claims to interests in the suit land, and can only revisit its own Orders in an application for review.
 - v) That the 1st – 3rd Respondents have no cause of action against the Applicants and adding the latter to the Head suit would be to compel the Applicants to sue persons against whom they have no cause of action.
 - vi) That the Head suit does not violate the *lis pendens* rule as the matters in issue therein have never been in issue in any other suit.

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Answer by the 4th Respondent:

[9] The 4th Respondent did not file a reply to the application.

Rejoinder by the Applicants' to the answer by the 1st – 3rd Respondents:

[10] In an affidavit in rejoinder sworn by the 2nd Applicant, the Applicants aver (the gist):

- i) That on October 12, 2020 and on November 2, 2020 the 2nd Respondent filed an application before the Senior Registrar of Titles to cancel the special certificate of title issued to the 1st – 3rd Respondents and the Senior Registrar of Titles opined in a recommendation to the Commissioner Land Registration, that the special certificate of title be cancelled.
- ii) That the Commissioner Land Registration summoned the 1st - 3rd Respondents on February 9, 2021 and the latter made a response, and the Ruling is pending up to date, which fact the Respondents know, and have concealed.
- iii) That the Appeal has merit and a bearing on the suit before Court.

Issue for this court's determination:

[11] **Whether the Applicants should be joined as Defendants in the Head suit: No. 074 of 2021?**

Submissions by Counsel:

[12] Learned Counsel for the Applicants and for the 1st - 3rd Respondents each filed their respective written submissions. For brevity, I will not reproduce their arguments here. I have duly considered them.

[13] Learned Counsel for the 4th Respondent did not file any submissions.

Analysis by Court:

[14] The considerations a Court has to take into account when determining the question; 'whether to join a defendant to a suit'; are:

- i) That any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions **are alleged to exist against such proposed defendant**, where if separate suits were brought against them, any common question of law or fact would arise. (See Order 1 Rule 3 of the CPR).
- ii) That the presence before the court **of such proposed defendant** may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. (See Order 1 Rule 10 (2) of the CPR).

[15] I have carefully taken into account the above considerations, and carefully considered the grounds for and against this application.

[16] While the Applicants and their Counsel have made out spirited arguments for the joinder of the Applicants as Defendants to the Head suit, it is not open to this court to join them. Below are my reasons:

[17] From both the affidavits for and against the application, it is common ground, and indeed a fact, that in a previous suit vide **HCCS No. 167 of 2006**, the Applicants sued

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the late Major General Francis Nyangweso claiming an interest in the suit land on the basis of an alleged lease agreement.

[18] It is also common ground, and indeed a fact, that the previous suit: **HCCS No. 167 of 2006** was heard before **Aweri Opiyo, J., (as he then was)**, and was disposed of on February 9, 2010. In which the Court held that the Plaintiffs (the Applicants herein) had not established their case to the required standard.

[19] **It is my view therefore, that owing to the above facts; the proposed joinder of the Applicants to the Head suit would tantamount to a re-trial by this Court of the same claims or issues. Such a scenario would be absurd, legally untenable and futile, as it would render that re-trial as 'Res judicata'.**

[20] The Doctrine of *Res Judicata* is embodied in sec. 7 of the CPA, which stipulates 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 has been subsequently raised, and has been heard and finally decided by that court.

(underlining added)

[21] Suffice it to add, that:

The Doctrine of *Res Judicata* applies not only to points upon which the first court was actually required to adjudicate, but also to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

Per Law, Ag. V.-P in Kamunye v Pioneer Assurance Ltd¹, and explanation 4 under section 7 of the CPA.

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¹ [1971] E.A pages 263-267 at page 265

[22] In addition, the Head suit being one of alleged infringement under **Article 50 of the Constitution**, for which the Plaintiff seeks for damages, I agree with learned Counsel for the 1st – 3rd Respondents that their clients who oppose the application, cannot be compelled to sue and make averments against the Applicants against their will.

[23] I subscribe to the reasoning of Mosdell, J., in Santana Fernandes v Kara Arjan & Sons & 2 ors², who, after consideration of several authorities, opined that:

‘A Plaintiff being the *dominus litis*, cannot be compelled to sue a person for damages in respect of a tort, whom he does not wish to sue’

‘A Defendant cannot be added under Order 1 Rule 10 (2) of the Civil Procedure Code³ even if he be a willing party, in the face of opposition from the Plaintiff in a suit in Tort’.

[24] Although the Santana Fernandes case (supra), unlike the present Head suit, was a suit involving a collision of motor vehicles, for which the Plaintiff therein sought damages pursuant to the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, in both suits the Plaintiffs sought / seek Damages for the alleged injurious conduct of the Defendants. The same Principle therefore applies in the present Head suit, like it applied in the Santana case, that:

‘Plaintiffs cannot be compelled to make averments for damages in an amended plaint against Defendants for whom they do not believe they have a case’.

[25] Turning to the question: whether or not the Head suit violates the *lis pendens* rule, embodied in sec. 6 of the CPA, on account of **Civil Appeal No. 344 of 2019** in the Court

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² [1961] E.A pages 693 -697

³ Equivalent to Order 1 Rule 10 (2) of the Civil Procedure Rules S.I 71-1

of Appeal? This Court shall address that question in the Head suit when taking the scheduling conference that is already fixed for October 23, 2023.

Decision of Court:

[26] **For the reasons given, this application fails and is dismissed. No Order is however made as to costs.**

This application has brought to the fore, at a preliminary stage, the existence of **Civil Appeal No. 344 of 2019** and of **HCCS No. 167 of 2006**, and of related proceedings before the Commissioner Land Registration. All of which matters may be of assistance to this Court at the scheduling conference in the Head suit.

I so Order,



P. BASAZA - WASSWA

JUDGE

October 12, 2023

Ruling delivered electronically on the Judiciary ECCMIS system and via email to the parties:

Email to: info@mulindwaadvocates.com for the Applicants, and to: kbwadadvocates@gmail.com and kiryae356@gmail.com for the 1st – 3rd Respondents.