THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. JUSTICE L.E.M.MUKASA-KIKONYOGO, DCJ.***

HON. JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.

HON. JUSTICE C.K.BYAMUGISHA.

CIVIL APPEAL NO.36/07

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BETWEEN

BOUTIQUE SHAZIM LTD::::::::::::::::::::::::::::APPELLANT

AND

1. NORATTAM BHATIA

2. HEMANTINI BHATIA::::::::::::::::::::::::RESPONDENT

20 ***[Appeal from the decision and orders of the High Court (*Aweri-Opio J) *dated 27th September 2005 in Miscellaneous Application No.505/04 arising from HCCS No.411/98]***

JUDGMENT OF BYAMUGISHA, JA.

This is a first appeal from the ruling and orders of the High Court wherein the appellant's suit was struck out for being *res judicata.*

The brief facts of the case were summarized in the joint conferencing memorandum filed in this court on 10th August 2009.

The appellant filed HCCS No. 910 of 1999 against Nipun Bhatia, the respondents' attorney,

30 seeking specific performance of a contract of sale of property situated at plot 12 Buganda Road, Kampala.

The appellant then filed Miscellaneous Application No. 47/97 under Order 1 rule 10(2),(4) of the Civil Procedure Rules seeking to substitute Nipun Bhatia with the respondents as defendants.

The application was heard and dismissed by Mukanza J on 14th April 1998. In the same ruling the learned judge struck out the suit for not disclosing a cause of action.

The appellant filed a fresh suit No. 411/98 against the respondents seeking the same reliefs of specific performance.

On 29th June 2004 the respondents filed Chamber Summons under Order 7 rule 11 seeking the rejection of the plaint for being statute –barred on ground of *res judicata.*

The application was heard by Aweri –Opio J. who struck out the suit for being *res judicata* in view of the earlier ruling of Mukanza J.

The appellant was aggrieved and filed the instant appeal with one ground of appeal namely

whether HCCS No 411/98 was barred by *res judicata.*

The respondents filed a notice of grounds affirming the decision of the High Court under ***Rule 92*** of the **Judicature (Court of Appeal Rules) Directions- S.I No.13-10.**

The ground is that the plaint does not disclose a cause of action.

Both parties filed conferencing notes and legal arguments. They also made oral submissions.

Mr Nerima learned counsel for the appellant, submitted on the provisions of section 7 of the Civil Procedure Act with regard to *res judicata*. Learned counsel enumerated the ingredients as

- ***(i)*** The matter was in issue in the former suit.
- ***(ii)*** Parties were the same or their representatives in the former suit.
- ***(iii)*** Court of competent jurisdiction.
- ***(iv)*** The matter must have been heard and finally decided.

He stated that apart from the jurisdiction of the High Court, the rest of the ingredients were not satisfied. On the parties counsel submitted that the first suit was between the appellant and an attorney of the respondents while the second suit is against the respondents. He further stated that a donee cannot sue as a plaintiff or be sued as a defendant. He asserted that any proceedings brought against an attorney are a nullity. He cited the case of ***Ayigihugu &Co Advocates v Mary Muteteri Munyankindi [1988- 90] HCB 161*** for his assertion.

He disagreed with the learned judge when he held that the parties were litigating under the same title.

He further submitted that the suit was not heard and finally determined. He stated that what was before Mukanza J was an application for substitution of parties and not the main suit and the judge rightly rejected the application. In the ruling, counsel went on to state, the judge

made some observation regarding the merits of the suit. Those observations were *obiter dicta* as the breach of contract was not before the trial judge for determination and the parties did not address him about it. He claimed that the views and comments of the judge were not meant to decide the merits of the case.

On *res judicata* counsel cited the decision of this Court in the case of ***Lt David Kabarebe v Major Prossy Nalweyiso CACA No.34/03*** where this court held to give effect to the plea of *res judicata*, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit.

He invited court to allow the ground

On the ground of affirming the decision of the court, Mr Nerima submitted that the suit was struck out for res judicata and not for not disclosing a cause of action and parties did not address court on it. He however stated that a cause of action was disclosed. He cited the case of ***Auto Garage &others vMotokov [1972] EA 514***

He prayed that the appeal be allowed with costs and that the file be remitted to the High Court to be heard by another judge.

In reply, Mr Byenkya, learned counsel for the respondent, opposed the appeal and stated that the ruling of Mukanza J is a valid ruling and he made observations on matters that were before him. He further submitted that the parties were the same and there was a nexus between the parties.

He conceded that the application before Mukanza J was for substitution of parties and the main suit was not called for hearing but he contended that an interlocutory application is filed under a suit and therefore it cannot be said that the main suit did not come in issue.

He supported the decision of the judge which he claimed was made on merit and that no appeal was preferred against it.

On the cause of action, learned counsel submitted that the plaint does not aver that the defendants did anything wrong. He relied on the case of ***Attorney General v Major General David Tinyefuza- Constitutional Petition No.1/97*** in which the Supreme Court defined what amounts to a cause of action.

Mr Nerima in a brief reply submitted that the appellant had a right to bring a fresh suit instead of appealing against the decision of Mukanza J because an appeal is based upon a decision and not views. He reiterated that Mukanza J made a ruling on substitution of parties.
He further submitted that allegations have been made in the plaint and the court has to look at the plaint only. He, too, cited the case of ***Attorney- General v Tinyefuza*** (supra) and the judgment of Mulenga at page 12 in which the learned justice stated that it is not necessary to determine whether there is merit in the allegations before determining whether a cause of action has been disclosed. The court only looks at the plaint.

Section 6 of the **Civil Procedure Act** which deals with *res judicata* provides as follows:
"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 the 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 of competent jurisdiction to try the subsequent suit or suit in which the issue subsequently raised, and has been heard and finally determined by that court."

The provisions of this section is an embodiment of the rule of conclusiveness of judgments as to the points decided by court in every subsequent suit between the same parties or parties under whom they or any of them claim.

Essentially the test to be applied by court to determine the question of *res judicata* is this: Is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he/she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon?
If the answer is in the affirmative, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time. See ***Greenhalgh vMallard [1947[2ALL ER 255.***

In the case of ***Lt Kabarebe v Major Prossy Nalweyiso*** (supra) Bahigeine JA who wrote the lead judgment with which the other members of the Coram concurred said:
"To give effect to a plea of res judicata, the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing

more than that a person shall not be heard to say the same thing twice over in successive litigations."

Section 2 of the **Civil Procedure Act** defines suit to mean all civil proceedings commenced in any manner prescribed. This means that Miscellaneous Application No.47/97 which was heard and finally determined by Mukanza J. was a suit in its own right and it fell within the meaning of the definition.

Applying the above principles to the facts of this appeal, there is no dispute that the application which was before Mukanza J was between the appellant and one Nupun Bhatia. It was filed under Order 1 rule 10(2) (4) of the Civil Procedure Rules and it was seeking substitution of parties. The current respondents were not party to that application and they were not party to HCCS No.910/95 out of which the application arose.

It is true as both counsel submitted that in the course of writing his ruling Mukanza J made remarks and observations concerning the substantive suit. Those remarks and views were *obiter dicta* and not the *ratio decidendi* of the application that was before him. Those remarks were not raised in the application directly or by necessary implication.

Therefore, when the appellant filed HCCS No.411/98 it was not bringing in another way and in the form of a new cause of action a dispute which it had already put before a court of competent jurisdiction and which had been heard and finally adjudicated upon.

On whether the subsequent suit was between the same parties, the learned trial judge in dealing with the issue said:

"In the instant case the defendant in the first suit was sued on behalf of his principals who became defendants in the current suit. So the parties were litigating under the same capacity over the same subject matter and issue."

With respect, I think the learned judge erred when he held that the respondents and their attorney were litigating under the same capacity. The attorney had no capacity to sue or be sued. He is also not the registered proprietor of the suit property. It is the respondents who are the registered proprietors. In my view the capacities were not the same.

On perusal of the written statement of defence, I have noticed that the respondents did not raise by their pleadings the fact that the subsequent suit was barred by *res judicata.*

Order 6 rule 28 of the **Civil Procedure Rules** provides for points of law to be raised by pleading. It states:

"Any party shall be entitled to raise by his or pleading any point of law, and any point of law so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before hearing."

To reject a plaint for being barred by law under ***Order 7 rule 11*** of the **Civil Procedure Rules** it should appear "from the statement in the plaint to be barred by any law." This means that no affidavits are required to prove a point of law. In the instant appeal the respondents made an application accompanied by an affidavit and the appellant had to file an affidavit in reply. All this, in my view was unnecessary because it should have appeared from the statement in the plaint that the suit was barred by law.

The ground of appeal ought to succeed.

As to whether the plaint discloses a cause of action this can be determined by looking at the plaint and the allegations made therein. The dispute between the parties is about the payment of the balance of the purchase price.

Paragraph 3(g) of the plaint averred as follows"

"On 13th September, 1995 Mr Azim Kassam who was at the time in Canada called on phone Ebert Byenkya in Kampala to ascertain for him the Bank Account Number of the defendants in order to remit money to the same as the plaintiff did not have the details at the time. He was however not given the details himself and asked Mr Azim Kassam to call back the next day. When Mr Azim Kassam called Mr Ebert Byenkya the next day 14/9/1996, Mr Byenkya refused to give him the details."

"3(h) the next day 15th September 1997 Byenkya Kihika and Company acting on behalf of the defendants notified the plaintiff of the lapse of sale. (Annex E)."

"3(i) the plaintiff was ready and willing to pay and offered the money directly to Byenkya Kihika and Company to Nipun Bhatia."

Paragraph 4 states:

"The plaintiff shall at the trial aver that the defendants are in breach of contract for failure to furnish the plaintiff with details of mode of payment and refusal to accept payment."

The allegations in the plaint are denied but that is a different matter altogether.

The above averments are sufficient in themselves to establish a cause of action. They allege the breach that was allegedly committed by the respondents.

Iam satisfied on the facts as pleaded that the suit discloses a cause of action. The ground affirming the decision of the court would fail.

The appeal would be allowed with costs here and in the lower court. The file is remitted to the High Court for hearing before another judge.

Dated at Kampala this……**08th** ……day of…**October**……..2009.

C.K.Byamugisha

Justice of Appeal.

JUDGMENT OF HON JUSTICE L.E.M.MUKASA –KIKONYOGO, DCJ

I read in draft the judgment prepared by Byamugisha JA. I agree with the reasons she gave for the conclusion she reached. She ably dealt with all the issues raised by the parties. I have nothing useful to add.

Since Alice E. Mpagi-Bahigeine, J.A also agrees, this appeal is allowed with costs in this Court and the High Court.

The judgment and orders of the High Court are hereby set aside. The file in this case is hereby remitted to the High Court to be tried by another judge.

Dated at Kampala this ..**8th** …day of ….**October**….2009

L.E.M.Mukasa-Kikonyogo

Deputy Chief Justice

JUDGMENT OF HON JUSTICE A.E.N.MPAGI-BAHIGEINE, JA

I am in full agreement with the judgment prepared by Byamugisha, JA. I have nothing more to add.

Dated this **08th** day of **October, 2009**

HON JUSTICE A.E.N.MPAGI-BAHIGEINE
JUSTICE OF APPEAL