

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**AT KAMPALA**  
**LAND DIVISION**  
**CIVIL SUIT NO. 193 OF 2009**

1. **REV. GEORGE LUBEGA**  
2. **IRENE KAJUMBA..... PLAINTIFFS**

**VERSUS**

1. **LUWERO TOWN COUNCIL**  
2. **UGANDA NATIONAL ROAD AUTHORITY (UNRA).....DEFENDANTS**

**BEFORE LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING ON PRELIMINARY OBJECTION**

In the course of hearing this case, learned Counsel Nestar Byamugisha for the plaintiff raised a preliminary objection (PO) that there was no written agreement between the 1<sup>st</sup> plaintiff and the registered owners yet the defendants claimed to have purchased the land in 1991. He stated that the 1<sup>st</sup> defendant in its written statement of defence (WSD) and counterclaim justified their occupation of the suit land on grounds that it acquired equitable interest in part of the suit land through purchase. He argued that the 1<sup>st</sup> defendant is a town council which is required to enter into a transaction only with the consent of the Minister as provided in section 35 of the Urban Authorities Act, read together with section 66 of the same Act. He submitted that there is no evidence that the 1<sup>st</sup> defendant obtained the mandatory ministerial consent, that the lack of consent would render the transaction void, and that it is trite law that this court cannot validate an illegal transaction. He argued that this would also affect the 2<sup>nd</sup> defendant who is just an appendage that acquired from the 1<sup>st</sup> defendant. He prayed that the two defences be struck out though the two defendants can be heard on the question of damages since they admit they are in occupation of the suit land. He cited **Kisugu Quarries Ltd V Attorney General [1999] KALR 246** to support his submissions.

Learned Counsel Abaine Buregyeya for the 1<sup>st</sup> defendant opposed the PO and prayed that it be dismissed with costs to the defendants. He submitted that the PO is based on facts which are disputed by the defendants more so as to the sale and compensation of the suit land *vis a vis* the payments made to the 1<sup>st</sup> plaintiff and the father of the 2<sup>nd</sup> plaintiff. He argued that sections 35 and 66 of the Urban Authorities Act relied on by the plaintiff cannot benefit them since they were the vendors in the purchase of the suit land who sold the same on willing buyer willing seller basis. He contended that the Minister's consent can be obtained anytime before transfer since the sale transaction between the parties was not yet complete, and

that therefore the plaintiffs cannot use the said section as a sword. He argued that section 130 of the Registration of Titles Act (RTA) requires such consent at a time of effecting transfer. He contended that the 1<sup>st</sup> defendant still holds an equitable interest in the suit land and therefore cannot turn around to allege illegality where they received adequate consideration and allowed the 1<sup>st</sup> defendant to enter, occupy and develop the suit land where she has lived for the last eighteen years since 1991. He also argued that though the defendant did not attach a sale agreement between her and the plaintiffs, he attached a series of correspondence and payment vouchers to the written statement of defence, and that an oral contract is as valid as a written one provided all the essential requirements of a contract are met, as was held in **Greenboat Entertainment Ltd V City Council of Kampala HCCS 0580/2003**. He also submitted that the facts relating to the PO are not clear and need to be proved by way of evidence which necessitates a full trial. He contended that the PO is based on facts which court has to ascertain and it remains an exercise of judicial discretion. He cited **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696** to support his submissions.

Learned Counsel Pope Ahimbisibwe for the 2<sup>nd</sup> defendant, like Counsel for the 1<sup>st</sup> defendant, submitted that the PO raised by the plaintiff's Counsel require the calling of evidence or testimony which can only be raised as issues for trial and answered when the defendants present their case. He also submitted that if the plaintiff intended to challenge the 1<sup>st</sup> defendant's purchase of the suit property on grounds that there was no written agreement nor a ministerial consent in the purchase of the suit land, he ought to have pleaded it as a material fact as required by Order 7 rule 1 of the Civil Procedure Rules (CPR) to enable the defendants respond to it in their respective defences. He cited **Interfreight Forwarders Uganda Ltd V East African Development Bank SCCA No. 33/1992** and submitted that for as long as a point of law is premised on the proof of existence of some facts, then the existence and or non existence of those material facts ought to have been pleaded in the plaint to enable the defendants respond to the same in their defences. He also, like Counsel for the 1<sup>st</sup> defendant, submitted that a court of law will not entertain a PO unless it is one that will dispose of the whole action. He cited **Eng. Yashwant Sipra & Another V Sam Ngude Odaka & 4 Others HCCS No. 365/2007** to support this position.

Learned Counsel Byamugisha in rejoinder to both Counsel reiterated that the PO was derived from the defendant's pleadings and the law, which is sufficient for court to strike off the defendants' defence. He also submitted that the PO was on illegality which, as held in **Makula International Ltd V Cardinal Nsubuga & Another [1982] HCB 11** can be brought to the attention of court at any stage and which illegality court cannot sanction. He further submitted that in its reply the 1<sup>st</sup> defendant never sought to amend its pleadings in order to provide the written agreement evidencing the transaction and the ministerial consent.

It is stated in the cited case of **Makula International Ltd V Cardinal Nsubuga & Another** that a court of law cannot sanction what is illegal and illegality once brought to the attention of court, overrides all questions of pleading, including any admission made thereon. It is in spirit of this decision that I will address this PO. The 2<sup>nd</sup> defendant's Counsel submitted that if the plaintiff intended to challenge the 1<sup>st</sup> defendant's purchase he ought to have pleaded it as a material fact as required by Order 7 rule 1 of the CPR to enable the defendants respond to it in their respective defences. It is apparent the plaintiff's Counsel raised the PO alleging illegality as derived from the defendants' pleadings. The decision in **Interfreight Forwarders Uganda Ltd V East African Development Bank SCCA No. 33/1992** would therefore not be applicable in the instant case.

Law JA in **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696, at 700** stated that:-

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a preliminary point may dispose of the suit.”*

Sir Charles Newbold in the same case at page 701 stated that:-

*“A preliminary objection raises a pure 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 if what is sought is extrinsic evidence of judicial discretion.”*

The principle, as I understand it, is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from continuance of futile and useless proceedings.

The essence of the PO is that the 1<sup>st</sup> defendant's claim in the pleadings that it acquired equitable interest in part of the suit land through purchase is void as there is no evidence of the mandatory ministerial consent to the transaction under which the defendants base their claims on the suit land. The plaintiff's Counsel argues that this would justify this court to invalidate it as an illegal transaction and strike out the two defences, leaving the defendants only to be heard on damages.

I note that the facts not agreed on in the joint scheduling memorandum signed by both Counsel include the fact that the 1<sup>st</sup> defendant bought any part of the suit land. This, looked at together with Counsels' submissions, the pleadings, and the joint scheduling memorandum, clearly reveal the 1<sup>st</sup> defendant's purchase of the suit land to be an issue. Learned Counsel for the plaintiff in his submissions particularly alludes to the lack of agreement between the 1<sup>st</sup> defendant and the plaintiffs as well as lack of ministerial consent before purchasing the suit property. These factors are disputed by the 1<sup>st</sup> defendant's Counsel, who in addition to submitting on the existence of a contract between the 1<sup>st</sup> defendant and the plaintiff, contends that the consent can be procured under section 130 of the Registration of Titles Act.

The submissions of Counsel on the PO are partly on points of law and partly on points of fact. I agree with both Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants that those points, particularly those on points of fact, give rise to questions that would require the calling of evidence to prove or disprove them. Those matters would require this court to delve into extrinsic evidence. They are matters in proof of which, evidence can only be adduced during the hearing of the case on the merits. For instance, court can only be able to determine the existence and or non existence of an agreement or ministerial consent by calling evidence during the hearing. Addressing them at this point would tantamount to delving into extrinsic evidence which would defeat the nature of a PO normally argued on the assumption that all the facts pleaded by the other side are correct. A PO cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial discretion. Court can only assume that what the parties allege in the pleadings are true. As held in **N. A. S. Airport Services V Attorney General [1959] EA 53 (CA) at page 60**, the procedure of raising a PO should be sparingly used and only in exceptional circumstances where the facts relevant to the PO to be set down are so clear cut on the pleadings that there is no room for evidence upon any fact pleaded which would assist in the decision of that point of law, or which fact, if decided in one way, would result in the point no longer arising.

In my opinion, this is a situation where the facts are not so clearly and definitely stated in the pleadings as to make an impression on this court that it has all the necessary facts before it and can decide the case without hearing any witnesses, on the pleadings and admitted documents alone.

The case of **Kisugu Quarries Ltd V Attorney General** cited by learned Counsel for the plaintiff is not applicable to this case. The decision of the appellate court in the said case was made after analysing the evidence adduced by the parties at the trial court. The question was not disposed of on a PO but after the appellate court had analysed the evidence as adduced before the trial court as well as the law applicable to the case.

Secondly, it appears to be settled law that a PO should be one which disposes of the whole action, as held in **Mukisa Biscuit Manufacturing Co V West End and Eng. Yashwant Sipra & Another V Sam Ngude Odaka & 4 Others**, already cited. Justice Kiryabwire referring to *Odgers: Principles of Pleading and Practice In Civil Actions In The High Court of Justice*, made this quotation:-

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

In this case the point of law raised cannot dispose of the entire suit. It is doubted that even if this court declared the defendants' transactions on the suit land void on a finding that there was need for a ministerial consent in the 1<sup>st</sup> defendant's transactions regarding the suit land, it would entirely dispose of the suit. It would for instance leave unanswered questions in respect of the plaintiff's prayers for especially special damages like those seeking payments of money, reserves of murram, value of additional murram, and costs of the plaintiff's professional fees while getting reports. These are challenged by the defendants and are not necessarily affected by whether or not there was a ministerial consent and an agreement to sell. Counsel who raised the PO himself submitted that the defendants can be heard on the question of damages since they admit being in occupation of the suit land. These matters would require to be heard and determined before court.

In the premises, for reasons given and authorities cited, I do not find merit in the preliminary objection.

I accordingly overrule it with costs.

**Dated at Kampala this 30<sup>th</sup> day of May 2013.**

Percy Night Tuhaise

**JUDGE.**