

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL SUIT NO. 18 OF 2005**

**HARIHAR ASHABHAI  
PATEL ..... APPLICANT**

**VERSUS**

**MEERA INVESTMENTS LTD .....  
RESPONDENT**

**Hon. Lady Justice Monica K. Mugenyi**

**RULING**

The plaintiff is the administrator of the estate of one Jeshang Popat Shah (now deceased). Jeshang Popat Shah; his brothers, Manilal and Mulchand Popat Shah (both also deceased), and a company known as General Trading Ltd were co-proprietors of land comprised in LRV 85 Folio 5, Plot 11 Market Street, which property is hereinafter referred to as the suit property. M/s General Trading Ltd held 50% ownership of the suit property while the 3 brothers jointly held the other 50% ownership. The defendant company purchased the interest of M/s General Trading Ltd, as well as that of Mulchand and Manilal Popat Shah thus effectively acquiring a 5/6 stake in the suit property. The defendant company then purported to assume the management of the company. It subsequently instituted **High Court Civil Suit No. 1195 of 1997** against the estate of Jeshang Popat Shah seeking a declaration for the surrender of the certificate of title in respect of the 3 brothers' interest in the suit property. The said estate countered this suit with a claim for accumulated rental income and/ or an account by the defendant on rental funds received from the suit property. The parties to those legal proceedings negotiated an out-of-court settlement whereby the present defendant would account for the rental payments vide an independently appointed accountant/ auditor, whereupon the suit and counter-claim were withdrawn. Following the defendant's default on the negotiated settlement, the matter was heard *de novu* and judgment entered

for the estate of Jeshang Popat Shah. On appeal, however, the judgment was reversed on the sole ground that, having withdrawn the suit and counter-claim there was no pending dispute between the parties unless a fresh suit was filed; hence the present suit. The present plaintiff *inter alia* seeks declaratory orders that the defendant was wrongly registered on the title; that its name be deleted from the certificate of title, and the defendant be ordered to account to the plaintiff for all rental income collected since 1996, when the defendant assumed management and control of the suit property.

The defendant raised preliminary points of law as follows. First, the defendant contends that the amended plaint does not disclose a cause of action and should, therefore, be struck off as provided by Order 7 rule 11 of the Civil Procedure Rules (CPR); secondly, the defendant portends that plaintiff has no locus to institute the present proceedings or challenge the transfer of interests in the suit property by the legal representatives of Mulchand and Manilal Popat Shah, and finally, it is the defendant's contention that the present suit is moot in so far as it does not present a live dispute for resolution and any court orders issued would be academic and lack practical effect. The third objection was particularly premised on the rights of co-owners of property that hold the property as tenants in common as opposed to joint tenants, as well as the expiry of the 99-year lease in respect of the suit property in 2010.

Conversely it was argued for the plaintiff that the issue of the unpaid rental income is in dispute and forms the basis for the prayer for accountability by the defendant for monies received as such. The plaintiff further argued that the expiry of the lease in issue had not been pleaded and, in any event, the plaintiff's locus to sue the defendant was grounded on a similar premise as the latter's locus to sue the former in the earlier suit, **Civil Suit No. 1195 of 1997**. With regard to the alleged absence of a cause of action, learned counsel for the plaintiff argued that the plaintiff's suit was premised in fraud in respect of that portion of the suit land to which he was entitled under the doctrine of survivorship that applies to co-owned property. Learned counsel further argued that the plaintiff disputed the defendant's entitlement to 5/6 of the rental proceeds from the property and sought to secure an account of the rental proceeds of the property from 1996 to date. It was counsel's contention that proof of the cause of action herein was a question of evidence that could not be adequately determined as a preliminary point of law. Finally, citing Article 26 of the Constitution, section 95(4) of the Land Act and the case of **Kampala District Land**

**Board & Another vs. National Housing & Construction Corp. Supreme Court Civil Appeal No. 4 of 2004**; Mr. Wakida argued that the plaintiff as the rightful sitting lessee of a portion of the suit land was entitled to a fresh lease grant but the defendant fraudulently sought to deprive him of his interest therein.

In reply, learned counsel for the defendant reiterated that the plaintiff had not stated that it was deprived of its interest in the suit property or any part of it. Counsel countered the plaintiff's submissions on locus, arguing that the expired certificate of title was part of the pleadings therefore there was no need to amend the written statement of defence; the defendant's pleadings were explicit on the proof of rental payments made therefore the plaintiff could not claim for more than his interest in the suit property warranted and the plaintiff had no locus to sue in respect of the interests of Mulchand and Manilal Popat Shah. Mr. Rezida maintained that the plaintiff had failed to show that he enjoyed a right to the 2 brothers' interests in the suit property and that right had been violated by the defendant. Counsel argued that the doctrine of survivorship did not apply to tenants in common such as was the case presently and even if this court were to find after trial that the interests of Mulchand and Manilal Popat Shah were sold without consent that would not give the plaintiff an interest in their property. Finally, Counsel argued that the amended plaint did not extend to the new lease after 2010 and this court was enjoined to look at the plaint before it and decide whether or not it disclosed cause of action or whether the suit before it was moot. It was his contention that such matters did not require a hearing as had been argued by learned Counsel for the plaintiff.

Order 6 rule 28 of the Civil Procedure Rules (CPR) entitles parties to legal proceedings to raise points of law in their pleadings and does also mandate courts to dispose of points of law so raised either at or after the hearing of the suit. Thus points of law duly raised in pleadings may be disposed of either as preliminary objections before commencement of the trial or as legal questions to be determined after the close of the trial with the benefit of evidence.

In the case of **Baku Raphael Obudra and Obiga Kania vs. The Attorney General Constitutional Appeal No.1 of 2003** the Supreme Court drew a distinction between points of objection as to the form of a pleading and those as to the substance of the case that is pertinent to the present preliminary objections. In that case Mulenga JSC observed:

**“Distinction must be made between points of objection as to the form of a pleading and those as to the substance of the case. It is one thing to object that a plaint does not disclose a cause of action, and quite another to object that the claim in the suit is not maintainable in law. That is because the outcome is different. In the latter category, the court decides on the merits of the case on basis of law only. The procedural rules applicable to this category are O.6 rr.27 and 28, and O13 r.2 of the Civil Procedure Rules. On the face of it, the point of objection in the instant case falls in the former category, where, subject to one exception that I will revert to later in this judgment, the court decides on only the fate of the impugned pleading, without going into the merits of the case. The relevant procedural law for that category is O.6 r.29 and O.7 r.11 of the Civil Procedure Rules.”**

From the foregoing decision, it seems to me that when a court is faced with a preliminary objection that pertains to the form of a pleading the court decides the objection on the face of the impugned pleading without going into the merits of the case; the court ought to restrict its ruling to the defect of the plaint and not decide the issue on the merits of the case. If satisfied that the pleading does offend a legal requirement, the court may strike out the offending pleading under Order 6 rule 30 of the CPR. In the instant case the first objection, premised on the provisions of Order 7 rule 11 of the CPR, is that the plaint does not disclose a cause of action. In determining this objection, this court has duly restricted itself to the face of the plaint itself without recourse to the merits of the case. I have carefully considered the contents of the amended plaint and find that the plaint discloses a cause of action in fraud, which is pleaded and particulars thereof furnished in paragraph 7 thereof. Among the particulars of fraud pleaded are the entries entered onto the title after the lodging of a caveat in respect of the suit land in 1997 and while the matter was *sub judice* vide a previous suit. In paragraph 8 the plaintiff seeks damages for the loss suffered as a result of the defendant's fraudulent actions. The plaint does also raise the question of accountability for rental payments made to the defendant in respect of the plaintiff's portion of the land. At this stage of the proceedings, without recourse to the merits of the case, the plaint thus reveals that the plaintiff enjoyed an interest in the suit property and, therefore, a right to a portion of the suit property, as well as the proceeds therefrom; the said right has been violated on account of fraud, and the

defendant is liable for the violation. This is a distinct cause of action in fraud. I do therefore over-rule the objection on non-disclosure of a cause of action.

The second category of objections identified in **Baku Raphael Obudra and Obiga Kania** (supra) is an objection that the claim in the suit is not maintainable in law, in which case a court will determine the merits of the suit on the basis of the law only. I find that to be the scenario before this court with regard to the 2 outstanding objections. Having found that the plaintiff does disclose a cause of action, the question would be whether, on the basis of law alone, the cause of action is tenable; or stated differently, whether, upon applying the law to the undisputed facts at this stage (without the benefit of any evidence), the cause of action is sustainable.

As stated earlier in this judgment, Order 6 rule 28 of the CPR mandates courts to dispose of points of law either at or after the hearing of the suit. In the instant case the objection on *locus standi* has been raised as a preliminary point of law before the hearing of evidence. At this stage of the proceedings without the benefit of evidence, this court reverts to the pleadings to deduce the plaintiff's *locus standi* in the present matter. Paragraphs 2, 4(a) and (d) of the plaintiff suggest that his *locus standi* herein is two-fold; first, as the administrator of an estate with an interest in the suit property, and secondly, as a party that stands to be deprived of that interest in the property, as well as the proceeds that accrue therefrom, on account of alleged fraud. Sections 191 and 192 of the Succession Act clearly recognise the right of an administrator of an estate to establish the proprietary interests of an intestate in court.

Be that as it may, the defendant's objection to the plaintiff's standing in the suit appears to be premised on the disputed fact as to the latter's stake in the suit property. Whereas the defence maintains that the plaintiff is not entitled to benefit from the doctrine of survivorship with regard to the stakes in the suit property that were held by Mulchand and Manilal Popat Shah; the plaintiff contends otherwise. That notwithstanding, from the pleadings of both parties it is an undisputed fact that the plaintiff owned one sixth (1/6) stake in the suit property and it is not disputed either that he would be entitled to the rental proceeds for that stake in the property. It is not true, as stated by learned defence counsel in submissions in reply that the plaintiff had not stated that it was deprived of its interest in the suit property or any part of it. This was pleaded in paragraphs 4(a) and 9 of the amended plaintiff, and reiterated in the plaintiff's submissions herein in so far

as the plaintiff disputed the defendant's entitlement to 5/6 of the property or the rental proceeds therefrom. In its reply herein, the defence sought to counter this claim by arguing that the defence pleadings were explicit and proof of payment is on record. With respect, this court does not share learned counsel's proposition that the defence pleadings are conclusive enough on the matters in contention on this issue as to negate need for evidence properly adduced, tested, scrutinised and evaluated. In the instant case, in the absence of evidence, I am satisfied that the pleadings do portray the plaintiff as having had *locus standi* to bring the present suit. I would therefore over-rule learned defence counsel's submission to the contrary.

Similarly, the objection on absence of a live dispute for determination has been raised as a preliminary point of law before the hearing of evidence. It was substantiated by learned defence counsel that the suit was moot first, because as a tenant in common with his 2 deceased brothers the plaintiff could not benefit from the survivorship principle applicable to joint tenancies, and secondly, because the expiration of the lease in respect of the suit properties meant the present dispute had been overtaken by events and the issues in dispute no longer exist. As I have endeavoured to highlight hereinabove, the question of the rental payments due to the plaintiff is indeed a live dispute between the parties. Even if this court were to agree with the defence that the plaintiff's interest in the suit property is clear, can be determined on an application of the law alone and therefore does not warrant a trial, as this court understood learned defence case to suggest; as quite rightly argued by learned counsel for the plaintiff, there is the question of fraud prior to the expiration of the lease in 2010 and the remedies incidental thereto that begs determination. Proof of the remedies sought by the plaintiff would obviously be a question of evidence that must be established as such. I find that the circumstances of this case are such that it would be premature at this stage to conclusively opine that the claim herein is not maintainable in law; the remedies sought are superfluous or the entire suit is moot on account of the expiration of the lease. I am satisfied that the circumstances of this case dictate that the matter be heard on its merits and the points of law inherent therein be determined after the hearing of the suit as provided by Order 6 rule 28 of the CPR.

I therefore over-rule the preliminary objections raised by the defendant with costs to the plaintiff. I hereby order that the substantive suit proceed to be heard on its merits.

**Monica K. Mugenyi**  
**Judge**

27<sup>th</sup> October, 2014