THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 227 OF 2011

SPRINGS INTERNATIONAL HOTEL LTD :::::::::::::::::::: PLAINTIFF

VERSUS

1. **HOTEL DIPLOMATE LTD**
2. **BONEY M. KATATUMBA :::::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

At the commencement of the hearing of the case, Mr. Tusasirwe Benson, Learned Counsel for the defendants, raised a preliminary point of law to the effect that the suit offends the *lis pendens* rule. That the suit is founded on the same facts and seeks for the same remedies as in ***HCCS No. 126 of 2009,*** which is due for judgment in the Commercial Court Division of the High Court before Hon. Justice H.P Adonyo. Counsel submitted that under the principles that underpin the *lis pendens* rule, no court ought to entertain a case in which the same facts and issues are already up for consideration in another case pending before the same court or other court having the competent jurisdiction. Based on these reasons Counsel submitted the instant suit, ***HCCS NO 227 of 2011,*** is an abuse of court process, frivolous and vexatious, and should be dismissed.

Stating the rationale of the rule, Mr. Tusasirwe submitted that two courts hearing the same matter would set the concerned judicial officers on a "collision course" with the likelihood of arriving at conflicting judgments on the same facts; which would cause embarrassment. Further, that it would throw the doctrine of precedent into disarray and create uncertainty. Furthermore, that it would pave way for a situation where litigants choose which judge should hear their case. Counsel cited

Section 6 of the ***Civil Procedure Act (Cap.71)*** which embeds the spirit of the *lis pendens* rule. It provides as follows;

> ***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."***

On the facts of the instant case, Mr. Tusasirwe submitted that the plaintiffs filed several suits which are quite the same or similar as regards the parties and subject matter and the prayers sought. That for instance, ***HCCS No. 126 of 2009*** was filed on 09/04/2009 in the Commercial Court, and that it has since been heard *inter partes* and that judgment is to be delivered on 31/10/2014. That the current plaintiff filed a written statement of defence and counterclaim therein on 05/06/2009. Further, that the instant suit was filed in the Lad Division on 23/06/ 2011, but that on exactly the same date the plaintiff also filed another suit in the same Division, with exactly the same parties and subject matter.

Also, that in the instant suit in its original form, the plaintiff claimed to be the lawful owner of property situate at Kisugu Muyenga which is run as a hotel and accommodation, and that the defendants were in occupation of the same property and owed the plaintiff rent amounting to Ushs. 963,480,000/= for the period from 01/04/ 2009 to December, 2010, which the plaintiff prayed should be paid, with costs of the suit, but that the suit which was filed as a summary suit did not describe the property beyond what is produced above.

Further, that again in ***HCCS No. 228 of 2011*** filed the same day, but this time as an ordinary suit, the plaintiff fully described the property and claimed to be the registered proprietor of land and development thereon comprised in ***Kyadondo Plot***

971 Block No. 22 at Kisugu Muyenga. That the plaintiff claimed that following a hectic legal battle in ***HCCS No. 126 of 2009***, court had issued an order to the defendants to give the plaintiff vacant possession, which the defendants had allegedly defied. Counsel noted that no such order was, however, annexed as none existed. Also, that in the prayers, the plaintiff sought an order of vacant possession, general damages, costs and interest, which was strange, to claim there was already an order of vacant possession and then seek the very same order of vacant possession.

Counsel pointed out that the plaintiff, without serving summons upon the defendants, then applied for default judgment and on the 16/09/2011, and a decree was issued in ***HCCS No. 227 of 2011***. That when the defendants learnt of the decree and discovered the existence of the two suits, they applied vide ***HCMA No. 456 of 2011*** to set aside the decree and for leave to defend. That at the hearing of the application, the defendants pointed out that it was an abuse of process to file two separate suits over the same property, one seeking damages (rent) only, while other sought vacant possession. That Mr. Oloya, Counsel for the plaintiffs then, conceded that this was indeed improper and agreed that the two suits be merged so that the defendants respond to one suit.

That on the 1st November. 2011, Counsel for the plaintiff filed amended plaint in ***HCCS No. 227 of 2011*** whereby the plaintiff now alleged trespass by the defendants on the property comprised in ***Kyadondo Block 22, Plot 971 at Kisugu Muyenga***, but made no mention of ***HCCS No. 126 of 2009*** any longer. That in the amended suit, the plaintiff sought, a declaration that the plaintiff was the rightful owner of the said property with right of possession; an order of vacant possession; special damages of Ushs.963,480,000/= in rental arrears; general damages for continuing trespass; a permanent injunction; interest on special and general

damages; costs and any other relief the court deems fit. Counsel submitted that this is now the suit before court.

Mr. Tusasirwe also submitted that On 9th November 2011, the defendants filed a defence to the amended consolidated suit and in paragraph 4 (o), (p), (q) and (r) thereof pointed out that the defendants in the instant suit had earlier filed ***HCCS No. 126 of 2009*** in the Commercial Court on 17th April, 2009, against the instant plaintiff and its sister companies. Further, that the plaintiff in the instant suit had, along with its sister companies, filed a defence and counterclaim and in the counterclaim sought the very same reliefs the plaintiff now seeks in the instant suit. Furthermore, that the suit and counterclaim in ***HCCS No. 126 of 2009*** which was still pending in the Commercial Court is on all fours with the claim in the instant suit. That in the said counterclaim, the instant plaintiff and sister companies laid claim to two properties, to wit: ***Plot 2 Colville Street,*** also known as Blacklines House; ***Kyadondo Block 970 and 971*** at Kisugu Muyenga (both mailo and leasehold interest) also known as Hotel Diplomat, and that the latter property is now the subject of the instant suit. That though the plaint only mentions ***Plot 971,*** the hotel the subject of the claim is on ***Plot 970 and 971,*** and that not only is the property the subject of both suits the same, but also the remedies sought are the same.

Counsel went on to submit that the remedies sought in the counterclaim to the extent that they relate to ***Plot 970/971*** include a declaration that there was a valid sale between the plaintiff i.e. Boney Katatumba and Hotel Diplomate, who are the defendants herein, and the 2nd defendant i.e. Springs International Ltd, the plaintiff in the instant suit; a declaration that the purported repudiation by the instant defendants of the contract signed on 10 /11/2008 herein in respect of ***Plot 970 and 971*** amounted to breach of contract; an order of specific performance for delivery up of the property comprised in ***Plot 970/971,*** Hotel Diplomate to the 2nd defendant

(current plaintiff);an order for delivery of vacant possession of property comprised in ***Plot 970/971***, Hotel Diplomate to the 2nd defendant (current plaintiff);a permanent injunction in respect of ***Plot 970/971***, Hotel Diplomate; special damages for lost revenue since 3rd August 2008, at Ushs.1,000,000/= per day; general damages; interest on the special and general damages; and any other relief the Court may deem fit. Given these facts, Counsel argued that similarity between the reliefs claimed in the counterclaim in ***HCCS No. 126 of 2009*** and in the instant suit are glaring, and show that clearly the plaintiff in the instant suit simply filed two suits about the same property seeking the exact same reliefs, which offended the *lis pendens* rule (supra). Counsel argued that as far as the instant case, ***HCCS No. 227 of 2011,*** is concerned, the filing of the suit was not just wrongful, but an abuse of Court process and should be struck out and dismissed for being frivolous and vexatious and an abuse of the court process.

In reply Counsel for the plaintiff Mr. D. Nkunzigoma Rubumba agreed with principles under the *lis pendens* rule under ***Section 6 of the Civil Procedure Act (supra)*** but disagreed arguing that ***HCCS No. 227 of 2011*** and ***HCCS No. 126 of 2009*** are quite different in the facts and issues and pleadings. Counsel argued that the rule is centered "on the suit or proceedings to be between the same parties", which according to Counsel, implies that the phrase "same parties" be interpreted strictly. Counsel pointed out that ***HCCS No. 126 of 2009*** was brought by four plaintiffs, namely; Bonny Mwebesa Katatumba, Hotel Diplomate Ltd., Katatumba Properties Ltd., and Gertrude Namutebi Katatumba, against Shumuk Springs Development Ltd., Springs International Hotel Ltd., Shumuk Financial Services Ltd, and Mukesh Shukla. That on the other hand ***HCCS No. 227 of 2011*** was brought by Springs Diplomate Ltd. as plaintiff against Hotel Diplomate Ltd., and Bonny M. Katatumba as defendants. Counsel opined the parties in the two suits are very different, and that as the pleadings and later evidence would prove, they

all serve different purposes, and are not substitutes of each other. Counsel argued that it would be a serious misnomer were this court to find that the parties in these suits are the same, because they are not, but that it is just a case of property with various parties having different interests which are the subject of these suits.

Regarding the legal issues, Counsel submitted that the two suits raise different issues. That though apparently interrelated; each of the case presents its own face which the parties would like court to adjudicate on. Counsel further argued that the orders being prayed for on each of them are clearly not the same, and that the attempt to invoke the operation of the *lis pendens* rule would in itself occasion a serious miscarriage of justice which courts must always avoid, and that the principles of the rule must be judiciously and carefully applied in this case.

Counsel submitted that both suits are already proceeding separately and progressively, and that this court should allow the due process of the law to continue uninterrupted. Counsel prayed for the preliminary objection to be overruled as premature, inappropriate and inapplicable at this stage and in the circumstances and facts of these cases.

The preliminary objection, in my view, raises the following issues for investigation;

1. ***Whether the instant suit offended the lis pendens rule.***
2. ***If the answer in (1) above is in the affirmative, whether the filing of the instant suit was done in abuse of court process.***
3. ***What are the remedies available to the parties?***

Resolution:

Black's Law Dictionary (8th Ed) defines *"lis pendens"*, as a Latin expression which simply refers to a *"pending suit or action"*. ***The Oxford Dictionary of Law (5th Ed)*** also defines the expression in similar terms. In the context of ***Section 6 CPA (supra)*** which encapsulates the principles that underpin the rule, it simply

means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

I will start with the issue as to whether the matter(s) in issue in the instant suit are directly and substantially in issue in a previously instituted suit, i.e.; ***HCCS No. 126 of 2009, Boney Mwebesa Katatumba & 3 O'rs vs. Shumuk Spring Development Ltd & 3 O'rs.*** At the time this preliminary point of law was raised, the suit was due for judgment in the Commercial Court. The judgment has since been delivered, i.e.; on the 03/11/2014. I have had the benefit of reading and appreciating the said judgment in its entirety, and I have found that matters in issue in that suit, which were determined in that judgment, are directly and/or substantially the same and/ or similar as in the instant suit.

In the instant suit, the plaintiff claims *(in paragraph 5(a) of the plaint)* that it is the registered proprietor and owner of land and developments thereon comprised in ***Kyadondo Block 244 Plot 971*** situate at Kisugu - Muyenga, Kampala. In the earlier suit, ***HCCS No. 126 of 2009, Boney Mwebesa Katatumba & 3 O'rs vs. Shumuk Spring Development Ltd & 3 O'rs,*** in which the 1st plaintiff Boney Mwebesa is the 1st defendant in the instant suit, the 1st plaintiff claimed orders arising, from a series of transactions and dealings between himself and the defendant therein in relation to, among other properties, ***Kyadondo Block 244 Plot 971***. The judgment in the earlier suit in fact directly addressed the same subject matter as being in issue right from page 1, 2, 3 6, 10 and the subsequent pages. In particular, at page 101 of the judgment, the court ordered in item (vi) for the cancellation of titles or any instrument as regards, among other properties, ***Plot 971*** at Kisugu Muyenga**,** which had been registered into the defendant's name. Also in

item (vii) of the orders in the judgment, the court issued a permanent injunction restraining the defendants, among whom is the plaintiff in the instant suit, from effecting any dealings with ***Plot 971*** Kisugu Muyenga, among other properties.

To my mind there is no doubt on basis of these clear facts that the matters in issue in the instant suit as they relate to property in ***Kyadondo Block 244 Plot 971*** Kisugu Muyenga are also directly and substantially in issue in ***HCCS No. 126 of 2009***. To that extent, the subsequent filing of the instant suit by the plaintiff herein amounted to gross violation of the *lis pendens* rule; a fact which renders the instant suit wholly untenable.

On the issue as to whether the previously instituted suit, i.e.; ***HCCS No. 126 of 2009*** is between same parties as in the instant suit, it is apparent on face of the pleadings that of the four plaintiffs in the earlier suit, Boney M. Katatumba, and Hotel Diplomate were 1st and 2nd plaintiffs respectively. Similarly, of the four defendants in the earlier suit, Springs International Hotel Ltd was the 2nd defendant. As already noted, the subject matter of litigation in the earlier suit was ***Plot 971***, among the others. The 3rd defendant in the earlier suit happens to be the plaintiff in the instant suit, while the 1st and 2nd plaintiffs in the instant suit were the 1st and 2nd defendants respectively in the earlier suit.

Therefore, even if one were to adopt a strict interpretation as proposed by Mr D Nkuzingome, the parties are still the same in both suits. I am unable to interpret the phrase “same parties” in the context of the *lis pendens* rule to mean or be in reference to “all parties”; or where the “same parties” in the earlier suit are not exactly “all parties” in number in the subsequent suit to mean that they are different parties. Placing such an interpretation on the rule would lead to absurdity. Even if the “same parties” (as in numbers) in the earlier suit do not all appear in the subsequent suit, it would not make the “same parties” in the earlier suit that appear in the subsequent suit to be different parties; because they are not.

In this case, Boney M. Katatumba, and Hotel Diplomate; some of the plaintiffs in the earlier suit, ***HCCS No. 126 of 2009,*** are "same parties" in the instant suit as defendants. This is particularly clearer when the subject matter of litigation in both the earlier and instant suits is the same i.e.; ***Plot 970/971,*** among the other properties. I am thus not persuaded by submissions of Mr. Nkunzingoma that this is a case of property, but with various parties having different interests, which are the subject of these suits. The test in the rule is whether the parties in the previous suit are directly or substantially the same as in the subsequent suit; and the answer is in the affirmative.

The final test in the rule relates to whether the suit is pending in the same or any other court having jurisdiction to grant the reliefs claimed. ***Section 33 of the Judicature Act (supra)*** vests the High Court with wide discretion to grant remedies particularly or absolutely in any matter before it. At the time this preliminary objection was raised, the earlier suit ***HCCS No. 126 of 2009*** was pending in the Commercial Court - which is a competent court to grant the reliefs sought, and indeed the court rose to the occassion on 03/11/2014 in that suit. On the other hand, the instant suit, ***HCCS No. 227 of 2011,*** which is pending in the Land Division; the court too is seized with the power to grant the reliefs sought.

What is important under the test in the rule, though, is the nature of reliefs sought in each of the suit in respect of the subject matter in issue; and in this case the subject matter is ***Plot 970/971***. In ***HCCS No. 227 of 2011***, the relevant prayers in paragraph 9(a) of the plaint include a declaration that the plaintiff is the rightful owner of the suit land ***(Plot 971)*** and an order for vacant possession. In the earlier suit, the same prayers were made in respect to ***Plot 971,*** but this time by the plaintiffs therein. The court pronounced itself on these prayers in item (vi) and (vii) at page 96, and 101-102 of the judgment in the earlier suit. The court in fact found that the agreement between the 1st and 2nd plaintiffs and 2nd defendant therein as

regards ***Plot 971***, among others properties, was invalid. Therefore, even if the instant suit was taken to be a case of property, but with various parties having different interests which are the subject of these suits, I would still find that such interests could be properly resolved in the earlier suit, because the matters in the instant suit, which is a subsequent suit, are directly and substantially in issue in the previous suit as relates to ***Plot 971.*** This means that the plaintiff in the instant suit simply perpetuated a multiplicity of suits, because there is no issue or prayer that could be resolved or granted in the instant suit which could not be resolved or granted in the earlier suit.

It is apparent that the plaintiff simply picked out one item of the many others in the earlier suit as regards only ***Plot 971*** and made a separate suit of it in the instant suit, with similar prayers in respect of the subject matter, but this time with reversed role as plaintiff in the instant suit even though it was one of the defendants in the earlier suit. It is based on these findings that I could not, but find that this was a clear case of abuse of court process by the plaintiff in the instant case**.** ***Section 98 CPA (supra)*** which vests this court with inherent power also enjoins it, *inter alia,* to curtail abuse of court process. Similarly, ***Section 17(2) of the Judicature Act (supra)*** enjoins this court to curtail abuse of court process. Also, ***Section 33 Judicature Act (supra)*** empowers court in its administration of justice to, as much as possible, avoid multiplicity of suits. In ***Attorney General vs. James Mark Kamoga & A'nor, SCCA No. 8 of 2004,*** Mulenga JSC (R.I.P) in the lead judgment concurred with the definition of "abuse of court process" as proffered by authors of ***Black's Law Dictionary(6th Ed)*** and held that;

> "***Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established."***

The learned Justice went further to state that;

"A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by law to effect; in other words, a perversion of it."

It is my considered opinion that one such instance of potential abuse lies in the filing of multiplicity of suits in court, such as the plaintiff did in the instant case. Therefore, when the above enunciated principles are applied to facts of the instant case, it is doubtless that the plaintiff acted in abuse of court process by filing the instant suit well knowing that another suit had was pending in another court with parties and issues directly and substantially the same as in the instant case. The plaintiff herein was acutely alive to the fact that the defendants in the instant suit had instituted an earlier suit against it in ***HCCS No. 126 of 2009,*** in which the subject matter of the suit ***(Plot 971)*** was directly the same as in the subsequent suit. The plaintiff herein knew or ought to have reasonably known that the resolution of the issues, particularly one that relates to ownership and the propriety of transfers ***Plot 971***, would finally and conclusively resolve any other issues in the subsequent suit.

The filing of a multiplicity of suits was not just an abuse of court process but potentially exposed the concerned judicial officers to the danger of arriving at different and perhaps conflicting decisions in cases of the same facts. This would have far reaching consequences as it would create uncertainty and inconsistency in court decisions. Uncertainty and inconsistency of court decisions are vices which have the undesirable consequences of, among others, undermining the doctrine of precedent which is the mainstay of our jurisprudence. For these reasons courts frown at the perpetrators of the vices, and normally invoke the heaviest possible sanctions in their arsenal; not just to penalize but also curtail such vices. To that end, the instant suit is struck out and dismissed for being an abuse of court process, with costs to the defendants.

BASHAIJA K. ANDREW
JUDGE
03/12/2014

Mr. Benson Tusasirwe Counsel for the defendants: present.

Mr. D. Nkuzingoms Rubumba Counsel for the plaintiff: present.

Mr. Boney M. Katatumba, and Ms. Angella Katatumba representing the 1st and 2nd defendant present.

Ms. Justine Court Clerk: present.

Ruling read in open Court.

BASHAIJA K. ANDREW
JUDGE
03/12/2014