THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 65 OF 2012

HABIB KAGIMU :: PLAINTIFF

VERSUS

CAIRO INTERNATIONAL BANK (U) LTD :::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

HABIB KAGIMU (hereinafter referred to as the "plaintiff") filed this suit against *M/S. CAIRO INTERNATIONAL BANK (U) LTD. (hereinafter referred to as the "defendant")* for a declaratory order that the defendant has no caveatable interest in land comprises in Plot 440 Block 269 land at Lubowa *(hereinafter referred to as the "suit land");* general and punitive damages for wrongful lodgment of a caveat, and costs of the suit.

At the commencement of the hearing Mr. Enos Tumusiime, Counsel for the defendant, raised a preliminary point of law to the effect that the suit is *res judicata;* the subject matter as contained in paragraph 3 of the plaint having been finally determined by court in ***HCMA No. 660 of 2007 Cairo International Bank vs. Siraje Kasumbakali.***

Referring to the ruling at page 29, Mr. Tumusiime submitted that the court found and ruled that the defendant has a caveatable interest in the suit property, and thus ordered the Commissioner for Land Registration to maintain the defendant's caveat on the suit land pending the final disposal of the main suit in ***HCCS No. 621 of 2006,*** provided the defendant paid into court as security UGX 55 million within 30 days from the date of ruling; which was done.

Mr.Tumusiime submitted that whereas the ruling in ***HCMA 660 of 2007*** was delivered on 30.11.2007, the instant suit was filed on 10.02.2012 subsequent to the said ruling. Counsel argued that for that matter the plaintiff was fully aware that the court had pronounced itself on the issue and the purpose of the caveat. Mr. Tumusiime submitted that for the plaintiff to come to court and claim that the defendant had no caveat is illegal and contravenes ***Section 7 of the Civil Procedure Act (Cap.71).***

Mr. Tumusiime further submitted that had the plaintiff waited for judgment in ***HCCS No. 621 of 2006;*** and upon its decision court ordered for the caveat to be vacated and it was not, probably the plaintiff could have a cause of action. That since that was not the case, it would mean that as at the date of filing the instant suit the plaintiff had no cause of action at all because the suit was barred by *res judicata*. Counsel prayed that the plaint be struck out and the suit dismissed with costs to the defendant.

In reply Mr. A. Bagayi, Counsel for the plaintiff, submitted that the plaintiff's cause of action is based on the unlawful lodgment of a caveat, which is actionable both under statute and at common law. That under ***Section 142 of the Registration of Titles Act (Cap.230)*** an aggrieved party on whose land a caveat has been placed without reasonable cause is entitled to sue for its removal.

Counsel further submitted that ***HCMA 660 of 2007*** was filed by the defendant herein for attachment before judgment, and that court found that the plaintiff was an equitable owner of the suit land having purchased the same under foreclosure by the bank. Mr.Bagayi argued that in the affidavit in support of the caveat dated on 19.01.2007, the justification for lodging the caveat was that Siraje Kasumbakali *(the Respondent in **HCMA 660 of 2007***) fraudulently submitted another security of Plot 811 and that it was

when he defaulted to pay that the bank then realised that another property had been mortgaged instead of Plot 440. Counsel argued that even after realising this, the bank went ahead and sold Plot 881 which was not supposed to be mortgaged to them.

Mr. Bagayi pointed out that in ***HCCs No. 621 of 2006*** against Siraje Kasumbakali, the bank sued for the unrecovered balance because when they sold Plot 811 they only recovered UGX43 million leaving a balance of UGX 86 million. Counsel argued that in said suit the bank did not allege fraud but simply wanted the recovery of the balance of UGX86 million.

Mr. Bagayi also submitted that in November, 2007, the court in ***HCMA 660 of 2007*** found that the plaintiff herein had an equitable interest in the suit land having purchased the same prior to the filing of the application. Mr. Bagayi argued that there was no way court was going to make an adverse finding that would affect the plaintiff's equitable interest without giving the plaintiff now a chance to be heard. Counsel submitted that it would have been prudent at the point for the bank to apply to join Habib Kagimu as co-defendant, but they did not do so.

Mr. Bagayi further submitted that on 11.11.2010 they wrote to the bank advising that the caveat should be vacated because the outcome of ***HCCS No. 621 of 2006*** would have no bearing, but that as at November, 2010, the caveat had been in place for three years. Mr. Bagayi maintained that the gist of the plaintiff's case is that the caveat has prevented his client from utilising the suit land and that as a result he has suffered loss for which the defendant is liable. There are essentially two main issues for resolution to wit;

1. ***Whether the plaintiff's suit is res judicata.***
2. ***If so, what are the remedies available to the parties?***

Resolution of the issues:

Issue No.1: Whether the plaintiff's suit is res judicata.

The doctrine of *res judicata* derives from the Latin maxim *"res judicata pro veritate accipitur*", which literally means that "a thing (or matter) adjudicated upon is received or accepted as the truth". The spirit of the maxim is substantively encapsulated in ***Section 7 of the Civil Procedure Act (supra)*** which provides as follows;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under which 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."***

Two basic maxims underpin the doctrine of *res judicata* i.e. *interest republicae ut finis litum;* which means that it concerns the state that there should be an end to law suits of litigation. The second one is; *nemo debet bis vexari pro una et eadem causa,* which means that no man should be harassed twice over the same cause.

Thus for the doctrine of *res judicata* to apply, the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. See: ***Karshe vs. Uganda Transport Company [1967] EA 774.*** Secondly, the former suit must have been between the same parties or between parties under whom they or any of them claim. See: ***Gokaldas Laxilidas Tana vs.Sr. Rose Mujurizi, HCCS No. 707 of 1987 [1990 -1991] KALR 21***. Thirdly, such parties must have been litigating under the same title in the former suit. Fourthly, the court trying the former suit must

have been a court competent to try the subsequent suit or a suit in which such issue is subsequently raised. See: ***Ismail Dabule vs. Wilson Osuna Otwanyi (1992) 1 KALR 23.*** Fifthly, such matter in issue in the subsequent suit must have been heard and finally decided in the first suit. In the case of ***Lt. David Kabareebe vs. Maj. Prossy Nalweyiso CACA No. 4 of 2003,*** the Court of Appeal went on to hold that *res judicata* simply means nothing more than that a person cannot be heard to say the same thing twice over in successive litigation.

In the instant case, the basis of the contention stems from paragraph 3 of the plaint in which the plaintiff avers that;

> ***"The plaintiff brings this suit for a declaratory order that the defendant has no interest at law in Plot 440 Block 269 land at Lubowa and for the recovery of general and punitive damages, for wrongful lodgment of a caveat."***

These particular averments in the plaint wholly and solely constitute the basis of the plaintiff's cause of action in the instant case. The subsequent paragraphs in the plaint simply bring out facts showing how the cause of action arose.

From the "receiving stamp" of the Court Registry, it is evident that the plaint was filed on 10.02. 2012; the filing fees having been paid the same day. For all intents and purpose, the instant suit is deemed to have been duly filed on that date. The question therefore becomes whether as at the date of the filing this suit the plaintiff had a cause action. This calls for the examination in paragraph 3 of the plaint to the effect that the defendant had no interest in the suit land and had wrongfully and unlawfully lodged a caveat on the suit land and maintained it thereon.

After carefully reading and fully appreciating the entire ruling in ***HCMA No. 660 of 2007,*** there is no doubt that the issue whether the defendant had interest in the suit land was adjudicated and pronounced upon by the court in the said ruling. Also put to rest was the issue whether the defendant lawfully lodged a caveat on the suit land and could maintain it thereon. These findings are apparent from the ruling, at page 26, where the court held as follows;

> ***"The Applicant's case is that had it not been for the fraud, the mortgage property is the suit land. The Applicant thereby claims an equitable interest in the suit land faulted by the alleged fraud. He has a right to safeguard against the fraudulent transaction affecting the land that would have been the security and thus in the preservation of its status in quo. <u>In the circumstances, pending the resolution of the issue of fraud, I find that the Applicant has a caveatable interest in the suit land</u>."*** *(Emphasis added).*

Worthy of note is that the ruling in ***HCMA 660 of 2007*** was delivered on 30.11.2007, and the issue of the caveat (at page 29) was specifically further addressed as follows;

> ***"…… Court has room to order a continuation of the caveat under sub-section 3 subject to the Applicant furnishing security or paying into court such amount of money and within such further period as the court may order."***

The court then ordered the Commissioner for Land Registration not to remove the caveat of the defendant on the suit land pending the determination of ***HCCS No. 621 of 2006***.

It follows that the instant suit filed on 10.02.2012 subsequent to the ruling above is caught up by the doctrine of *res judicata*. The cause of action was premised on the facts in paragraph 3 of the plaint that the defendant had no caveatable interest at law and

wrongfully lodged the caveat on the suit land. These are the very same issues that court adjudicated and pronounced itself upon in the ruling in ***HCMA 660 of 2007*** which was delivered earlier on 30.11.2007.

As at the time the plaintiff filed the instant suit on 10.02.2012, he was fully aware of the implications of the ruling in ***HCMA 660 of 2012*** which were, inter alia, that the defendant had a caveatable interest, and that he should maintain his caveat on the suit land. In a strict legal sense therefore, the plaintiff herein could not be heard to litigate upon the matter directly and substantially in issue in the subsequent suit which was directly and substantially in issue in the former suit.

My findings above are further buttressed by the averments In paragraph 4(j) of the plaint in which the plaintiff clearly demonstrates that he was aware of the ruling in ***HCMA No. 660 of 2007*** to the effect that the defendant had "caveatable interest" and that the caveat be maintained on the suit land pending determination of the main suit ***HCCS 621 of 2006.***

Therefore, the instant suit filed subsequently on 10.02.2012 premising the cause of action on the fact that the defendant had no caveatable interest is *res judicata*. It is immaterial that the *status quo* could have changed after the judgment in ***HCCS No. 621 of 2006*** was delivered. What is of essence in a cause of action is the existing state of facts existing at or prior to the time of the institution of the suit giving rise to a right, and not in the *status quo ante.* This is underpinned by the essential elements of a cause of action where the plaintiff is required to show that he or she enjoyed a right, the right has been violated, and the defendant is liable. See: ***Auto Garage vs. Motokov [1971] EA 314***.

There must be prior existence of facts in order to give rise to a cause of action, and not the reverse. A plaintiff cannot lawfully plead facts in anticipation of a cause of action arising at some future occasssion. This is the reason that courts look only at the existing facts plainly appearing on the pleadings and attachments, if any, to determine whether there is a cause of action and nowhere else. See: ***Kapeeka Coffee Works Ltd. & An'or. vs. Non Performing Assets Recovery Trust CACA No. 03 of 2000.***

Order 7 r.11 (d) of the Civil Procedure Rules (supra) provides that where a suit appears from the statement in the plaint to be barred by <u>any law</u> it shall be rejected. The plaint in the instant suit is barred by the doctrine of *res judicata,* and thus discloses no cause of action against the defendant. The suit is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

22/10/2015

Mr. Enos Tumusiime, Counsel for the Defendant present.

Mr. A. Bagayi, Counsel for the Plaintiff present.

Ms. Clare Akampurira, Legal & Compliance Manager of the Defendant present.

Mr. Godfrey Tumwikirize, Court Clerk present

Ms. Nansera Hasipher, Court Transcriber present

Court: Ruling read in open Court.

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JUDGE

22/10/2015