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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

MISC. APPLICATION NO. 393 of 2020

(ARISING OUT OF CIVIL SUIT NO. 296 of 2020)

10

TULLOW UGANDA LIMITED

TULLOW UGANDA OPERATIONS PTY LTD

} **APPLICANTS**

VERSUS

JACKSON WABYONA RESPONDENT

15


BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

RULING

a. Background:

This application was brought by notice of motion under sections 6, 7 and 98
20 of the Civil Procedure Act, Order 6 Rule 30, Order 7 Rule 11 (a) and Order 52
Rules 1 and 3 of the Civil Procedure Rules seeking orders that;

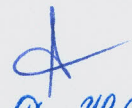
- i. The Plaintiff in *Civil Suit No. 296 of 2020, Jackson Wabyona vs Tullow Uganda Limited, Tullow Uganda Operations Pty Limited and Others* be struck out/rejected, as against the Applicant for not disclosing a
25 cause of action and/or being barred by law
- ii. Costs of the application be provided for


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5 The grounds of the application, as set out in the affidavit of Mrs. Mariam
Nampeera Mbowa include that;

1. On the 15th May 2020, the Respondent filed *Civil Suit No. 296/2020 Jackson Wabyona vs the Attorney General And 6 Other Defendants* which suit seeks to impugn/ invalidate the Settlement Deed executed
10 on 18th June 2015 amongst the Applicants, Uganda Revenue Authority (URA) and the Government of Uganda
2. The Respondent was not party to or otherwise privy to the Settlement Deed and founds his *locus standi* under the 'public interest suit' exception relating to the 'duties of a citizen' set out in Article 17 of the
15 Constitution of the Republic of Uganda
3. The Respondent's pleaded case, set out in paragraph 10 of the plaint is that his cause of action is founded on his 'constitutional duty...to protect and preserve public property, combat corruption and misuse or wastage of public property, and expose or combat corruption and abuse
20 of power by those holding political and public offices'
4. The Respondent's case is accordingly squarely based on the allegation of corruption and the consequential loss/ wastage of public property but the Respondent does not meet the *locus standi* threshold for the exercise by Court of its judicial discretion to permit a public interest
25 suit pursuant to Article 17 of the Constitution.

In the affidavit in support of the motion, Mrs. Mariam Nampeera Mbowa, the Country Manager of both Applicants depones that the *locus standi* threshold for exercise by the Court of its judicial discretion to permit a '**public interest**


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5 **suit'** pursuant to Article of 17 of the Constitution of Uganda is well established by case law and the Respondent failed to meet it because;

- i. The plaint does not contrary to the mandatory provisions of Order 6 rule 3 of the Civil Procedure Rules particularize the allegations of corruption said to be the basis of the Settlement Deed
- 10 ii. The plaint does not disclose the high constitutional principle that is sought to uphold the suit *locus standi* principle

Mrs. Mariam Nampeera Mbowa also averred that the plaint does not disclose any prior steps taken by the Respondent to protect and preserve the public property in question and that the said plaint did not aver to those steps as
15 having not borne fruit in order to establish that there was need for the Court intervention as a last resort. Furthermore, Mrs. Mariam Nampeera Mbowa averred that the Settlement Deed referred to by Mr Wabyona can only be varied through an appeal or through an application for judicial review and additionally Mrs. Mariam Nampeera Mbowa averred that the suit is barred for
20 being *lis pendens* since the matters in issue are directly and substantially in issue in a previously instituted suit. Mrs. Mariam Nampeera Mbowa thus prayed that this application be allowed.

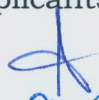
The respondent, Mr. Wabyona Jackson deponed in his affidavit in reply that HCCS NO. 296 of 2020 is one of a public interest suit which was filed in
25 exercise of his duty as a citizen of Uganda under Article 8 A and 17(i) of the Constitution and that he has a duty under those articles to defend, protect, promote, preserve and uphold the rule of law, good governance, accountability and transparency in the conduct of public affairs in Uganda as well as to

5 expose, combat and eradicate corruption, abuse and misuse of power in
public offices and to protect and preserve public property.

Mr. Wabyona Jackson further pointed out in his affidavit that his grievances
were based on six reasons of;

- 10 a) The impugned Settlement Deed was arbitrarily and illegally signed
by public officials without authority and mandate and in breach of
the law
- b) The Settlement Deed compromised the tax liability by reducing the
taxes payable to the Consolidated Fund from USD 542,793,821 to
USD 250,000,000
- 15 c) As a result of the compromise the taxes payable to the Consolidated
Fund and Petroleum Fund were written off.
- d) Article 152 (2) of the Constitution and section 35 of the Public
Finance Management Act, 2015 which laws relate to waiver of taxes
or public resources were not complied with and as such the
20 Settlement Deed was illegal and a nullity
- e) The rule of law coupled with the principles of good governance,
accountability and transparency were infringed and violated
- f) Since the Minister did not seek the approval of Parliament, there was
lack of transparency and accountability

25 Furthermore, Mr. Wabyona Jackson averred that the suit raises matters of
public interest and national importance since it raises allegations of fraud and
corruption which require determination by this court as to whether or not the
waiver by URA of taxable amounts payable by the Applicants complied with


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5 the law in additionally to averring that these issues bring into question whether there was infringement of the rule of law, good governance, accountability and transparency principles and thus raising issues relating to misuse of power and corruption by people in public offices as well as connivance with multi-national companies.

10 Additionally , Mr. Wabyona deposes that the suit HCCS No. 296 of 2020 raises various questions relating to whether the Defendants acted within the law and whether the execution of the settlement deed was within the mandate of the Government of Uganda and the URA when it turned a tax liability into a compromise and waiver resulting in the 3rd and 4th Defendants together with
15 the 1st, 2nd, 5th, 6th and 7th Defendants in HCCS No. 296 of 2020 causing loss to the Consolidated Fund by waiving tax liability without the approval of Parliament as provided for under Article 152 (2) of the Constitution and section 25 of the Public Finance Management Act, 2015 which action should be found arbitrary and illegal for it caused a total loss of the tax of USD
20 1,122,929,097 with the Applicants committing transactional legal malpractice by misadvising their clients to contravene the laws of Uganda.

Again, Mr. Wabyona Jackson deposed that HCMA NO. 197 of 2017 is an application for review seeks for a declaration that the Settlement Deed executed on 18th June 2015 was illegal, void and a nullity and deals with a
25 decree that settled Civil Appeal No.19 of 2014 while HCCS No. 296 of 2020 deals with the illegality in the execution of the Settlement Deed executed on 18th June 2015 which latter issue has not been tried directly and substantially in any court with the reliefs sought in HCMA NO. 197 of 2017 being very

5 different from those sought in HCCS No. 296 of 2020. Therefore he prayed
that this court dismiss this application.

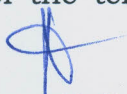
b. Submissions:

i. Applicants:

In their submissions learned counsels for the parties submitted as follows.

10 Learned counsel for the Applicant raised three issues including that the main
suit was *res judicata* in light of the subsisting decree/order dated 19th June
2015 in *High Court Civil Appeal No.19 of 2014 (arising out of TAT Application
No. 4 of 2011) Tullow vs URA* , that the plaint and main suit be rejected for
15 failure to disclose a cause of action and alternatively that the main suit and
any interlocutory applications there under should be stayed on the basis that
there is subsisting an application of 2017 for review which renders any
proceedings on any aspect of the main suit to be barred by the *lis alibi
pendens* rule.


To support of the above contention the Applicant's counsel submitted that the
20 main suit of HCCS No. 296 of 2020 was *res judicata* in light of the subsisting
decree/order dated 19th June 2015 in High Court Civil Appeal No.19 of 2014
(arising out of Tax Appeal Tribunal Application No. 4 of 2011) Tullow vs URA
as the matters in issue in the instant matter were directly and substantially
same as those from Tullow's tax liability arising from the Tullow's acts of farm
25 down of it interests in addition to same tax liability being in issue in High
Court Civil Appeal No. 19 of 2014 which was an appeal against a ruling of the
Tax Appeal Tribunal which appeal was disposed of by a decree/ order issued
by this court leaving the said decree to be the basis of the terms of the


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5 Settlement Deed which the instant head suit HCCS No. 296 of 2020 again
seeks to re-open afresh yet the said matters had been closed by the appeal
making the instant suit to contravene the provisions of section 7 of the Civil
Procedure Act as it is *res judicata* .

Alternatively counsel for the applicant submitted that the head suit and any
10 interlocutory applications there under ought to be stayed on the basis that
since there is subsisting an application for filed by the Respondent seeking
to have reviewed and set aside the Decree / Order dated 19th June 2015 in
Civil Appeal No. 19 of 2014 Tullow vs URA which review suit has not been
disposed of and is still pending adjudication and since the matters in issue in
15 HCCS No. 296 of 2020 are also directly and substantially in issue in the review
application then the head suit of HCCS No. 296 of 2020 fall short of the
provisions of section 6 of the Civil Procedure Act as it *lis pendens*.

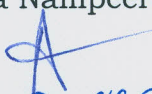
Further Counsel for the Applicant submitted that since the Respondent
alleges that the Uganda Revenue Authority and/or the government acted *ultra*
20 *vires* their powers then the proper course for the respondent would by way of
the respondent applying for a judicial review which meets the threshold for a
cause of action under Article 17 of the Constitution of Uganda as set out in
Misc. Application No. 394/395 of 2004 Kikungwe Issa & 4 Others vs Standard
Bank Investment Corporation & 3 Others and *HCCS No. 248 of 2012 Hon. Abdu*
25 *Katuntu and Another vs MTN Uganda Ltd and 6 Others* but that since the
plaint does not show the particularized or substantiated allegations of fraud
or corruption as required under law which is a fundamental defect, then the
head suit should be rejected and dismissed accordingly.


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5 **ii. Respondent:**

In reply to the Applicants' submissions, learned counsel for the Respondent submitted that acts of corruption and fraud existed in the execution of the Settlement Deed as this was evident from the false assumption of authority and mandate by the signatories of the Settlement Deed and that fraud was
10 evident as could be seen from the turn-about by the Uganda Revenue Authority from its earlier held position in addition to it (URA) not having the mandate to waive taxes without the approval of the Parliament arguing that all causes of action were readily seen since they were particularized as well as the acts of corruption and fraud, illegality which contravened Article 152 (2)
15 of the Constitution and section 35 of the Public Finance Management Act, 2015 in addition to violating the principles of the rule of law, good governance, accountability and transparency and should be nullified due lack of consideration, corruption and fraud in the execution of the settlement deed, legitimate expectation to collect taxes as assessed without compromise and
20 preferential treatment of the Applicants to be found discriminatory as against the respondent and the Uganda tax payers as a whole thus constituting the ingredients of causes of action as disclosed in the plaint which the court should not look beyond thus satisfying the principles as set out in the case of ***Auto Garage vs Motokov***.

25 Counsel for the Respondent further submitted that the head suit did not involve 'a high constitutional principle' as the same was already established in paragraph 26 read together with paragraphs 4, 9 and 16 of the respondent's affidavit in reply to the affidavit of Mrs. Mariam Mbowa Nampeera in support


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5 of the application clearly showing that the Respondent as a member of the
public had the right to come to court to ensure that the law is enforced or
upheld demonstrating sufficient interest in the instant matter thus proving
that all the questions raised in HCCS No. 296 of 2020 were of public interest.
Finally, learned Counsel for the Respondent submitted that HCCS No. 296 of
10 2020 makes a different claim and was seeking different reliefs from HCMA No.
137 of 2017 and therefore does not offend the rule of *lis alibi pendens* and so
the court should find that the said suit was proper before it and should thus
be allowed to proceed accordingly upon dismissal of this application.

c. Decision

15 In making this ruling, I have considered the submissions of both parties. In
regard as to whether HCCS NO. 296 of 2020 *is res judicata* Section 7 of the
Civil Procedure Act provides that;

20 ***'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 a 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 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'***

25 The question thus for determination is whether the matters in issue in HCCS
No. 296 of 2020 were directly and substantially in issue in Civil Appeal No. 19
of 2014. I have carefully studied the contents of the decree in **TAT NO. 4 OF**


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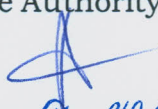
5 **2011 Tullow Uganda and Another vs Uganda Revenue Authority** as well
as the decree in **High Court Civil Appeal No. 19 of 2014** between the same
parties, I note that the Decree in HCCA No. 19 of 2014 pertains to the tax
liability of the Applicants in respect of the farm downs, imposed by Uganda
Revenue Authority which was consented to by the parties therein to an
10 amount of USD 250,000,000.

On the other hand the plaint in HCCS No. 296 of 2020 asserts that the 1st,
2nd, 3rd and 4th Defendants caused financial loss in the form of unpaid taxes,
due to Consolidated Fund with further seeking of declarations that the
Settlement Deed was illegal, null and void and breaches the principles of
15 accountability occasioning financial loss in form of uncollected taxes as seen
from paragraphs 9 and 10 of the plaint.

Furthermore, in paragraph 31 the Plaintiff thereof prays for an order to quash
and expunge the Settlement Deed, the collection and assessment of the
monetary loss occasioned to the Consolidated Fund as ordered by the Tax
20 Appeals Tribunal and or an order attaching a lien on the farm downs.

My perusal of HCCS No. 296 of 2020 shows that the facts in the instant suit
are similar to the facts in which similarly raises issues of tax liability of the
Applicants and seeks the re-assessment of the tax liability on the Applicants
arising from the farm downs. These same matters were in issue and were
25 raised substantially HCCA No. 19 of 2014, heard and finally decided by the
Court in that suit with the court issuing a consent order/ decree. Equally of
note is that even the same parties litigated under the same title in the former
suit and are the same herein and the Uganda Revenue Authority was litigating

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5 *bona fide* in respect of a public right and the Respondent was bound by that right and cannot subsequently institute a separate suit regarding the same issues I would make finding that the HCCS No. 296 of 2020 is *res judicata*.

In regard to whether the main suit barred by the *lis alibi pendens* rule Section 6 of the Civil Procedure Rules provides for this scenario and it states that ‘no
10 *court shall proceed with any suit or proceeding in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings 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*
15 *claimed...*”

In paragraph 3 of the affidavit in support of the notice of motion in HCMA No. 137 of 2017 as well as paragraph 10 of the plaint in HCCS No. 296 of 2020, the respondent herein refers to and bases his action on his interest as a citizen of Uganda who is duty bound to protect and preserve public property.

20 I further note that a Settlement Deed that was executed on 18th June 2015 is again the subject matter of challenge in HCCS No. 296 of 2020 which the respondent herein seeks to have reviewed and set aside yet these same issues arose from HCMA No. 137 of 2017 from which a consent order/ decree was extracted therefrom on 19th June 2015. Specifically, while HCMA No. 137 of
25 2017 seeks to set aside the consent decree / order, HCCS No. 296 of 2020 similarly seeks to set aside the Settlement Deed from which the earlier mentioned consent order was derived. More importantly, I note that both matters contain claims of corruption and fraud and the seek for re-

5 assessment of the tax liability of the Applicants as evidenced in paragraphs
6, 8, 10 of the affidavit in support of the notice of motion in HCMA No. 137 of
2017 and paragraphs 10 (b), 17 of the plaint with paragraphs 11, 12, 16, 20,
of the same also mentioning tax waiver which led to loss of taxes due and
payable to the consolidated fund. These issues are similarly mentioned in
10 paragraph 10, 11 of the instant plaint thus goes on to show that the instant
matter is one and the same with matters which have already been handled or
are substantially issues in another matter pending before this court therefore
meeting the requirements of the *lis alibi pendens* in spite of the fact that one
action had three parties while the other constituted seven. I find those
15 differentiation to be material, rather what is of importance is the similarity
and substantiality of the issues in both matters which is that both suits bring
into contention the issue of waiver of taxes and the alleged corrupt, illegal and
fraudulent acts of the Applicants and the Uganda Revenue Authority which
the respondent states resulted in the loss of taxes estimated over USD
20 460,000,000 making me not to buy the Respondent's submission that the
reliefs sought in HCCS No. 296 of 2020 are different from those sought in
HCMA No. 137 of 2017 for the test in cases of this nature is as to whether the
parties in the previous suit are directly or substantially the same as in the
subsequent suit. I would conclude that the said test apply to the matter before
25 me thus making HCCS No. 296 of 2020 to breaches the *lis pendens* rule.
Therefore, since HCMA No. 137 of 2017 has not yet been disposed of and is
still pending adjudication before this Court, HCCS No. 296 of 2020 will
automatically stand stayed pending the completion of the former suit. I do so
find accordingly.



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- 5 On whether the plaint should be struck out for failure to disclose a cause of
action, I would rely on **Hon. Abdu Katuntu and Another vs MTN Uganda
and 6 Others HCCS No. 248 of 2012**, the learned justice, agreeing with the
decision in **Kikungwe Issa and Others vs Standard Bank Investment
Corporation and Others HCMA No. 0394/2004** highlighted the following as
10 the parameters for considering whether or on a plaintiff has *locus standi*;
- Granting of *locus standi* is an exercise of judicial discretion
 - The Plaintiff must demonstrate that he is a citizen of Uganda. The
Plaintiff must also demonstrate that he or she sufficient interest and
that he is not just a mere busy body
 - 15 - The issue raised for decision are sufficiently grave and of sufficient
public importance
 - Lastly the Applicant should demonstrate that the issues brought for
consideration of the court involve a matter of a 'High Constitutional
principle'.
 - 20 - The Applicant must also demonstrate what steps he has taken to
protect and preserve the public property in question and that the steps
did not lead to a remedy.

Taking into account both parties' submissions on the above cases and
authorities and going by the parameters above it is my considered opinion
25 that the Respondent needed to exhaust other remedies before filing an
ordinary suit. His does not, however, demonstrate that he had exhausted
other remedies, including through instituting an application for review and
failed. Therefore, given the respondent's averments in paragraph 12 (a) of his


5 plaint in the head suit, I find that the plaint in HCCS No. 296 of 2020 to be premature leaving the Applicant to have no *locus standi* before this court.

I now turn to the question whether the plaint discloses a cause of action and whether fraud and corruption were pleaded as per the legal requirements in such cases. I note that the plaint in HCCS No. 296 of 2020 refers to acts of
10 corruption and fraud in addition to other causes of action. However, paragraph 17 of the plaint which pleads corruption and fraud does not itself not particularise or itemise these as was the holding of court in set out in cases such as **Mayanja Hussein vs Mubiru Christopher Civil Suit No. 0129 of 2010**, and **Fredrick JK Zaabwe vs Orient Bank and 5 Others SCCA No.**
15 **4/2006** leaving me to conclude that the plaint in HCCS No. 296 of 2020 does not disclose a cause of action in respect of corruption and fraud as alleged by the Plaintiff therein.

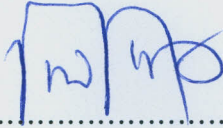
d. Orders:

Therefore, this court having found as above find that the Applicant has
20 satisfied this court on all the grounds in its application and I would thus make the following orders and declarations;

- a) This application is allowed.
- b) The Plaint in **High Court Civil Suit No. 296 of 2020 of Jackson Wabyona vs Tullow Uganda Limited, Tullow Uganda Operations Pty**
25 **Limited and Others** is hereby struck out as against the Applicant for not disclosing any cause of action and is barred in law as it offends the *lis pendens* rule since there is pending HCMA No. 137 of 2017 which is yet been disposed of.


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5 c) This application is allowed with costs to the Applicant.



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JUDGE

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14TH JULY 2020