IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT O F UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0375-2009

1. **SHUMUK SPRINGS DEVELOPMENT LTD}**
2. **SPRINGS INTERNATIONAL HOTEL LTD} …… PLAINTIFFS**
3. **SHUMUK FINANCIAL SERVICES }**
4. **MUKESH SHUKLA }**

VERSUS

1. **BONNEY MWEBESA KATATUMBA }**
2. **VIRANI BAHADUKADI }**
3. **JOSEPH SEMPEBWA }**
4. **PETER LULE } …… DEFENDANTS**
5. **TECTON GROUP }**
6. **ARVIND PATEL }**
7. **REGISTRAR OF TITLES }**

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

The Plaintiff's action against the Defendants is for a permanent injunction prohibiting the sale, transfer or any other dealings with the property disclosed in the plaint; a declaration that the third Defendant's purchase agreement is null and void; general damages and costs of the suit. The permanent injunction is to forbid the sale and transfer or dealing with the property comprised in plot 2 Colville Street units leasehold register volumes 3605/4 unit 52, 3605/5 unit 53, LRV 3605/6 unit 54, LRV 36054/7 unit 55, LRV 3605/8 unit 56, LRV 36054/9 unit 57, LRV 3605/10 unit 58, LRV 3605/11 unit 59, LRV 3605/12 unit 60, held by Peter Lule; LRV 3604/16 unit 1, LRV 3605/13 unit 63, LRV 3605/19 unit 69, LRV 360 5217 unit 71, LRV 3605/25 unit 75, LRV 3606/2 unit 77, LRV 3606/3 unit 78, LRV

3606/24 unit 79, LRV 3606/8 unit 80, LRV 3606/23 unit 98, LRV 3606/24 unit 99, LRV 3606/25 unit 100, LRV 3607/1 unit 101, or held by the second defendant. Also LRV 3606/8 unit 83, LRV 3606/9 unit 84, LRV 3606/19 unit 94, LRV 3606/20 unit 95 held by the 5th defendant; LRV 3606/1 unit 76, held by the 6th defendant; and LRV 3605/4 unit 52, LRV 36054/5 unit 53, LRV 3605/6 unit 54, LRV 3605/7 unit 55, LRV 3605/8 unit 56, LRV 3605/9 unit 57, LRV 3605/10 unit 58, LRV 3605/11 unit 59, LRV 3605/12 unit 60, held by the 4th defendant; in a manner which would defeat the plaintiffs contingent interests therein.

On 15 March 2012 when the matter came for preliminary hearing, learned counsel Augustine Kibuuka Musoke, represented the Plaintiffs. The first Defendant was represented by learned counsel Benson Tusasirwe, learned Counsel Masembe Kanyerezi represented the 2nd, 3rd, 5th and 6th defendants and was on holding brief for learned counsel Mubiru Kalenge counsel for the 4th Defendant while the 7th Defendant was not represented and was not in court.

Learned counsel for the first Defendant sought leave to argue a preliminary objection to the suit.

The objection is that the suit offends the *lis pendens* rule under section 6 of the Civil Procedure Act but goes beyond that to other objections that there is misjoinder of plaintiffs. Thirdly, that the plaint discloses no cause of action against the 1st Defendant and other Defendants. The 1st plaintiff's action is that the contract collapsed for fundamental breach so there was never a sale by the 1st defendant and no amendment can cure that problem because it relies on the rescinded contract. It will have to file a new suit with new parties. Learned Counsel Masembe additionally informed Court that in relation to the 2nd, 3rd 4th, Defendants the contracts being sued upon are between one of the plaintiffs and the 1st Defendant and there is no cause of action against the other Defendants. He submitted that this could dispose of the suit. Though the learned counsel for the plaintiff intimated that he applied to amend the plaint, court agreed that the Preliminary Objection be argued first under order 6 rules 28 and 30 and Order 15 rules 2 of the CPR.

Submissions on the preliminary objection

Learned Counsel Benson Tusasirwe, counsel for the 1st Defendant submitted that the Plaintiffs suit offends provisions of a fundamental principle of law; the *lis pendens* rule which is to the effect that a court will not hear matters where issues are similar to another case pending hearing between the parties before another court of competent jurisdiction under section 6 of the Civil Procedure Act.

The plaint in this suit, paragraphs 7 (iv) (v) (vi) and (xix) (xx) (xxi) refer to HCCS No.126 of 2009. The 1st defendant has prepared a bundle of documents with the pleadings in that suit. Civil Suit 126 of 2009 was filed on 9th April 2009. The plaint in the suit concedes that the suit exits. This plaint was filed on 8th October 2009 after that in HCCS No.126 of 2009. The current Plaintiffs in this suit were the Defendants in Civil Suit 126 of 2009. On 5th June, 2009, those Defendants filed a Written Statement of defence and a counter claim. In the instant suit, the Plaintiffs seek general damages, an injunction on condominium property in Colville Street. The plaintiffs are stated to be the true owners of the property in Plot 2 Colville Street, based on assertion that they bought it from 1st Defendant by an agreement dated 16th August 2008. In Par 7 (i) Par 7 (iv) (v) (vi), pendency of Civil Suit 126 2009 is admitted but they do not tell court of the counter claim.

Learned Counsel referred to the counterclaim at page 12 of the trial bundle. In the counterclaim, the Plaintiffs in the current suit state that the 1st Defendant sold the property and all condominiums at Colville Street for 5 million dollars. The defendants (now plaintiffs) refer to a schedule of creditors including the current 2nd to 6th Defendants.

The current plaint refers to the schedules in paragraph 7 (ix). In the counter claim at page 4 the defendants now plaintiffs rely on same agreement of 16th August 2008 and allege breach of the agreement and that it was vitiated by fraudulent misrepresentation. Referring to the pleadings learned Counsel submitted that in the earlier suit, the plaintiffs acknowledged that the 1st Defendant sold these condominiums to the creditors. They also state that they rescinded the contract of purchase for misrepresentation and they entered into a new agreement to sell the properties to the current 2nd Defendant for 4 million dollars. The prayers in paragraph 20 of the counter claim show that the plaintiffs in the current suit seek

a declaration that the sale agreement of 16th August 2008 was rescinded for fraudulent misrepresentation. Surprisingly in (b) they seek for an order to deliver the property under a contract they rescinded. They also seek special damages for lost revenue and general damages for breach of contract.

In the current suit the plaintiffs are the very parties in civil suit 126 of 2009. The counter claimants in that suit claim to be owners of Plot 2 Colville Street on the same agreement of 16th August 2008. The basis of claim in the current suit is the same as civil suit 126 of 2009. They seek a permanent injunction to prevent dealing with property on Colville Street, a declaration that the sale is null and void, general damages, and the same prayers.

As against the 1st plaintiff, the issues would be the same to determine whether there was a valid sale. The consequences would be the same as those of the earlier suit. Even to determine the issue of whether the plaintiffs are entitled to an injunction you have to determine the validity of sale, whether the 1st defendant was a bona fide purchaser, the very issues in the other suit.

The above not only offend section 6 of the CPA but are an example that the suit is vexatious. Learned Counsel further submitted that Paragraph 7 (xix) of the suit states that the plaintiffs are at risk of losing the remaining 27 units if the scheduled creditors are not prevented. This suit is therefore seeking an injunction in the earlier suit. The link between the 2 suits is known to the plaintiffs in both suits so counsel contended that it is vexatious of them to seek interim reliefs in this suit, for another suit.

Counsel further submitted that under section 6 of the Civil Procedure Act the remedy is stay of this suit but there are other problems with the suit that necessitate striking it out.

There is incurable misjoinder

It does not disclose a cause of action against all defendants especially the 1st defendant

On misjoinder learned counsel relied on order O. 1 r 1 of the CPR and contended that there are 4 plaintiffs Shumuk Springs, International hotel, Shumuk Financial services and Mukesh Shukla. The 2nd and 3rd plaintiffs are Limited liability Companies. The 4th plaintiff is a Director of the 1st three plaintiffs. There is absolutely no connection between the 3rd and 4th plaintiffs. The suit is between the 1st plaintiff and the first defendants. The question is why the 2nd and 4th plaintiffs were joined, what rights did they have to be joined, since none of the reliefs is against them? What separate suit would the 2nd and 3rd and 4th plaintiffs have brought on 2nd to 4th defendant? The plant does not disclose any claim.

The 4th plaintiff is a director and a company is a separate legal entity. So the 4th plaintiff had no interest in the suit. The cases are many on the separateness of a Director a company. Learned Counsel relied on the case of Macaura V. Northern Assurance Co. [1925] AC 619 to demonstrate the distinctiveness between a director and a company. He submitted that the contract of the 3rd and 4th plaintiff is not that of the 4th plaintiff. The 2nd 3rd and 4th plaintiffs were redundant in this suit and their misjoinder is incurable. The remedy under O. 25 of the CPR is for the plaintiffs to withdraw the suit and pay costs of the suit to the defendant.

Thirdly learned counsel submitted that as far as the 1st plaintiff is concerned, this plaint ought to be rejected under order 7 rule 11 (e) of the CPR for failure to disclose a cause of action. Alternatively is should be struck out or dismissed under Order 6 rules 30 of the CPR.

Counsel submitted that under order 6 rules 30 CPR, the defence has shown that the suit is vexatious for being an application for interim orders in an earlier suit before this court. Learned counsel submitted that his preference was for the court to apply order 6 rule 30 CPR as the appropriate rule. Under this rule the suit should be dismissed and not stayed. The other ground of objection is found under paragraph 7 (i) of the plaint. In par 7 (i) the plaintiff relies on an agreement of 16th August 2008 to found his claim. In paragraph 7 (ii) it is pleaded that 1st defendant fundamentally breached the said agreement and consequently the 1st plaintiff rescinded it. Counsel contended that if the 1st plaintiff rescinded the only agreement mentioned in the plaint, how did it acquire rights to seek orders on

the property? By pleading that the 1st plaintiff rescinded the agreement, the 1st plaintiff loses the right to seek possession of the property and the remedies prayed for. At best it could seek damages for breach. But it has already sought damages in another suit. Also the suit against the 2nd – 6th defendants fail because if they rescinded, the plaintiffs cannot seek remedies against them thus the suit discloses no cause of action and cannot be cured by amendment.

In establishing whether a plaint discloses a cause of action or not the court examines the pleadings as they are and the agreement was rescinded. There cannot be a cause of action against 2nd, 3rd and 6th defendants because their rights were known to the 2nd plaintiff. So is not conceivable that the plaintiff could get an order to remove bona fide purchasers. The plaint does not disclose the right they have against other defendants. Privity of contract comes in. It is not stated that the 2nd to 6th defendants were party to the agreement.

Learned Counsel concluded that the plaintiff's suit violates the *lis pendens* rule and in a manner in which the nature of this suit makes it frivolous and vexations. Though section 6 of the CPA provides for a stay, under order 6 rules 30 the court can strike out the suit on the ground of being frivolous, vexatious and not disclosing a reasonable cause of action. He prayed that the suit is struck out with costs.

Learned Counsel Masembe Kanyerezi associated himself with the submissions of the first defendant's Counsel. As stated the agreement, the basis of the suit is between the 1st plaintiff and 1st defendant. Although not annexed to the plaint there is another agreement of 10th November 2008 between the 2nd plaintiff and the 1st defendant. The point is neither the agreement the basis of the suit nor the subsequent on relates to parties other than the 1st Defendant.

There is no agreement between the 1st or 2nd plaintiff and 2nd to 6th defendants. This suit seeks to enforce actual rights under a sale agreement but under privity of contract doctrine there is no relation with parties not party to the agreement. There is no cause of action against the 2nd to 6th defendant. When one looks at both agreements, the 2nd and 4th, 5th and 6th defendants are mentioned in 1st agreement as alleged creditors. The 2nd agreement is in respect of specific

condominium units. It shows that there are 27 condominiums. 13 were taken by Virani, 9 by the Peter Lule, 1 by Arvind Patel

Counsel contended that for someone to try to enforce a right to property without a sale agreement between him and the owners is not how commerce works. Unless some is willing to sell one cannot buy from that someone however much money you may have to pay. The purpose of this suit is that there is another suit and they stated therein that Shumuk is likely to lose the condominium if the earlier suit is not concluded. There is no cause of action against the 2nd, 3rd, 4th and 6th defendant.

On the applicable law learned counsel submitted that the relevant order is Order 6 rule 30 of the CPR. In this case no measure of amendment can allow anyone to come up with a new contract or make anyone a party to a contract they are not party to. Learned Counsel contended that this is a case which counsel should not be allowed to file before a court given the fact that there is not contract between the plaintiff and the 2nd to 6th defendant.

Learned Counsel submitted that there are counter claims in this suit. In spite of the injunction having failed the plaintiffs have succeeded in keeping possession of the 13 units and of – 2 units of Lule and 1 of the Patel they have failed to get back these units despite several efforts. There is a counter claims seeking to get back the possession. He prayed that the suit should be dismissed against the 1st to 6th Defendants.

In reply learned Counsel Augustine Kibuuka – Musoke prayed that the court should dismiss the objections because they lack merit.

Lis Pendens Rule: Learned Plaintiffs Counsel submitted that this rule applied where the subject matter or parties are similar but he contended that the Parties in present suit are different from the earlier suit. In the earlier suit, the defendants were the plaintiffs in this case, the other defendants were not in that suit and this distinguishes the two cases so that the lis pendens rule is inapplicable.

Learned plaintiff's Counsel contended that in the earlier suit there was a counterclaim mentioning an agreement between the 1st plaintiff and 2nd plaintiff with the 1st defendant. In that counter claim, there was an agreement that described another agreement. He submitted that obviously courts do not entertain theoretical situations but arbitrate disputes. If the counter claim discloses an issue between the 1st and 2nd plaintiff and 1st defendant that issue must be resolved. The important point is that there is a dispute and not the annexure.

Counsel further contended that the question of misjoinder cannot be raised at this stage. The claim in the plaint is distinctly for a permanent injunction. Issues of plaintiffs as owners are presupposed. If ownership is denied by the defendants, those are matters that require evidence. After looking at the documents he submitted that his learned colleagues brought the objection application as an afterthought. The plaintiffs bring the suit as owners and other interests are a matter of evidence.

Learned Counsel submitted that a cause of action is disclosed by the plaint and it is for a permanent injunction. Court has to determine the issue of rights before it is granted. The issues not brought in the plaint can be amended. There was a sale and other parties claim they purchased. Therefore there is a dispute which includes other 3rd parties not in the earlier suit.

He submitted that his learned colleagues concede that the plaintiffs are in possession of the suit property. The plaintiffs have a right and if this right is not clear in the plaint, the plaint can be amended. The 2nd plaintiff has already filed an application for amendment and this is to clear the matters in this dispute. In that application the parties appearing to be irrelevant are to be dropped. Court has power to add or drop a party. He prayed that the court proceeds with the actual parties who are relevant. He further prayed that the application for amendment be heard and defendants can respond to the application. Issues of cause of action and misjoinder do not arise, the plaint can be amended and the suit proceeds.

Ruling

I have carefully listened to the submissions of both counsel, and perused the pleadings on record.

The plaint discloses that in an agreement dated 16 August 2008; the first Defendant sold to the first Plaintiff company property comprised in plot 2 Colville Street including all condominium units there under for a sum of US$5 million. Under the agreement a sum of US$5 million was payable to the first Defendant's creditors according to the list annexed to the agreement. The plaint avers that it was an understanding between the parties that once the sum of US$5 million was paid to the creditors other titles would be surrendered to the first Plaintiff. The first Defendant however fundamentally breached this contract as the first Plaintiff found that the monies being claimed by the each of the first Defendant's creditors including the second, fourth, fifth and sixth Defendants did not correspond to be sums put against their names in the creditors schedule which had been attached to the sale agreement and thus the total purchase price will be far beyond a sum of US$5 million. It is further averred that several communications were exchanged in a bid to salvage the said transaction to no avail, leading to the first plaintiff rescinding the agreement.

It is further pleaded that the first Defendant instituted a suit against the Plaintiffs in the respect of the above transaction vide suit number 126 of 2009. Notwithstanding some of the creditors including and especially the second Defendant had agreed to cede their interest as creditors to the Plaintiffs and the second Plaintiff is currently managing the property on their behalf and has a registered caveats thereon pending the outcome of the suit. The suit has never proceeded and has never been set down for formal hearing by that on the 18th day of May 2009; the parties appeared in court for the hearing of an application by the Defendants for a temporary injunction under the same suit. That at the hearing the first Defendants counsel sought to make an application for judgment to be entered on admission by the first Plaintiff for the sum of US$1.7 million allegedly admitted in the Plaintiff’s written statement of defence.

The Plaintiff's counsel opposed the application on account of the fact that the clause to which the supposed admission related was not an admission to a debt but related to the money that the Plaintiffs had reserved for any remaining condominium titles of plot 2 Colville Street that the Defendant's creditors may still have. The above notwithstanding, at the same hearing, by way of mutual agreement and to prevent both parties from suffering any further loss in the dispute an interlocutory order was entered by both parties. The order was for the plaintiffs, upon receipt within 30 days of the creditors schedule containing the remaining condominium titleholders, execute a bank guarantee for a sum of US$1.7 million being the balance payable in respect of plot to convert the street payable to the first Defendants creditors upon the delivery unencumbered condominium titles to the bank. Although there was no mention of priority of payment in the order, or payments where depending on the schedule and the schedule was to include the remaining condominium titles of plot 2 Colville Street which were 27 and the term remaining in the interlocutory order related to all the remaining holders of condominium titles remitting the plot to qualify Street and that both parties were aware of this fact.

The remaining 27 titles comprised in units LRV 3605/4 unit 52, LRV 3605/5 unit 53, LRV 3605/6 unit 54, LRV 3605/7 unit 55, LRV 3605/8 unit 56, LRV 3605/9 unit 57, LRV 3605/10 unit 58, LRV 3605/11 unit 59, LRV 3605/12 unit 60, held by Peter Lule; LRV 3604/16 unit 1, LRV 3605/13 unit 63, LRV 3605/19 unit 69, LRV 360 5217 unit 71, LRV 3605/25 unit 75, LRV 3606/2 unit 77, LRV 3606/3 unit 78, LRV 3606/24 unit 79, LRV 3606/8 unit 80, LRV 3606/23 unit 98, LRV 3606/24 unit 99, LRV 3606/25 unit 100, LRV 3607/1 unit 101, which are held by Mr Virani Bahadukali; LRV 3606/8 unit 83, LRV 3606/9 unit 84, LRV 3606/19 unit 94, LRV 3606/20 unit 95 held by Tecton group (Kenny Adebanjo) LRV 3606/1 unit 76, held by Arvind Patel; and LRV 3605/4 unit 52, LRV 3605/5 unit 53, LRV 3605/6 unit 54, LRV 3605/7 unit 55, LRV 3605/8 unit 56, LRV 3605/9 unit 57, LRV 3605/10 unit 58, LRV 3605/11 unit 59, LRV 3605/12 unit 60, held by Peter Lule.

The Plaintiff pleads that the first Defendant did not submit within the requisite 30 days, and acceptable schedule as per the order including all the above-mentioned parties, and this court and the first Defendant were reliably informed through

their lawyers that the schedule would not be used as the basis for payment as it was non-compliant. The plaint avers that the Plaintiffs have done everything required of them in respect of the said order and had already obtained approval of its bankers for the bank guarantee to be issued and were merely waiting for the requisite schedule as per the order. Consequently the Plaintiff did not pay the 2nd, 4th, 5th and 6th Defendants because an acceptable schedule had not been submitted and furthered order upon which the payment was to be based was returned to the judge for interpretation and termination of the party's obligation there under. The plaint avers that the presiding judge has not yet given a ruling in respect of this order and as a result all dealings relating to the remaining 27 titles have come to a standstill as the Plaintiffs have no court sanctioned basis upon which to pay the first Defendants Creditors to wit the 2nd, 4th, 5th and 6th Defendants.

It is pleaded that in the meantime the second Defendant went ahead to register himself as proprietor of units on plot 2 Colville Street comprised in units 1, 63, 69, 71, 75, 77, 78, 79, 80, 98, 99, 100 and 101 on 29 July 2009 when the property was still subject to a suit. The second Defendant has executed a sale agreement in favour of the third Defendant in respect of the units stated above in spite of the fact that the Plaintiffs registered a caveat on the said property on 4 August 2009. That the Plaintiffs are at risk of losing 27 remaining condominium units if each of the remaining in the minimum titleholders/creditors are not barred from selling, transferring or dealing with the units before the determination of High Court civil suit number 126 of 2009. The Plaintiffs have attempted to enter into mutual agreements with the Defendant to prevent the transfer of any of the said units until the disposal of HCCS 126 of 2009 to no avail. That any purported agreement to sell the above-mentioned units would be invalid as it would contravene the court process in respect of HCCS 126 of 2009 and will have the effect of making the suit between the Plaintiffs and Defendants redundant.

Finally in the plaint avers that by reason of those facts the Plaintiffs are suffering loss and damages and are at risk of facing even further loss if the permanent injunction is not granted and for which loss the Plaintiffs will also seek for general damages and costs of the suit.

The first objection of the Defendants is made under section 6 of the Civil Procedure Act. Section 6 deals with stay of a suit and 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 should or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where the suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claim.
>
> Explanation – the pendency of a suit in the foreign court shall not preclude the court from trying a suit in which the same matters or any of them are in issue in that suit in the foreign court."

Section 6 of the Civil Procedure Act is mandatory in that it bars a court from proceeding with the trial of any suit or proceeding where the matter in the suit is also directly and substantially in issue in a previously instituted suit or proceeding and between the same parties. First of all the court has to establish whether there is a previously instituted suit or proceeding between the same parties. Secondly the court has to determine whether the matter in controversy in the second suit is also directly and substantially in issue in a previously instituted suit. Thirdly, this suit instituted prior in time must be before a court of competent jurisdiction. In this case the previously instituted suit referred to is HCCS No. 126 of 2009. There is no dispute that HCCS No. 126 of 2009 was filed prior in time to the current suit. This previous suit was between the first Defendant, Hotel Diplomat Ltd, Katatumba Properties Ltd and Mrs Gertrude Katatumba as Plaintiffs against all the Plaintiffs in current suit namely in HCCS 375 of 2009.

As far as parties are concerned, the plaintiffs in the current suit were Defendants in the previous suit namely High Court civil suit No. 126 of 2009 and also plaintiffs by way of counterclaim against the plaintiffs. However it is only the first defendant Mr Boney Katatumba who has been sued in the current suit. The question therefore is whether the other Defendants claim under the first Defendant for section 6 of the Civil Procedure Act to be invoked to stay the suit. The current suit clearly avers that the other defendants claim title from the first

defendant. Paragraphs 7 which give the facts constituting the plaintiffs cause of action clearly indicate that the other defendants were creditors and were named in a schedule to the agreement between the first defendant and the first plaintiff. Particularly paragraphs 7 indicate that there was a suit affecting the interest of the creditors whose interests were being managed by the second plaintiff. The plaintiff avers that this suit never proceeded. The schedule mentioned in the agreement is particularly mentioned in the previous suit in paragraph 7 (x) as follows:

> "The order was for the plaintiffs, upon receipt within 30 days of the creditors schedule containing the remaining condominium title holders, to open a bank guarantee for the sum US$1.7 million being the balance payable in respect of plot 2 Colville Street and payable to the first defendant's creditors upon the delivering unencumbered condominium titles to the Bank."

The court order is attached as annexure "D". Annexure "D" is a consent order issued by honourable Justice Lameck Mukasa on the 18th of May 2009 in Miscellaneous Application number 193 of 2009 and arising from HCCS 126 of 2009. The order reads as follows:

> "

1. That the respondents/defendants shall issue an irrevocable Bank Guarantee in favour of the applicants/plaintiffs in the maximum sum of US$1.7 million, valid for a period of 12 months from the date of issuance of the Bank Guarantee.
2. That the sum guaranteed (US$1.7 million) shall be payable to the plaintiffs creditors were shall include, but are not be limited to the remaining condominium title holders on brought to court by Street and in accordance with such schedule as shall be submitted by the first plaintiff to the defendants in a period of 30 days. Such schedule shall not exceed the sum of US$1.7 million.

3. That the defendant shall cause the irrevocable guarantee in the sum of US$1.7 million to be issued within 15 days from the date of receipt of the creditors schedule from the plaintiff.
4. That payments from the bank guarantee shall be made in accordance with the creditors schedule as follows:
    a. In respect of each individual condominium titleholder, upon the delivery to the bank of a condominium title free of any encumbrances.
    b. In respect of each non-condominium creditor, upon the issuance of a letter of instruction/consent issued by the respective parties lawyers.
5. Costs of this application to be in the main suit."

First of all, this agreement is between Boney Katatumba the first defendant in the current suit, Hotel Diplomat Ltd as applicants in MA No. 193 of 2009 and Shumuk Springs Development Ltd and Springs International Hotel Ltd. In the current suit there is an alleged breach of the order of the court issued above. High Court civil suit number 126 of 2009 is still pending.

In HCCS 126 of 2009, the current plaintiffs to HCCS 375 of 2009 were the defendants and in the amended written statement of defence include a counterclaim in which paragraphs 2 to 5 need to be set out for analysis and they read as follows:

"2. The defendants shall state that by an agreement dated 16 August 2008, the first plaintiff sold to the first defendant company, property comprised in plot 2 Colville Street including all condominium units there under for a sum of United States dollars 5 million. Further under the agreement, a sum of USD 101,000 was payable on execution of the agreement to the first plaintiff, while the balance of US$520,000 was payable to the first plaintiffs Creditors as per a list annexed to the agreement. The said agreement and its Annexure are already attached and marked annexure "A".

3. The Defendant shall aver that it was the understanding between the parties that whereas the sum of US$5 million was paid to the first plaintiff and his creditors in accordance with the schedule attached to the agreement, other

condominium titles would be surrendered to the first defendant. Already attached is a letter from the first plaintiff communicating the same and marked annexure "B".

4. The defendant shall aver that the first plaintiff however breached the contract by fundamentally misrepresenting to the first defendant the monies owed to and claimed by each of the plaintiffs creditors, as such sums did not correspond with sums put against their names in the creditors schedule which had been attached to the sale agreement and thus the total purchase price would go beyond a sum of US$5 million. Hereto attached is the annexure of the list of creditors that was attached to the first sale agreement and the corresponding creditors demands marked group Annexure "H".

5. The Defendants shall state and aver in respect of the said contract that several communications were exchanged between the first plaintiff and the fourth defendant to salvage this transaction to no avail. As a result, the first defendant decided to rescind the agreement based on the fraudulent misrepresentation by the first plaintiff.

Particulars of the fraudulent misrepresentation

I. Representing to the defendants that the holders of the condominium unit titles were the first plaintiff's Creditors while in fact he had sold some of these units to the holders.
II. Representing and issuing a creditors schedule as the basis of the sale price fully aware that the amount owing were not determined and were still subject to negotiation.
III. Executing the agreement fully aware that the basis of the contract was the credit owing to the first plaintiff's creditors and misrepresenting the amounts owed by him to the creditors."

In the current suit, the plaintiff's claims have more or less originated from the same unresolved claims in the counterclaim quoted above. Even though the creditors were not part of the original suit, the subject matter of the suit is exactly

the same. The complaint against the creditors, who are the other defendants in the current suit other than the first defendant, arises from the same subject matter which is pending in the previous suit. Defendants 2 – 7 claim from the first defendant. All in all an examination of the current suit namely HCCS No. 375 of 2009 and HCCS No. 126 of 2009 clearly reveals that the matter in issue in the current suit is also directly and substantially in issue in a previously instituted suit namely HCCS No. 126 of 2009 between the same parties or between parties under whom they or any of them claim. The creditors who are the other defendants in the current suit, other than the first defendant, claim from the same transaction and from the first defendant who is a principal party to the counterclaim in HCCS No 126 of 2009. The matters in controversy are substantially the same as to who is entitled to the suit property. Learned counsel for the plaintiff submitted that the current suit is for a permanent injunction against the defendants. A permanent injunction cannot be granted without establishing a right of the plaintiffs which can only be determined by trying the suit on matters in controversy which are directly and substantially in issue in HCCS No. 126 of 2009. It is therefore my conclusion that the current suit cannot be tried as the court is barred from proceeding with the trial of the suit under section 6 of the Civil Procedure Act.

Learned counsel for the first defendant further objected to the suit on the ground of misjoinder of parties and that the plaint discloses no cause of action. Learned Counsel Masembe concurred. They invited the court to try the question of whether the suit discloses a cause of action or whether there was a misjoinder of parties. I have considered the provisions of section 6 of the Civil Procedure Act. It provides in part;

> “No court shall proceed with the trial of any suit or proceeding".

Upon finding that the matter in issue in the current suit is also directly and substantially in issue in a previously instituted suit between the parties or parties claiming under them, can I go ahead to determine whether the plaint discloses a cause of action? This depends on the definition of the term "trial".

The trial of an action means the determination of a controversy which would end up also determining a matter that was directly or substantially in issue in the previous suit within the meaning of section 6 of the Civil Procedure Act. The matter in controversy is raised by the pleadings of the parties. In terms of order 15 rules 1 of the Civil Procedure Rules, issues arise where material propositions of law or fact are affirmed by the one-party and denied by the other. The rule goes on to provide that material propositions are those propositions of law or fact, which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. Order 15 rule 1 (3) provides and I quote:

> "Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

The court must be alert and ensure that any issue that arises in the current suit does not end up determining any matter in controversy in the previous suit contrary to section 6 of the Civil Procedure Act. This may well depend on the matter in question and its impact on the previously instituted suit. The word "trial" was considered in the case of **Cope v United Dairies (London) Ltd [1963] 2 All ER 194** by the High Court of England Queens bench division. The court had to determine the question of costs incurred by a person to whom legal aid was provided and whether there had been a "trial or hearing of the action". The court inter alia had to determine what was meant by the "trial or hearing of the action, cause or matter". MEGAW J at page 197 said:

> “...meaning of “the trial or hearing of the action, cause or matter” in reg 18(1). Paragraph (5) uses those same words in, I think, deliberate contrast with other methods of putting an end to proceedings, such as discontinuance, default of appearance or summary judgment. That indicates that the dismissal of an action for want of prosecution is not comprehended within the words “trial or hearing of the action, cause or matter” in reg 18(1).”

The learned judge agreed that the trial or hearing of an action meant the final determination of the matter of a question in controversy. As far as issues for determination in a suit are concerned, I agree that where any matter in

controversy as stipulated by order 15 rules 1 of The Civil Procedure Rules is determined, it would amount to the trial of the action forbidden by section 6 of the Civil Procedure Act. On the other hand, a point of law which touches on the competence of a suit or which in effect results in an order that the matter should not be tried, can be determined without offending section 6 of the Civil Procedure Act. This is because the determination of the question of whether the suit should be tried does not offend provisions for mandatory stay whose intention is not to try a matter in controversy which is also directly and substantially in issue in a previously instituted suit between the same parties or those claiming under them. The question of misjoinder of parties and the plaint not disclosing a cause of action is a manner of saying that the suit should not be tried. Notwithstanding provisions for mandatory stay of proceedings, an objection that holds that a suit should not be tried does not conflict with section 6 of the CPA as it amounts to saying that the suit should not be tried at all. In the premises I may consider whether the plaint discloses a cause of action against the defendants together with the question of whether there has been a misjoinder of parties without conflict with section 6 of the CPA.

Learned counsel for the first defendant submitted that the suit offends order 1 rule 1 of the Civil Procedure Rules which provides as follows:

> "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, where, if those persons brought separate suits, any common question of law or fact would arise."

He contended that there is absolutely no connection between the 3rd and 4th plaintiffs which are limited liability companies. The fourth Plaintiff is a director of the first three plaintiffs. The suit is between the first plaintiff and the 1st Defendant. The question is why the second and fourth plaintiffs were joined. What separate suit would the second, third and fourth plaintiffs have brought on the second and fourth defendants? The plaint does not disclose any claim. The fourth plaintiff, the company is a separate legal entity. So the fourth plaintiff

would have no interest in the suit. Finally counsel contended that the second third and fourth plaintiffs are redundant in this suit. This cannot be cured by dropping them off and the remedy would be a withdrawal under order 25 of the Civil Procedure Rules.

Learned Counsel Masembe associated himself with the submissions of learned counsel for the first defendant. He submitted that the basis of the suit is between the first plaintiff and the first defendant. Although not annexed to the plaint there is another agreement of 10th of November 2008 between the second plaintiff and the first defendant. Neither the agreement the basis of the suit or the subsequent one relates to parties other than the first defendant. There is no agreement between the first, second plaintiff and the 2nd to the 6th defendants. The suit seeks to enforce actual rights under a sale agreement but under privity of contract shows no relationship with the parties who are not privy to the agreement. In reply learned counsel for the plaintiffs submitted that the question of misjoinder cannot be raised at this stage. He contended that the claim in the plaint is distinct and for a permanent injunction. The issue of plaintiffs as owners are presupposed. If they are denied by the defendant those are matters of evidence. He submitted that counsels for the defendants are bringing this objection as an afterthought. The plaintiffs bring the suit as owners and other interests are a matter of evidence.

Order 1 rule 1 of the Civil Procedure Rules applies where several plaintiffs have a right to relief in respect of or arising out of the same act or transaction or series of acts or transactions. The question of whether any party has a right to relief arising out of an act or transaction or series of acts of transactions is a component of the question of whether the plaint discloses a cause of action. I would therefore consider whether the plaint as framed discloses a cause of action against the defendants before resolving the issue of whether there has been a misjoinder of parties.

Firstly learned counsel for the first defendant submitted that this suit has been filed for an interim order in another suit before this court. In other words his contention is that the permanent injunction sought in this suit ought to have been

sought in the previous suit. Secondly, the plaintiffs relies on an agreement dated 16th of August, 2008 to found their claim. However, they plead that the first defendant fundamentally breached the agreement and the first plaintiff rescinded the agreement. Consequently because the first plaintiff pleads that it had rescinded the agreement it could not acquire rights to seek the orders sought in the suit. Even if he sought damages for breach of contract, he has already sought damages in the previous suit. As far as the 2nd to the 6th defendants are concerned, because the plaintiffs plead that the agreement dated 16 August, 2008 was rescinded there is no cause of action against them. This is because the 2nd, 4th, 5th and 6th defendants are mentioned in the first agreement as alleged creditors. The plaintiff mentions another agreement of shillings four million dollars between the first defendant and the second plaintiffs. It is not averred that the 2nd to the 6th defendants are parties to the agreement and the doctrine of privity of contract comes into play. Because the suit violates the rule of lis pendens in a manner in which the nature of the suit makes it frivolous and vexatious. Counsel prayed that this suit be struck out under order 6 rule 30 of the Civil Procedure Rules for being frivolous and vexatious and not disclosing a reasonable cause of action.

Learned counsel Masembe associated himself with the submissions of learned counsel for the first defendant and submitted that the agreement, the basis of the suit is between the first plaintiff and the first defendant. Although not annexed to the plaint there is another agreement of 10th of November 2008 between the second plaintiff and the first defendant. The point is that neither the agreement, the basis of the suit, nor the subsequent one relate to parties other than the first defendants. There is no agreement between the first or second plaintiff and the 2nd, 3rd, 4th, 5th and 6th defendants. The suit seeks to enforce actual rights under a sale agreement but under the doctrine of privity of contract there is no relationship as far as the parties are concerned. Therefore there is no cause of action against the 2nd, 3rd, 4th, 5th, and 6th defendants. As far as the above arguments are concerned the above-mentioned defendants are mentioned in the first agreement as alleged creditors. The second agreement is in respect of specific condominiums and shows that there at 27 condominiums. 13

condominiums were taken by the 2nd defendant, 9 taken by the 4th defendant, and 1 taken by the 6th defendant. The right to property cannot be enforced without a sale agreement between the plaintiffs and the owners. Unless the defendants are willing to sell, they cannot be forced to do so. Consequently the purpose of the suit is that there is another suit in which the plaintiff is likely to lose the condominium if the earlier suit is not concluded. There is therefore no cause of action against the 2nd, 3rd, 4th and 6th defendants. Learned counsel also prayed that the suit is dismissed under order 6 rule 30 of the Civil Procedure Rules. The court should dismiss the suit and proceed with the counterclaim against the plaintiffs.

Learned counsel for the plaintiff on the other hand contended that the plaint discloses a cause of action. This is because it is for a permanent injunction. The court has to determine the issue of right before its grant. He argued that the issues which have not been pleaded can be done through amendment. There was a sale and the other parties claim that they purchased. Therefore there is a dispute and this suit includes other third parties not in the earlier suit. The defendants counsel's concede that the plaintiffs are in possession. The plaintiffs have the right. If this is not clear in the plaint, the plaint can be amended. The second plaintiff has brought an application for amendment and this is to clarify the matters in dispute. In that application the parties appearing to be irrelevant are to be dropped. Court has power to add or drop a party and proceed with the actual parties who are relevant. Learned counsels for the defendants can respond to that application. The issues of cause of action and misjoinder do not arise.

As far as misjoinder of causes of action is concerned, it would appear from the submissions of learned counsel for the plaintiff, that he intends and has asked the court to drop the parties who appear not to be relevant. This is a strange submission in light of the objections of the defendants. It amounts to a concession that some of the parties are not relevant to this action. Should the court wait for the application which seeks to drop these parties by way of amendment of the plaint? Learned counsel for the applicant/plaintiff did not specify which parties appear to be irrelevant under order 1 rule 10 of the Civil Procedure Rules. Indeed this submission on misjoinder of parties by way of an

objection was made under order 1 rule 1. The question of whether any party enjoys a right to relief is a question of whether there is a cause of action disclosed against the defendant. The misjoinder or nonjoinder of a party cannot form the basis of an objection to the suit.

As far as misjoinder and nonjoinder are concerned order 1 rule 9 of the Civil Procedure Rules provides that:

> "No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

The proper procedure to be used in the circumstances and the proper rule to be invoked are rules 10 and 13 of order 1 of the Civil Procedure Rules. Rule 1 of order 1 is only permissive in that it defines who may be joined as a plaintiff. Rule 9 bars the defeat of a suit on the ground of misjoinder or nonjoinder of parties. Order 1 rule 10 (2) gives the court discretionary powers to strike out the name of a party improperly joined whether as plaintiff or defendant. Order one rule 13 provides that any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner. In other words the defendants were at liberty to apply to strike out the names of the plaintiffs or defendants improperly joined at any time before trial.

In the circumstances of the case, if a party is struck out it would be unnecessary to determine whether the plaint discloses a cause of action against any defendant sued by the party struck out. After careful consideration of all the rules namely order 1 rule 1, 9, 10 (2) and 13 of the CPR an application ought to have been made either to strike out the plaintiffs or the defendants for misjoinder. Instead learned counsels for the defendants proceeded to argue an objection under order 1 rule 1 which rule only defines which parties may be joined as plaintiffs. Their submissions are relevant to the question of whether the suit or the plaint discloses a cause of action against the defendants.

The principles for determining whether a plaint discloses a cause of action are not in controversy. The question of whether the plaint discloses a cause of action is determined upon perusal of the plaint only and attachments thereto. In the case of **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Wambuzi CJ as he then was held that in determining whether a plaint discloses a cause of action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 30 only the plaint can be considered. In the case of **Attorney General vs. Oluoch (1972) EA page 392 it** was held that the question of whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true. The plaint that discloses no cause of action is rejected under order 7 rule 11 of the Civil Procedure Rules. Similarly, apart from an assertion that there is an abuse of the process of court, an objection that no reasonable cause of action is disclosed is made under order 6 rule 30 of the Civil Procedure Rules. A point of law on the other hand may be determined upon agreed or uncontested facts. The relevant rules for arguing a point of law are order 6 rules 28 of the Civil Procedure Rules which allows a point of law raised by the pleadings or agreed upon to be set down for hearing. A point of law so set down for hearing which wholly or substantially disposes of the suit or any distinct cause of action, may lead to the dismissal of the action under order 6 rule 29 of the CPR. Arguments on a point of law need not depend upon perusal of the plaintiff's plaint only but may incorporate agreed facts or facts not in dispute.

Last but not least, both counsels submitted and concluded their submissions with the prayers that I strike out the pleadings or dismiss the suit under order 6 rule 30 of the CPR. Rule 30 (1) provides that:

> "The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit be stayed or dismissed or judgment to be entered accordingly, as may be just.

In Miscellaneous Application No 523 of 2011 arising From High Court Civil Suit No. 139 of 2011 between **Kampala Rugby Union Football Club vs. Capital Ventures International Limited**, I had occasion to review judicial precedents on order 6 rule 30 of the Civil Procedure Rules. In **Odgers' 'Principles of Pleading and Practice in Civil Actions of the High Court of Justice 22nd edition at page 148**, the learned authors note that in an objection on the ground that the action discloses no reasonable cause of action or that the action is frivolous and vexatious, the court only looks at the pleadings, particulars, and not any affidavit evidence. Where there is an objection to the effect that there is an abuse of the process of court, evidence may be admitted.

The term "reasonable cause of action" was defined in **Drummond Jackson versus British Medical Association [1970]** 1 ALL ER 1094 per Lord Pearson at page 1101

> "... No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19(2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."

In this case, arguments were not confined to the plaint only. Both parties referred to the pleadings in HCCS 126 of 2009. The existence of the previous suit and the pleadings are not facts in dispute. Points of law may be argued from these pleadings some of which are not part of the plaint. Order six rules 30 strictly construed provides for the determination of the question of whether there is a reasonable cause of action through examination of the pleadings. It is the pleading which discloses no reasonable cause of action or answer.

I have examined the plaint to establish whether it discloses a cause or reasonable cause of action against the defendants jointly and severally as the case may be. The crucial question to be considered is what the basis of the claim in the plaint is. Paragraph 6 of the plaint indicates what relief the plaintiffs are seeking from the defendants. The plaintiff's action against the defendants is for a permanent injunction forbidding the sale and transfer or dealing with the property comprised in plot 2 Colville Street. The units involved are described in paragraph 6 of the

plaint. It is averred that the defendants are holding the property in a manner which would defeat the plaintiff's contingent interests therein and for costs in the suit.

What are these "contingent interests" in the property? The facts constituting the cause of action are averred in paragraph 7 of the plaint. Paragraph 7 (i) indicates that in an agreement dated 16th of August, 2008 the first defendant sold to the first plaintiff company property comprised in plot 2 Colville Street including all condominiums units there under for a sum of United States dollars 5,000,000. It was an understanding between the parties to the sale agreement that when the sum of five million U.S. dollars was paid the titles would be surrendered to the first plaintiff. The plaintiff avers that the first defendant's fundamentally breached this contract and the first plaintiff rescinded the contract. Annexure "C" is referred to support averments of rescinding of the agreement and it is a letter dated 29 January, 2009 addressed to the managing director of the first plaintiff. It is signed by the first defendant and copied to the 6th defendant. It reads as follows:

> "I refer to what was agreed when the sale of for the above was cancelled, by your selves.
>
> I confirm, I gave you full powers to manage my affairs, pending a better sale price, for the above property.
>
> In the meantime you can pay Mr. Arvind Patel the sale value of security title for unit number 74 up to US $ 60,000 in order to finalise matters amicably."

Reference is made to the rescinding of the agreement by the first plaintiff. It is disclosed in the plaint that the first defendant and the first plaintiff have since fallen out when the first defendant instituted a suit against the plaintiffs in HCCS 126 of 2009. That the creditors including the second defendant have agreed to cede their interests as creditors to the plaintiffs. It is averred that an order was made by consent of the parties for the plaintiffs upon receiving receipt within 30 days of the creditors schedule containing the remaining condominium title holders, to open a bank guarantee for a sum of US$1.7 million being the balance

payable in respect of plot 2 Colville Street and payable to the first defendants creditors upon their delivering unencumbered condominium titles to the bank. It is crucial to show that the plaint shows that the first defendant did not submit within the requisite 30 days an acceptable schedule according to the order including all the parties. It is further averred that the presiding judge has not given a ruling and as a result all dealings relating to the remaining 27 titles have come to a standstill as the plaintiffs have no court sanctioned basis upon which to pay the first defendants creditors.

It is averred that in the meantime the second defendant went ahead to register himself as proprietor of certain units. That the second defendant has executed a sale agreement in favour of the third defendant. Consequently the plaintiffs are at risk of losing 27 remaining condominium units. The plaintiff seeks a permanent injunction prohibiting the sale, transfer or any other dealings with the property disclosed in the plaint. A declaration that the 3rd defendant's purchase agreement is null and void. General damages and costs of the suit.

The basis of the plaintiffs claim for a permanent injunction arises from an order of this court in HCCS No. 126 of 2009. There is an alleged breach of the order of this court by the first defendant. It is further alleged that due to the non-compliance of the first defendant with the order of the court, the plaintiff was unable to pay the 2nd, 4th, 5th and 6th defendants. Secondly the presiding judge has not yet given a ruling in respect of the order and all dealings relating to the remaining 27 titles have come to a standstill. That the second defendant has gone ahead to register himself as proprietor of units 1, 63, 69, 71, 75, 77, 78, 79, 80, 98, 99, 100 and 101 on 29 July 2009 when the property was still the subject of this suit (HCCS 126 of 2009). The second defendant has executed a sale agreement in favour of the third defendant in respect of the said units. Therefore the plaintiffs are at risk of losing the 27 remaining condominium units. The plaintiffs have attempted to enter into mutual agreements with the defendants to prevent the transfer of any of the said units until the disposal of HCCS 126 of 2009 to no avail.

I have carefully considered the above pleadings. The basis of the averments for the 2nd, 3rd, 4th, 5th, and 6th defendants to hand over titles to the plaintiffs

(particularly to the first plaintiff) is an agreement embodied in a consent order pleaded in paragraph 7 (x) of the plaint.

The consent order is annexure "D" to the plaint. It is between Boney Katatumba and Hotel Diplomat Ltd against the first and second plaintiffs in Miscellaneous Application No. 193 of 2009 arising out of HCCS 126 of 2009. The terms of the consent order are:

> "This matter coming up before honourable Justice Lameck Mukasa on the 18th day of May 2009 by agreement and consent of both parties and in the presence of Dr Alan S Shonubi and Deo Rubumba counsel for the respondents/defendants and Charles Odere and Pius Olaki, counsel for the applicants/plaintiffs and in the presence of the Applicants and the Respondents in the above application it is ordered as follows:

1. That the respondents/defendants shall issue an irrevocable Bank Guarantee in favour of the applicants/plaintiffs in the maximum sum of US$1.7 million valid for a period of 12 months from the date of issuance of the Bank Guarantee.

2. That the sum guaranteed (US$1.7 million) shall be payable to the plaintiffs creditors were shall include, but are not be limited to the remaining condominium title holders on brought to court by Street and in accordance with such schedule as shall be submitted by the first plaintiff to the defendants in a period of 30 days. Such schedule shall not exceed the sum of US$1.7 million.

3. That the defendant shall cause the irrevocable guarantee in the sum of US$1.7 million to be issued within 15 days from the date of receipt of the creditors schedule from the plaintiff.

4. That payments from the bank guarantee shall be made in accordance with the creditors schedule as follows:

a. In respect of each individual condominium titleholder, upon the delivery to the bank of a condominium title free of any encumbrances.
b. In respect of each non-condominium creditor, upon the issuance of a letter of instruction/consent issued by the respective parties lawyers.

Costs of this application to be in the main suit"

The 2nd, 3rd, 4th, 5th and 6th defendants are not parties to the suit or to the consent order. Whereas the consent agreement is an agreement of the parties subject to the same principles of the law of contract, the basis of the claim for permanent injunction is the said consent agreement embodied in an order of this court. It is not a controversial point that a contract is only enforceable between the parties to the agreement even if it is made for the benefit of third parties. It has been held to be an elementary principle of law that only parties to an agreement can sue upon it (see **Scrutons vs. Midland Silicones Ltd [1962] 1 ALL ER 1).** This doctrine was upheld by the Ugandan Supreme Court in the **case of Shiv Construction Ltd vs. Endesha Enterprises Ltd [1999] EA** page 329 where the Court held that where a contract is executed for the benefit of a third party, it is only the parties to the contract who can enforce it for the benefit of the third-party. The third-party is not allowed to assert rights under the contract in a court of law. Coming to the current suit and by the same token, the contract is not binding or enforceable as between the third-party and any of the party's privy to the contract. In other words the consent order cannot form the basis of the suit against the 2nd, 3rd, 4th, 5th, and 6th defendants who are not parties to the same. By the same token a permanent injunction cannot be granted against the said defendants. The plaint does not aver that the first defendant is an attorney or representative of the said creditors who are also the second, third, fourth, fifth and sixth defendants. Furthermore, an examination of paragraph 2 of the consent order shows that the money indicated therein namely the sum of US$1.7 million was payable to the plaintiffs creditors. It is not sufficient to aver that the plaintiffs in the current suit are unable or have been unable to fulfil their obligation under the order to pay the plaintiffs creditors. This cannot give rise to a cause of action against the said creditors who may be paid by the plaintiffs at will and without

compulsion. If they had agreed to be paid under the consent order, why doesn't the plaintiff just pay them so that they handover the condominium titles held by them?

Secondly, the order was made under HCCS 126 of 2009. Apart from the question of enforceability of contract between the parties who are privy to it, the consent order is still an order of the court and enforceable as an order in a particular suit and against parties who are parties thereto.

In the premises, the plaint discloses no cause of action against the 2nd, 3rd, 4th, 5th and 6th defendants.

Secondly, as far as the first defendant is concerned, High Court civil suit number 126 of 2009 is still pending. In that suit the first defendant sued the plaintiffs in the current suit. The first defendant claims a declaration that the first plaintiff in the current suit is in breach of the agreement dated 16th of August 2008. In the current suit they plaintiffs claim against the first defendant includes an averment that the first plaintiff had rescinded the agreement of 16 August 2008. The suit is also for declarations that the first defendant and the other plaintiffs in the HCCS 126 of 2009 are still the owners of plot 2 Colville Street. It is also for a permanent injunction to issue against the defendants who are the plaintiffs in the current suit to restrain them their servants, workman or any other person from entering, remaining and or interfering or otherwise dealing whatsoever with the suit property.

On the other hand, the plaintiffs in the current suit filed a counterclaim against the first defendant and Hotel Diplomat in which they assert that they had rescinded the agreement. Several other claims are made against the first defendant and Hotel Diplomat.

After reviewing the authorities and the pleadings of the parties, the alleged cause of action against the first defendant by the plaintiffs in this action arises from an allegedly breach of the order of this court in HCCS 126 of 2009. From that it may be concluded that the alleged cause of action arose after the filing of HCCS 126 of 2009. As I have noted above, HCCS 126 of 2009 which is the previous suit and

HCCS 0375 of 2009 which is the current suit are suits in which each plaintiff respectively seeks a permanent injunction against the other. They also seek declarations against each other based on the same transactions. The determination of High Court civil suit number 126 of 2009 between the first defendant and the plaintiffs and the counterclaim therein would render any matter in controversy on the same subject matter res judicata under section 7 of the Civil Procedure Act. If this is read together with section 6 of the CPA which deals with stay of proceedings, the current suit will lead to no possible good. This is made worse by the fact that there is the consent order which is alleged to have been breached by the first defendant in the suit. The suit where the consent order was entered is still pending and the consent order has not been set aside and is enforceable as an order of the High Court. In other words, it is frivolous and vexatious to plead that the first defendant did not comply with the court order in a separate suit when the court order remains enforceable until and unless set aside. Last but not least, the second suit attempts to circumvent the previously instituted suit and the orders therein by filing a separate suit and does not seek either to enforce the order or set aside. If this had not been the case, the best course of action would have been to stay the proceedings under section 6 of the Civil Procedure Act. As it were the plaintiffs are complaining about proceedings in another suit which is still pending. They complain that the Judge has not yet delivered a ruling in this suit instituted prior in time in respect of the consent order relating to the remaining 27 titles which comprise entire subject matter of the current suit. Worst of all, in the previous suit the first defendant sought a permanent injunction against the plaintiffs which suit remains pending and in the current suit they plaintiffs seek a permanent injunction against the first defendant over the same subject matter. Even if the plaintiffs had a genuine grievance, such a suit is frivolous and vexatious and amounts to an abuse of the process of this court. In the premises the following orders shall issue:

1. The plaint discloses no cause of action against the 2nd, 3rd, 4th, 5th and 6th defendants and is rejected under the provisions of order 7 rule 11 of the Civil Procedure Rules with costs.

2. The suit against the first defendant is frivolous and vexatious and an abuse of the process of this court. The suit against the first defendant is accordingly dismissed with costs under order 6 rule 30 of the Civil Procedure Rules.

3. The 7th Defendant, the Registrar of titles is only a nominal defendant and comes in for purposes of any consequential orders in the suit. It was not represented and the suit against it is dismissed with no order as to costs.

Ruling delivered in open court on the 20th of April 2012.

Honourable Justice Christopher Madrama

Ruling delivered in the presence of:

Masembe Kanyerezi for the 2nd, 3rd and 5th,

Holding brief for Mubiru Kalenge for 4th defendant,

Benson Tusasirwe for 1st defendant,

Augustine Kibuuka Musoke for the Plaintiff,

Ojambo Makoha

Honourable Justice Christopher Madrama

20th of April 2012.