THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION No. 112 OF 2014

(Arising from Civil Suit No. 649 of 2013)

EVARIST MUGABI ..... APPLICANT/DEFENDANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION LTD.....RESPONDENT/PLAINTIFF

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

The Applicant brought this application, by way of chamber summons, under section 98 of the Civil Procedure Act, and 0.7 rr.11 and 19 of the Civil Procedure Rules (C.P.R.). He seeks Court's orders that the plaint in the head–suit herein (H.C.C.S. No. 649 of 2013) between the parties hereto be rejected or struck out. The grounds for this, as can be gathered from the affidavit in support of the application, are that: –

(i) The head–suit herein, H.C.C.S. No. 649 of 2013, is barred by statute for being res judicata since the claim therein has been decided in H.C.C.S. No. 84 of 2013, which was also between the parties herein.

(ii) The head suit herein is bad in law, vexatious, and intended to derail and defeat the course of justice.

The Respondent did not file any affidavit in response to the application although there is an affidavit of service on record showing proper service of the chamber summons on Counsels for the Respondent, and acceptance by them of the same.

This may be because the application is wholly founded on law. However, Counsels for both parties filed written submissions in support of the respective party's case.

Ground No. 1: Whether the plaint in the head–suit should be rejected.

0.7, r.11 (a) and (d) of the C.P.R. mandates this Court to reject a plaint. The said r.11 (a) provides for the rejection of a plaint where the statement of claim therein does not disclose a cause of action, while its rider, r.11 (d), on which this application apparently hinges, provides for the rejection of a plaint where there is some provision of the law barring the statement of claim therein. The Court of Appeal has authoritatively clarified on this provision of the law in ***Mulindwa Birimumaso vs Government Central Purchasing Corporation C.A.C.A. No. 3 of 2002***, where TWINOMUJUNI J.A. stated thus: –

> *"It is now settled law that when a Court is considering whether a plaint raises a cause of action or not, under order 7 rule 11, it must only look at the plaint and its annextures.* See ***N.A.S. Airport Servises Ltd vs Attorney General of Kenya [1959] E. A. 53, and Wycliffe Kiggundu vs Attorney General Civil Appeal No 27 of 1993 (SC).***"

His Lordship reproduced, with approval, a passage from the Supreme Court decision in ***Wycliffe Kiggundu Kato vs Attorney General – S.C. Civil Appeal No. 27 of 1993*** in which the Court had said as follows: –

> *'A distinction must be drawn between an application to reject a plaint and one when a matter of law is set down for argument as a preliminary point. That distinction was very clearly explained in* ***Nurdin Ali Dewji & Others vs G.M.M. Meghji & Co. and Others (1953) 20 E.A.C.A. 132.*** *The distinction is that under Order 7 rule 11 (a) of the Rules an inherent defect in the plaint must be shown rather than that the suit was not maintainable in law. In the latter case a preliminary point should be set down for hearing on a matter of*

law ... if the State insists that as a matter of law no suit can be brought, the State should not try to have the plaint rejected under Order 7 rule 11, but should apply to have the suit dismissed on a preliminary matter of law.'"

The Applicant's case, in the matter before me, is that the claim in the head suit hereto was determined in a former suit between the parties hereto. This is a claim the Applicant has to prove by evidence since it is not discernible as inherent from the impugned plaint herein to cause me to reject the plaint. Accordingly then, the option available to the Applicant is the preliminary objection thereto, on a point of law, that the claim in the plaint was settled in a former suit; hence, the head–suit herein is res judicata. It is to this issue, that I now turn.

Ground No. 2: Whether the head–suit herein is res judicata.

Section 7 of the Civil Procedure Act, which the Applicant relies on, provides as follows:–

"7. Res judicata.

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."

There are explanatory notes to the provision of the law above, which are intended to clarify on the principle of res judicata. These, in paraphrase, are that: –

(1). Reference to a former suit denotes a prior date in its determination, and not necessarily prior date in instituting it.

(2). Any provision for a right of appeal from such decision does not affect the competence of the Court which decided it.

(3). The matter in the former suit must have been alleged by one party and was either denied or admitted, expressly or impliedly, by the other party.

(4). Any matter which ought to have been made a ground either of attack or defence in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

(5). Any relief which is claimed in a suit, but is not expressly granted by the decree, shall for purposes of res judicata be deemed to have been refused.

In a nutshell then, the elements that have to be satisfied for a suit or issue to be barred under the res judicata principle of law, are: –

(i) The existence of an earlier decided suit between the same parties who are the parties in the subsequent, and impugned, case.

(ii) The claim or matter in issue, between the parties, in the subsequent suit is directly and substantially the same with the one in the earlier (decided) suit.

(iii) The earlier suit must have been finally decided by a Court with competent jurisdiction.

With regard to the matter before me, the Applicant's contention is that in H.C.C.S. No. 84 of 2013, which is the former suit between the parties hereto, the very claim determined by the Court therein is the very one the Respondent has made in the head–suit herein. True, in the former suit, the Plaintiff then, (Applicant herein), had claimed that the leasehold certificate of title issued to Defendant then (Respondent herein) was founded on a lease which was not in compliance with certain mandatory requirements of the Registration of Titles Act. The trial Court (Kwesiga J.) declared the lease to the Respondent herein illegal for offending certain

provisions of the Registration of Titles Act; and accordingly ordered for the cancellation of the leasehold title issued based on.

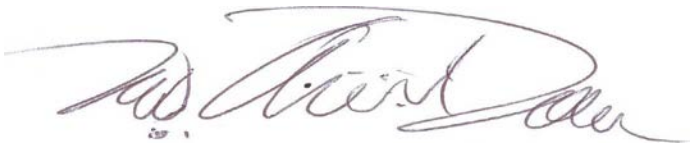
In so far as the Plaintiff in the subsequent suit (Respondent herein) avers in paragraph 3 (a) of the plaint that it holds a lease from the Defendant (Applicant herein) over the suit property, whereas the matter has already been put to rest by the decision of the High Court referred to herein, that claim is certainly res judicata. Had the subsequent suit (head–suit herein) been founded on this statement of claim only, I would have, on grounds of res judicata, struck it out. However, in the subsequent suit, the Plaintiff (Defendant in the former suit) has made claims for instance in paragraphs 3, and 4, of the plaint that go beyond the lease in issue. These claims were not made in the former suit, and so were not determined by Court therein.

Paragraph 3(b) of the plaint in the subsequent suit seeks an order of Court that the Defendant (Applicant herein) executes a proper lease pursuant to the negotiated agreement between them, as set out in paragraph 4(g) thereof. The Court did not decide in the former suit that the Respondent herein is prohibited from entering into a lease contract with the Applicant herein. The claim in the subsequent suit is that the parties had agreed to execute a lease, and the Respondent herein seeks specific performance of this agreement. This is a matter this Court is entitled to determine on the merits. Furthermore, the Plaintiff (Respondent herein) seeks, in the alternative, to recover premium and ground rent it claims to have paid to the Defendant (Applicant herein) as pursuant to the agreement for lease.

It also seeks determination of the issue of its equitable interest in the suit property owing to the premium and ground rent it paid following the agreement to lease the suit property to it. Further still, it seeks awards of damages for losses it incurred in taking possession of the suit property and the developments it has carried out thereon pursuant to the agreement they entered into regarding the lease of the suit

property. These are matters, which were not in issue in the former suit; hence, the Court did not deal with them. Therefore, these claims are open for consideration and determination by this Court on the merits; and so, are not barred on the grounds of res judicata.

Given that only one item out of the statements of claim by the Plaintiff (Respondent herein) – namely that there is a valid lease between the parties hereto over the suit property – is affected by the res judicata principle, for having been determined in the former suit, I allow this application in part only. I therefore strike out the statement of claim in the plaint of the head–suit hereof that the Plaintiff is a lessee of the Defendant. Following from which, I award the Applicant herein one quarter only of the taxed costs of this application.



Alfonse Chigamoy Owiny – Dollo
JUDGE

10 – 06 – 2014