

IN THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATE’S COURT OF NWOYA AT ATIAK

CIVIL SUIT NO. 001 OF 2024

OYOO PETERPLAINTIFF

VERSUS

1. LUBEGA JUMA

2. NALUJJA GRACEDEFENDANTS

BEFORE: H/W KYEMBE KARIM ESQ MAGISTRATE G.I

RULING

By way of pleading in the 1st defendants written statement of defence filed on 17th January, 2024, preliminary objections were raised to the effect that the instant suit is res-subjudice and ought to be stayed pending disposal of High Court at Gulu, civil suit no. 18 of 2013-***Dulu Wilson & 3 Others –Vs- Daniel Ambaku Alias Bera & 56 Others.***

When the matter came up for scheduling on the 15th January, 2024, by consent of both parties, the preliminary objection was set down for hearing and disposal. The parties agreed to file written submissions, which they did and I have duly taken the same into consideration in making this ruling. I appreciate the input of both Counsel.

Representation:

1. The plaintiff was represented by Mr. Komakech Steven from M/S Francis Owiny & Co. Advocates
2. The Defendants were represented by Mr. Etoma Joseph from M/S Uganda Law Society Legal Aid

It was the submission of the defendants that the plaintiff filed a suit against the defendants for declarations that they are trespassers on land comprised in Freehold Block 2 Plot 202 land at Lorikowo, general damages, mesne profits and costs of the suit.

It is the defendant's submission that **Section 6 of the Civil Procedure Act, cap 71**, deals with the Res Sub-judice concept. That in the year 2013, a civil suit no. 18 of 2013 was filed in the High Court of Uganda at Gulu by parties from whom the plaintiff and the defendants in the instant suit derived their interest. The defendants further submit that the High Court matter is on-going and it is in the interest of justice to stay proceedings in the instant matter until the High Court pronounces itself on the matter (civil suit no. 18 of 2023-***Dulu Wilson & 3 Others – Vs- Daniel Ambaku Alias Bera & 56 Others.***) now pending before it.

The defendants further submitted that the essence of **Section 6 of the Civil Procedure Act** is to prevent the courts of co-current jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief, besides curtailing frivolous litigation and wastage of court's time and resources.

The defendants further submit that, for the res-subjudice rule to take effect, there must be two suits, the facts are directly or substantially in issue, the suits are between similar parties or their representatives, parties are suing under similar titles in both suits and the suits must be filed in courts with competent jurisdiction.

In reply, Counsel Komakech submitted that, first; the provision requires that the matter is directly or substantially in issue in a previously instituted suit. It is Counsel's further submission that in raising this point of law, the defendants did not adduce evidence to show that the matter in issue in the instant suit forms part of the suit land in the High Court civil suit no. 18 of 2023.

It is Counsel's further submission that the defendants attempt to introduce the plaint in the High Court Civil suit no 18 of 2013 was improper as it was not originally attached to the pleadings.

Counsel referred to it as a "*smuggled plaint!*" That otherwise, even on perusal of the said "*smuggled plaint,*" it was not clear whether the matter in issue in the High Court Civil suit no. 18 of 2023 is the same matter in issue in the instant suit before this court.

That there was no evidence on record to show any transactions between any of the parties in the instant suit before this court and any of the parties listed in the "*smuggled plaint.*"

Counsel submitted further that neither of the parties in both suits are similar and neither is the matter in issue in both suits directly or substantially similar. It was counsel's conclusion that the defendants have failed in discharging their burden of proof to support their

preliminary objection and he prayed that the same be overruled with costs.

In rejoinder, Counsel Etoma Joseph for the defendants submitted that evidence can be tendered in and officially marked by court at the commencement of hearing; that the plaintiff should in fact be held in contempt of injunctive court orders arising from the High Court case no. 18 of 2023. That to prove that the plaintiff is wrong, he did not attach any evidence in form of a sale agreement to show that he purchased the suit land from Julia Kelementia;

Counsel submitted further that the entire land in Elegu Township is in dispute, and under judgment in the High Court at Gulu filed by the plaintiffs who are 329 versus 57 defendants and that it is impossible to say that the suit land in the instant case is outside the disputed land;

Counsel submitted further that Julia Kelementia is a wife to Ben D Mangwi, the 11th Defendant in the High Court civil suit no. 18 of 2013. He concluded by reiterating the defendants prayers that the instant suit be stayed pending disposal of the High court civil suit no. 18 of 2023.

Consideration By court:

In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*) Court stated that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion. (*Bolding and underlining added for emphasis.*)

In **M/S Semuyaba, Iga & Co. Advocates & anor –VS- Attorney General of The Republic of South Sudan & 2 Others Miscellaneous Application no. 0004 of 2022, HON. JUSTICE STEPHEN MUBIRU held that** Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit or oral evidence. (*underlining added for emphasis*)

Section 6 of the Civil Procedure Act provides:

Stay of suit

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

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in that suit in the foreign court.”

I entirely agree with learned Counsel, Mr Etoma Joseph's interpretation of the above provision. I also totally agree that the provision is purposed to prevent the courts of co-current jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief, besides curtailing frivolous litigation and wastage of court's time and resources.

My difficulty is relating the cited law with the facts of this case. Counsel Etoma submitted for the defendants that, for the res-subjudice rule to take effect there must be two suits, the facts are directly or substantially in issue, the suits are between similar parties or their representatives, parties are suing under similar titles in both suits and the suits must be filed in courts with competent jurisdiction. I agree with him in that respect.

However, learned counsel, Mr Komakech, on behalf of the plaintiffs, while he agrees with the interpretation of the cited section by counsel for the defendants, he, disagreed, and the way I understand him in a nutshell, his disagreement is grounded in the argument that the grounds of the defendant's preliminary objection are not pure points of law to be dealt with at the preliminary stage of the trial.

It is Counsel Komaketch's submission that this Court will need more evidence in order to determine the claims that the matters in the instant suit are directly or substantially similar to the matters in the High Court civil suit no. 18 of 2013.

Counsel Komaketch further attacks the propriety of the procedure adopted by the defendants in introducing a copy of the plaint in the high Court civil suit no. 18 of 2013, which was not attached to the original pleadings.

I entirely agree with him. Whereas, it is true that the said plaint would render an insight into the matters and facts before the High Court, it is unfortunate that the same was actually not attached to their written statement of defence, wherein, they raised the instant preliminary objection. I have perused the record but I do not see when the defendants sought or were granted leave to introduce the impugned plaint.

O. 6 r. 2 CPR provides for the documents to accompany every pleading, amongst others, to include the list of documents and that an additional list may be introduced with leave of court.

Perusing the list of documents accompanying the defendants' written statement of defence, I have failed to see the said plaint in HCCS no. 18 of 2013 listed anywhere and as I have already found, no leave of court was sought, let alone, granted to the defendants to introduce the said plaint in HCCS no, 18 of 2013.

While I disagree with the propriety of counsel Komakech's language of "*a smuggled plaint*," I entirely agree with him that the same was inappropriately introduced on the record.

Under **O. 6 r. 18 of the CPR**, this Court is empowered and enjoined to strike out any matter or pleading that is deemed scandalous, amongst other provisions.

Before I strike out the said plaint as aforesaid, I have exercised discretion granted to me under **Section 98 of the civil procedure Act** to peruse the said plaint in HCCS no. 18 of 2013 to extend the benefit of the doubt to the defendants.

Learned Counsel for the plaintiff submitted and I entire agree with him that none of the parties in this suit before me is listed as a party in the High Court civil suit no. 18 of 2013.

On further perusal of the impugned plaint, together with the pleadings in the instant suit before me, I note that the instant suit is in respect of land comprised in **Freehold Block 2 Plot 202, land at Lorikowo**, while the subject matter in the HCCS no. 18 of 2013 is customary land being claimed by more than 329 (*three hundred twenty nine*) plaintiffs. Clearly, this, cannot be the same subject matter.

It is my considered view that certainty about whether or not the subject matters in both suits is the same can only be attained by hearing of evidence from both parties, which I already said that if that is the case, then this ceases to be a point of law that can be disposed of as a preliminary objection, as properly guided in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd, supra.***

Counsel Komaketch further submitted and I agree with him that, contrary, to the defendant's submissions, there was actually no evidence on record to show any transactions between the parties in the instant

suit before me and any of the parties listed in the plaint in HCCS no. 18 of 2023.

In rejoinder, learned Counsel Etoma, on behalf of the defendants submitted that Juria Kelementia is a wife to Ben D. Mangwi, the 11th defendant in the HCCS no. 18 of 2013. With due respect, I have failed to see where learned counsel got this information from. It is neither on the record of this suit before me nor did I see it in the impugned plaint in HCCS no. 2013.

It appears to me that evidence of the said transactions/relationship was only being introduced from the bar and it is trite, that counsel cannot be a witness in the same case he is arguing.

Under **Section 101 of the Evidence Act**, whoever alleges must prove. It was the defendant's burden to prove to this court that the instant suit is barred by the res-subjudice rule as provided in **Section 6 of the civil procedure Act**.

As I have labored to explain herein above, I am not convinced that the defendants have discharged their burden of proof to support their preliminary objection to the satisfaction of this court.

Counsel for the plaintiff prayed that court be pleased to overrule the preliminary objection with costs and for the reasons given herein in detail, I hereby overrule the same.

Section 27 of the Civil Procedure Act, provides that costs are within the discretion of the court. I hereby grant costs to the plaintiffs and the same shall remain in the cause.

The suit shall be set down for scheduling.

I so order.

Dated at Atiak this.....day of2024

Hw. KK
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H/W KEMBE KARIM

MAGISTRATE G.1