

UGANDA / JUDGMENT

Musoke & 2 Others v DFCU Bank Limited
& 6 Others (Civil Suit 178 of 2019) [2024]
UGCommC 52 (4 March 2024)
[2024] UGCommC 52

COURT
Commercial Court of Uganda

BEFORE
Ocaya, J

CASE / FILE NUMBER
Civil Suit 178 of 2019

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION] CIVIL SUIT NO. 178 OF 2019

10	1.	EDMOND MUSOKE	]						
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	2.	PROSCOVIA NAKIMBUGWE KIZITO	]						
	3.	KAMYA LAWRENCE [ADMINISTRATORS	]	PLAINTIFFS					
		OF THE ESTATE OF THE LATE FRANCIS	]						
		MBOOZI	]						
15									
	VERSUS								
	1.	DFCU BANK LTD	]						
	2.	SHEENA IMRAN AHMED	]						
20	3.	NABILA IVY	]						
	4.	IMRAN AHMED	]	DEFENDANTS					
	5.	ANIL PUJABI	]						
	6.	VASHEILA ENTERPRISES LIMITED	]						
	7.	COMMISSIONER LAND REGISTRATION	]						

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Before: Hon. Justice Ocaya Thomas O. R

RULING

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Introduction

The Plaintiffs filed this suit against the Defendants seeking court orders a number of reliefs including for

- (a) a declaration that the suit land comprised in Kibuga Block 14 now plot 1026
- 35 land in Najjanakumbi measuring 0.134 Hectares ["the suit land"] belongs to the Estate of the Late Francis Mboози
- (b) a declaration that the subdivision of Plot 694 into plots 1025 & 1026 by the 7th Defendant was unlawful and fraudulent

- (c) a declaration that the 4th 5 , 5th and 6th Defendants have no authority to borrow using the suit title belonging to the late Francis Mboози
- (d) a declaration that the mortgage between the 1st Defendant and the 4th, 5th and 6th Defendants was improperly and illegally executed contrary to the law
- (e) a declaration that the mortgage registered on the land comprised in Kyadondo
- 10 Block 14 Plot 1026 at Najjanankumbi measuring 0.134 hectares between Gold Trust Bank (1st Defendant, 5th, 6th and 7th Defendants) is null and void
- (f) a declaration that the sale and transfer of the suit land between the 1st Defendant and the 2nd Defendant was fraudulent and illegal
- (g) a Declaration that the subsequent sale and transfer of the suit land between the 15 2nd and 3rd Defendants was fraudulent and illegal
- (h) an order of cancellation of the 2nd and 3rd Defendant's instruments of transfer and their registration on the suit land, an order directing the 7th Defendant to rectify the register and reinstate the late Francis Mboози on the suit title and register the Plaintiffs as Administrators of the Late Francis Mboози on the suit 20 title
- (i) an order of vacant possession directing the 2nd and 3rd Defendants to vacate the suit land.

The 1st Defendant filed a defence in which it alleges that the impugned transactions 25 were fully undertaken and concluded with Gold Trust Bank Limited ["GTBL"], that the 1st Defendant did not, by agreement or otherwise step into the stead of GTBL.

Accordingly, the 1st Defendant asserts that GTBL and it are two different corporate persons, that the present suit cannot be continued against it for the actions of GTBL 30 and that, therefore, the suit raises no cause of action against it.

Consequent to the closure of pleadings, the 1st Defendant raised a preliminary objection as to the competence of the suit against it, claiming that the plaint did not disclose a cause of action and accordingly, that the same should be dismissed as 35 against it.

5 Representation

The Plaintiffs are represented by M/s Nabakiibi, Kanyago & Co. Advocates and the 1st Defendant is represented by M/s Arcadia Advocates. The 2nd to 7th Defendants did not participate in these proceedings in respect of which this ruling is issued.

- 10 This court directed both parties to file written submissions in support of their respective cases regarding the preliminary point of law raised by the 1st Defendant. The parties duly filed written submissions which this court has considered and is thankful for. I have not, however, felt the need to reiterate the contents of the same herein.
- 15

Decision

A preliminary objection 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 20 be ascertained or if what is sought is the exercise of judicial discretion. 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 oral evidence. See **Yaya Farajallah**

v Obur Ronald & Ors HCCA 81/2016

Matters that require evidence cannot be entertained as preliminary objections but must instead be resolved in the main suit. See **Lweza Clays & Another vs Tropical Bank & Another SCCA 31 of 2018, Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696, Ssekabira Herbert v Ssuna Mulema & Anor 30 HCMA 186/2022**

It is trite law that a preliminary point of law can be raised any time before judgment. See **Charles Sserunjogi v Tony Nkuubi HCOS 7/2019**.

35 In determining a preliminary point of law, the court must consider the pleadings and assume the contents therein to be correct. See **Mukisa Biscuit Manufacturing Co v West End Distributors** [1969] EA 696, **N. A. S. Airport Services v Attorney**

5 General [1959] EA 53, **Rev George Lubega & Anor v Luwero Town Council & Anor** HCCS 193/2009, **Yutta Luda Musoke v Greenland Bank** HCCS 506/2001.

Cause of Action

A cause of action has been defined as every fact which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment. See **Read v Brown** 22 QBD 31, **Tororo Cement Company Limited v Frokina International Limited** SCCA 2/2001

The ingredients of a cause of action were laid down in the long standing authority of

15 in Auto Garage v. Motokov [1971] E. A 514, as

- (a) the plaintiff enjoyed a right;
- (b) the right had been violated; and
- (c) that it was the defendant that is liable.
- 20 All the three elements should be present in the plaint for there to be a cause of action. In considering whether a suit discloses a cause of action or not, one looks ordinarily only at the plaint and assumes that the facts alleged therein are true. See **Tororo Cement Co. Ltd v Frokina International Limited** SCCA No.2 of 2001, **Attorney General v. Oluoch** [1972] E. A 392 at 394, **Sullivan v. Mohamed Osman** [1959] E. A 25 239.

Existence of a right

The plaintiff asserts that the estate of Late Francis Mboozu enjoyed proprietary rights in the suit property as the registered proprietor of the same. Black's Law Dictionary, 30 9th Edition, P.1436 defines a right thus

"...2. Something that is due to a person by just claim, legal guarantee, or moral principle. 3. A power, privilege, or immunity secured to a person by law. 5. (often pl.) The interest, claim, or ownership that one has in tangible or intangible property. 6. The privilege of corporate shareholders to purchase newly issued securities in amounts proportionate to their holdings. 7. The negotiable certificate granting such a privilege to a corporate shareholder."

5 I am satisfied that this ingredient has been made out.

The right was breached and the Defendant is liable

I have decided to handle these elements together as they are interrelated in the circumstances of this case.

From the onset, it is important to state here that, generally, a successor in law may be made culpable for the actions of the predecessor. See **M/s Sendege Senyondo & Co. Advocates v KCCA HCCS 147/2016, Alice Kyebahangire & Anor v Uganda Telecom & Anor HCCS 488/1999, Paul Nyamarere v UEB CACA 55/2008**

The general rule of corporate-successor liability is that when a company sells its assets to another company, the acquiring company is not liable for the debts and liabilities of the selling company simply because it has succeeded to the ownership of the assets of the seller. Traditionally, there have been only four exceptions: (1) the 20 successor expressly or impliedly assumes the predecessor's liabilities; (2) there is an actual or de facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability. See **Creasey v. Breachwood Motors Ltd [1993] B. C. L. C. 480 (Q. B. 1992)**

In the case of Financial Institutions which were acquired, this question is usually determined by a look at the transactional documents underpinning the transaction, such as the purchase of assets and assumption of liabilities agreement. However, in this case, none was on record.

The case by the Plaintiffs against the 1st Defendant is essentially that the 2nd to 7th Defendants, together with the 1st Defendant [previously GBTL] disposed the Plaintiffs of their estate in the suit land wrongfully, fraudulently and/or illegally. It is not asserted that the 1st Defendant or its officials participated in the impugned 35 transactions per se, but that the 1st Defendant is the successor in title or culpable for

the actions of GBTL which participated in the impugned transactions.

5 Court is empowered to take judicial notice of notorious facts. See Sections 55 and 56 of the Evidence Act, Gbaniyi Osafile and John Emeri vs Paul Odi and Okwumaso Nwaje / SC 149/1987, Felix Arim v Stanbic Bank (U) Ltd SCCA 3/2015

I take judicial notice of the fact that in 2000, DFCU acquired Gold Trust Bank. A 10 statement from the DFCU Group website [dfcugroup.com] reiterates this:

"A subsidiary of dfcu Limited, dfcu Bank is a leading banking and financial services company domiciled in Uganda. It came into existence in May 2000 following dfcu's acquisition of Gold Trust Bank to extending universal banking services alongside the pre-existing equity finance; long term development finance; leasing and 15 working capital finance."

The question that stands to be decided is whether, by virtue of that acquisition, suits maintainable against GTBL can now be preferred against the 1st Defendant. I note that DFCU Bank and the 1st Defendant may be different corporate entities. Similarly, GTBL 20 referred to by the Plaintiffs may be a subsidiary or indeed separate corporate entity

from the entity acquired by DFCU Bank.

I have found a number of precedents where DFCU Bank asserts, at least in pleading, that it is a successor of GTBL. These include:

25 (a) DFCU Bank v Manjit Kent & Anor HCCS 193/2000 (b) DFCU Bank v Ann Persis Lusejjere HCCS 78/2003 [In which DFCU sought rights under a mortgage created by GTBL]

I also note that there is some record, from the precedents, of a transfer of employees 30 from GTBL to DFCU. One such case is that of **Fredrick Buwembo v DFCU Bank Limited HCCS 262/2011**.

I have also noted the decision of Justice Christopher Madrama *(as he then was)* in **Hajji Haruna Ssemakula v Stanbic Bank (U) Ltd HCCS 432/2009** where his Lordship 35 found that DFCU Bank were the successors of GTBL.

5 I am not suggesting that the above is complete and comprehensive evidence that the 1st Defendant is a successor in title of GTBL. I have not found a single precedent where this question was tried and determined.

Accordingly, I find that there is need for evidence to determine whether, indeed, 10 whether culpability, if any, of the actions of GTBL is transferrable to the 1st Defendant.

In the premises, I return the finding that this is not a point of law, but one requiring evidence to establish. Accordingly, in my view, the appropriate procedure is to frame the same as an issue for determination, and having it tried first. After leading evidence 15 on this issue, the court may then render a determination on the competence of the suit.

Conclusion

In conclusion, I am unable to determine the 1st Defendant's objection at this point as 20 the same requires evidence. In the circumstances I make the following orders:

- (a) This suit proceeds to trial.
- (b) The matter as to whether the present suit discloses a cause of action against the 1st Defendant shall be framed as an issue for determination.
- (c) Costs shall abide the outcome of the determination of this issue after adducing

25 of evidence on the same.

I so order.

⁴th March, 2024