

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT DIVISION]

CIVIL SUIT NO. 597 OF 2006

YOVANI TIBAKWANIKA=====PLAINTIFF

VERSUS

HAJATI YUDAYA

NALONGO NAMAGEMBE=====DEFENDANT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

The Plaintiff, Yovani Tibakwanika, filed Civil Suit No. 597 of 2006 against the Defendant, Hajati Yudaya Nalongo Namagembe. Briefly the Plaintiffs claim in the above Suit is that he instituted Civil Suit No. 513 of 1990 in the Mengo Chief Magistrate's Court and obtained Judgment against the Defendant therein, one Juma Kabongo. Following that Judgment the said Juma Kabongo ran out of Uganda and on the 6th August 1992, the Defendant herein executed an agreement with M/S Rajsid Results Court Brokers and Bailiffs, the Court Bailiffs appointed to execute the decree in Civil suit Non GK 513 of 1990 whereby the Defendant agreed to pay the sum of Shs. 1,902,840/= to the said Court Bailiffs in

discharge of the money the said Juma Kabogo was liable to pay under the said case. The Defendant did not pay within the agreed period of four months. As a result of the Defendants and failure to pay the Plaintiff and 3rd October 2006 filed this suit seeking to recover:-

- (i) Shs. 7,22,840/=
- (ii) General damages for loss, damage and inconvenience caused to the Plaintiff.
- (iii) Exemplary damages because of the Defendant's unlawful, malicious and unconstitutional acts.
- (iv) Interest at the rate of 30p from the date of filing the Suit.
- (v) Costs of the Suit.

The Plaintiff was represented by Mr. Fredrick Zaabwe.

At the scheduling conference Mr. Eric Mukwezi, Counsel for the Defendant raised two preliminary objections. First that the suit was time barred and second that the plaint did not disclose a cause of action against the Defendant. The Order 9 rule 11 provides:

"The plaint shall be rejected in the following cases -

- (a) *where it does not disclose a cause of action.*

- (d) *where the suit appears*

From the statement in the plaint to be barred by any law.

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With regard to the limitation period Mr. Mukwezi submitted that the Plaintiff's claim was based on a Judgment in Civil Suit No. GK 513 of 1990 delivered sometime in 1992. The instant suit was filed on 3rd October 2006. Counsel referred to Section 3 (3) of the Limitation Act. It says:-

“An action shall not be brought upon any Judgment after the expiration of twelve year from the date on which the Judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six year from the date on which the interest became due.”

Counsel submitted that this action is founded on a Judgment which was enforceable - 1992 and was limited to twelve years which had lapsed in August 2004.

In the alternative counsel referred to subsection (1) (a) of the same section which provides that actions shall not be brought after the expiration of six years from the date on which the cause of action arose if founded on contract. Continued as a contract the cause of action was founded on the agreement, annexure A, to the plaint dated 6th August 1992 whereby the Defendant agreed to pay the decretal sum in Civil Suit No. GK 513 of 1990.

Clearly when this suit was filed on 3rd October 2006 the limitation periods under both sub-sections (1) (a) and (3) of the Limitation Act had long lapsed. The provision “shall be

rejected” in rule 11 of Order 9 of the Civil Procedure Rules is mandatory. In **Fracis Nansio Micheal -Vs- Nuwa Walakira [1993] VI KALR 14** the Supreme Court held tht clearly if the action is time barred then that was the end of it.

In his submission Mr. Zaabwe relied on Section 25 of the Limitation Act. It sates:-

“Where in the case of any action for which a period of limitation is prescribed by this Act, either -

- (a) *the action is based upon the fraud of the Defendant or his or her agent or of any person through whom he or she claims or his or her agent*

the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it;---.”

Counsel referred to paragraphs 6 to 9 of the Plaint. For clarity I will reproduce the paragraphs;-

“6. The Plaintiff shall contend that Juma Kabogo ran out of Uganda and that on the 6/8/1992, the Defendant under look to pay shs. 1,902,840/= to Rapid Results Court Brokers and Bailiffs and clear J. Kabogo’s liability. A photo start copy of the document of

her undertaking is Annexure A.

7. The Plaintiff shall contend that soon after executing the above document the Defendant moved from Kibuye Nkers Zone RC.1 to a place unknown to the Plaintiff and the Court Bailiffs and that consequence execution of the Judgment became impossible.

8. The Plaintiff shall contend that he had no means of knowing the whereabouts of Juma Kobogo or the Defendant.

9. The Plaintiff shall contend that it is only in July 2006, that he learnt the whereabouts of the Defendant.”

Counsel argued that the Defendants conduct and acts as pleaded in the above paragraphs were fraudulent. He therefore sought to rely on fraud and submitted that the limitation period according to Section 25 above did not begin to run until the Plaintiff discovered the fraudulent conduct or acts of the Defendant stated in the Plaint. In his view this was in July 2006 when the Plaintiff discovered the whereabouts of the Defendant. As to pleadings of fraud counsel contended that:-

- (i) Juma Kabogo was under arrest in execution of the Judgment in Civil Suit No. GK 513 of 1990 and the Defendant obtained his release by making a representative that she will pay the Judgment debt. The Defendant made the representation with full knowledge that she was not going to honour the agreement.
- (ii) Juma Kabogo and the Defendant conspired to defraud the Plaintiff because immediately after the execution of the agreement and after obtaining the release of Juma Kabogo, the

Defendant moved from her known Residence at Kibuye Ntere Zone R.C.1 to an unknown place.

Order 6 rules 3 and 6 of the Civil Procedure Rules require that where a party relies on fraud it must be specifically pleaded. In this regard Mr. Zaabwe referred to **B.EA Triber Co. -VS- Inder Singh Gill [1979] EA 463** where Forbes, VP at page 469 stated:

“---It is--- well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud, however, is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently; but from the acts fraudulent intent may be inferred.”

As to the fraudulent intent of the Defendant counsel cited **Suleiman -VS- Azzan [1958] EA 553** where court held that circumstantial evidence suffices to prove fraud; In that case court found that the first Defendant's admissions compiled with the timing of the transfer clearly established that the first Defendant's object was to put the property out of reach of his creditor, the Plaintiff; such an object is *“unlawful”* for the purposes Section 23 of the Contract

Decree, both as being “*fraudulent*” and as being of “*such a nature that , if permitted of any law*”. Counsel submitted that the Defendants conduct was intended to deny the Plaintiff the proceeds of the decree in Civil Suit No. GK 513 of 1990 and to defeat Justice, thus fraudulent.

Assuming the pleadings in paragraphs 6 to 9 of the plaint amounted to a plea of fraud the agreement on which the Plaintiff bases his claim was executed on 6th August 1992. It is the Plaintiff contention, in paragraph 7 of the plaint, that “*soon after execution of the above document the Defendant moved from Kibuye Nkere Zone R.C. 1 to a place unknown to the Plaintiff and the Court Bailiffs and that consequence execution of the Judgment because impossible.*” It is not the discovery in July 2006 of the where about of the Defendant. It is the disappearance from the known place of about which the Plaintiff states was soon after execution of the agreement. This was in 1992. The Plaintiff must have discovered the alleged fraudulent conduct of the Plaintiff sometime in 1992, which was a period of fourteen years by October 2006 when this suit was filed. Thus within the limitation period blachet. It is trite that a party is brought by his/her pleadings. Order 5 rule 18 of the Civil Procedure Rules provides a solution where a party can not be traced for service of summons in the ordinary way, whereby it can be done by substituted service. Failure to trace a Defendant is no justification for failure to file a suit against him within the

statutory period. I therefore find that the Plaintiff's Suit is time-barred.

The second ground of objection was that the plaintiff did not disclose a cause of action. Mr. Mukwezi submitted that the Plaintiff was not a party to the undertaking on which he based his claim. The parties to the undertaking, annexure 'A' to the plaint, was the Defendant, Hajati Yudaya Nalongo Namagembe and M/S Rapid Results Court Brokers and Bailiffs. This was an agreement executed in execution of the Judgment in Civil Suit No. GK 513 of 1990 whereby the said Court Bailiffs were acting as agents of Court and not of the Plaintiff. Clearly the Plaintiff was not a party to the undertaking. The Plaintiff had no claim against the Defendant on the basis of that undertaking. I accordingly find that the plaintiff did not disclose a cause of action against the Defendant.

All in all the plaint is rejected under Order 9 rule 11 of the Civil Procedure Rules and dismissed with costs.

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Lameck N. Mukasa
JUDGE

8/06/07