THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 610 OF 2013

GENERAL PARTS (U) LTD}.....PLAINTIFF

VERSUS

1. **MIDDLE NORTH AGENCIES LTD}**
2. **DISTRICT LAND BOARD OF KAMPALA}.....DEFENDANTS**

(FORMERLY HIGH COURT LANDS DIVISION CIVIL SUIT NO 107 OF 2003)

CONSOLIDATED WITH

MIDDLE NOTH AGENCIES LTD}.....PLAINTIFF

VERSUS

NEW UGANDA SECURIKO LTD}.....DEFENDANT

(FORMERLY LAND DIVISION CIVIL SUIT NO 668 OF 2003)

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection to the Plaintiffs suit and seeking an order to reject Plaintiff's plaint under order 7 rule 11 (e) for being frivolous and vexatious or for dismissal of the suit for being time barred. At the hearing learned Counsel Jehoash Sendege represented the second Defendant, Kampala District Land Board, while Counsel Sekatawa Mathias represented Middle North Agencies Ltd (first Defendant) together with Counsel Deo Rubumba for the first Defendant. Counsel Moses Kuguminkiriza represented the Plaintiff (General parts U Ltd).

Submissions of Counsel

Counsel Mathias Sekatawa, Counsel for Middle North Agencies Ltd (first Defendant) submitted that the two grounds of objection are based on the pleadings as well as the joint scheduling memorandum executed between the parties.

Firstly it is Defendants contention that there was no land available to the second Defendant which it could allocate to the Plaintiff by the 1st of September 1987. It followed that the suit brought by the Plaintiff claiming to be the lawful owner of premises is frivolous and vexatious to the Defendants. Order 7 rule 11 (e) of the Civil Procedure Rules is mandatory and provides that the court shall reject a plaint on the grounds mentioned therein. The rule is imperative and provides in part that: "*the plaint shall be rejected in the following cases*..." Furthermore Order 15 rule 2 of the Civil Procedure Rules empowers the court to decide issues of law before determination of issues of fact. The suit is frivolous and vexatious and the plaint ought to be rejected. The plaint was filed on 23rd of March 2003 and is HCCS 167 of 2003. The plaint seeks declarations that allocation of the suit land to first Defendant by the second Defendant was fraudulent or illegal. Paragraph 3 (a) of the plaint refers. Counsel for the first Defendant asserts that the second certificate of title owned by the Defendant was acquired fraudulently and the certificate is exhibit D1 in the trial bundle.

Counsel submitted that the first title that was ever issued to Plaintiff by second Defendant was issued to it on the 1st of September 1987 according to exhibit D1 which is a certificate of title of the first Defendant showing that it was for a lease commencing 1st of May 1986 for two years. Exhibit P1 issued by second Defendant to Plaintiff is dated 1st September 1987. The question is what the contention between the two dates is. It is clear that the first Defendant's title was issued earlier in time and there is a difference of over a year between the two certificates in terms of when they were issued. The conclusion is that at the time the Plaintiff's lease over the suit property was issued, there was a running lease over the same piece of land in favour of the first Defendant.

The law on the issue is section 48 of the Registration of Titles Act which provides that where an instrument purports to affect the same estate or interest, it shall notwithstanding actual or construction notice be entitled to priority as between themselves according to the date of registration and not according to the date of instrument. The first Defendant's Counsel contends that the first Defendant has earlier registration on 1st of May 1986 and had priority over the Plaintiff. Furthermore, section 176 (e) of RTA allows the exception of a proprietor registered prior in time to sue for cancellation of title of a proprietor registered later in time. The RTA envisages instances of an action for ejectment and recognises that two or more titles on the same property cannot at the same time give rise to proprietors seeking declarations over the same piece of title/land.

Counsel further made reference to the evidence namely agreed exhibits D4 and D5. Exhibit D4 is from Commissioner of Land to Town Clerk KCC where the issue of two titles was discussed and is dated 3rd February 1989. The conclusion in the letter is that General Parts Uganda Ltd was issued with a title for plot M459 which is the suit property, when there was still a running lease and title in favour of the first Defendant. They write that the title issued to General Parts (U) Ltd is null and void. Secondly agreed exhibit D5 is a letter from Commissioner of Lands to the Town

Clerk of KCC of 6th February 1989. In his letter J.L Okello- Okello refers to exhibit D4 in his first paragraph. In paragraphs 2 and 5 of the letter he writes that it was erroneous to issue exhibit P1 (certificate of title of the Plaintiff) to General Parts (U) Ltd while there was a running lease and title. In paragraph 5 he admits that there was a mistake made by his department and the Council to issue the second title. The second Defendant is the controlling authority over the suit land. In the Supreme Court case of **Livingstone Sewanyana vs. Martin Aliker Civil Appeal No 4 of 1990** Justice Oder JSC on a similar issue held that the suit land was not available for leasing when there was a subsisting lease. This authority was applied by the High Court in the case of **Charles Nkoojo Amooti vs. Kyazze Francis and Commissioner Land Registration HCCS 536 of 2007** by Hon. Justice Andrew Bashaijja who held that a certificate of title to land issued earlier supersedes a later one and the subsequent title should be cancelled. On the basis of the above submissions learned Counsel for the first Defendant concluded that a suit filed by the Plaintiff whose claim to the suit land emanates from exhibit P1 is not only frivolous and untenable but also vexatious. This suit is the reason why the subject plot is undeveloped according to agreed fact Number 9 in the joint scheduling memorandum. Counsel prayed that the Commercial Court Division discourages suits of this nature. He further contended that to decide otherwise is to confer rights on a nullity.

Second ground of objection is that the action filed by the Plaintiff is time barred by the law of limitation. Section 5 of the Limitation Act cap 80 Laws of Uganda, thereof bars recovery of land by action brought after expiration of 12 years from the date the cause of action arose. The Plaintiff's plaint was filed on the 21st March 2003 and paragraphs 4 (a) and (b) thereof brings out the facts explained above. Lease title was to run for a period of two years. The Plaintiff's title was due to expire on 30th of August 1989 and that is when the cause of action arose and the 12th year period expired on 30th August 2001. The suit was filed two years outside the period stipulated by the law. Neither the original plaint nor amended plaint pled disability. There is no exemption from the limitation period pleaded. There is no acknowledgement or part payment pleaded. Time cannot be extended by plaint or argument and it is a creature of statute. Section 25 of Limitation Act creates exception on grounds of discovery of fraud. However the first Defendant's Counsel submitted that a search ought to have discovered the existence of a running lease or it ought to have been discovered through the exercise of reasonable diligence. Time brings to run on 1st of July 2007 when the Plaintiff applied for lease as averred in paragraph 4 (a) of the plaint. Section 14 of Limitation Act, bars the deeming of possession by virtue of a formal entry. Section 16 of same Act provides that after expiry of a period of limitation the title of that person to land shall be extinguished. The Plaintiff does not have a right of audience. Counsel relied on the case of **Muhammad B Kasasa vs. Jasphar Buyonga Sirasi Bwogi CA 42 of 2008**, where it was held by the Court of Appeal of Uganda that statutes of Limitation are by their nature strict and inflexible enactments. Where limitation applies the action cannot be maintained and no amendment can cure the defect. The cause of action arose when the Defendant is alleged to have gained or acquired the land. Counsel further relies on the case of **Hajati Ziribagwa and another vs. Yakobo Ntate HCCS No. 117 of 1991** reported in **[1994] Vol 2 KALR 61**, where

Hon. Lady Justice Constance Byamugisha held that the cause of action arose from the date the Defendant acquired the land. In this case the cause of action arose on the 1st of May 1986. The first Defendants Counsel invited the court to consider the reply to the written statement of Defence of the second Defendant filed on 25th of April 2003 by the Plaintiff and paragraph 4 thereof contains an admission by the Plaintiff that the fact of the Defendants acquiring land was not brought to the Plaintiff's knowledge at the time of the Plaintiff's allocation or acquisition. The Defendant would be entitled to dismissal of suit. Paragraph 3 of WSD filed on 8th April 2003 states that the Plaintiff has not cause of action. Plaintiff's remedy lies in refund of such monies as paid to second Defendant on premiums, ground rent etc. Counsel further prayed that any subsequent extensions of the Plaintiffs lease title as the Plaintiff might allege were an attempt to extend a nullity. A Court cannot condone a nullity and should reject the plaint or strike out the suit for being barred by limitation with costs.

In further support of the two objections the second Defendant's Counsel, Counsel Jehoash Sendege associated himself with submissions of the first Defendant's Counsel. He added that firstly that the power exercised by court under Order 7 rule 11 of the Civil Procedure Rules is mandatory. He emphasised that if the original grant is a nullity, no extension can put life into it. This is because an extension stems from the original grant the second Defendant's amended written statement of defence avers that the Plaintiff has no protectable interest in the suit land and what happened is regrettable. On the question of Limitation of the cause of action of the Plaintiff the second Defendants Counsel pointed out certain documents which show that in 1989 the Plaintiff was aware of the first Defendant's title to land. Exhibits D4 and D5 were copied to the Plaintiff. Other documents to be considered are the Plaintiff's reply to the second Defendant's amended written statement of defence pages 42, 43 and 44 and 45. These are attachments to Plaintiff's pleadings which demonstrate that the Plaintiff was aware of first Defendant's title by 1989. The second Defendants Counsel referred to the judgment of Hon. Lady Justice Irene Mulyangonja in **HCCS 68 of 2007 Safiba Bakulimya vs. Yusuf Musa Wamala** and last two pages thereof where it is emphases following previous precedents quoted therein that statutes of limitation are applied without regard to the merits or demerits of the case.

As far as the question of refund of the Plaintiff's premium etc is concerned, a refund claim is extinguished by the Limitation Act though it can be considered administratively. He invited the court to reject the Plaintiff's plaint with costs.

Reply by Plaintiff's Counsel

The Plaintiffs Counsel Moses Kugukuminkiriza prayed that the objections are overruled with costs. He further prayed that the court considers the points of law while considering the pleadings and joint scheduling memorandum filed by lawyers.

In reply to submissions of the second Defendant's Counsel on whether the suit is timed barred, the Plaintiff's Counsel contends that the submission is a complete departure from previous

pleadings in relation to the suit property and Counsel's own correspondence on the matter. He referred the court to annexure "Z" attached to the reply to the second Defendants amended written statement of defence being a letter dated 15th April 2010 addressed to Messrs Rubumba and Company Advocates to the second Defendant. In that letter 2nd Para it is written that following advice of Messrs Sendege and Co Advocates the consent judgment under MA 589 of 1988 arising from the same suit is set aside by the court on 30th March 1999 and the Land Board could not have based its decision on it. The letter concludes in the last paragraph that in the meeting of 14th of April 2010 it was agreed that the lease given to the first Defendant be withdrawn or cancelled. That the board would not renew the lease in future until HCCS No. 668 of 2003 consolidated with HCCS No. 107 of 2003 are disposed of. These are the suits for disposal by the court. The question is why the second Defendants Counsel did not give the advice to the board.

On the first objection, it has been consistently pleaded that the Plaintiff was granted a two year lease in 1987 as evidenced by annexure "D" to the reply to second Defendant's amended WSD. Later on the lease was extended by 2nd December 1989 for three years according to annexure E. Again the lease was extended for another three years from September 1992 according to annexure F of the reply. On 12th July 1996 as per annexure "G" of reply a letter was written to the Plaintiff by the second Defendant and the last paragraph states that "therefore your lease is withdrawn and treat it as cancelled until court resolves issues between you and Middle North Agencies" (the first Defendant). It follows that if there were any rights of the Plaintiff which had been infringed it arose on the 12th of July 1996 when the lease was withdrawn. It means that because suit was filed in 2003 it was filed 8 years later. This is therefore the effective date when any cause of action arose. Furthermore the Plaintiff's Counsel submits that three titles were issued to the Plaintiff and the last one was still running. It is misdirection through submissions for of first Defendant's Counsel to state that the cause of action arose in 1989.

Furthermore the Plaintiff's Counsel submitted that in 1989 there was a claim by the first Defendant over the suit land after discussions and negotiations and there was a withdrawal of claim of interest executed between the Plaintiff Company and first Defendant company annexure "A" to reply to the amended written statement of defence through an unequivocal document. The Plaintiff's Counsel contends that whatever claim of interest they may have had, the first Defendant withdrew it for money consideration. This includes the title the first Defendant was issued by the second Defendant. The document extinguishes any claims over the suit land by the second Defendant. Counsel further referred to a letter dated 20th April 1998, annexure H2 to the reply of the Plaintiff and written by Messrs Katongole and Mukasa Advocates addressed to Town Clerk KCC wherein they informed KCC that they withdrew all claim of interest in the property in favour of Messrs General Parts (Uganda) Ltd. Based on these two documents there is no basis for the first Defendant to claim the suit land. If the first Defendant has any basis, it becomes an issue for trial on the merits. Whatever happened was done with the intervention of

the City Authority according to annexure "I", "J" "K" and "L" of the Plaintiffs reply. The correspondence referred to culminated in withdrawal of interest by the first Defendant.

The Plaintiff's Counsel further sought to contextualise the case and submitted that in 1994 Middle North Agencies (The first Defendant) sued KCC and General Parts in HCCS 637 of 1994 annexure "N" to the reply. The suit was only for special and general damages. Even in the amended written statement of defence of KCC annexure "O" to the reply it was expressly pleaded that the Plaintiff Company surrendered its interest and withdrew its claim. The Plaintiff's Counsel further referred to paragraph 8 thereto. He submitted that by those pleadings the first Defendant recognised that it did not have any interest in the suit land.

Secondly on the 29th of April 1998 a consent judgment was executed between first Defendant and KCC to the exclusion of the Plaintiff. The terms of the consent were that Middle North was allocated the suit land and an extension of 14 years was granted which took effect from 1st of May 1988. By 1988 General Parts (U) Ltd had a certificate of title. The said consent judgment was set aside by CA Okello and the decision setting it aside is attached as annexure "T" to reply of the Plaintiff to amended written statement of defence of the second Defendant. The effect of the setting aside rendered the title null and void. There was affidavit sworn by Dan Muhumuza annexure V in paragraph 8 it is indicated that according to consent judgment KCC issued a certificate of title to the first Defendant in 1998 and this is the title that the first Defendant is waving for assertion of its rights.

Paragraph 3 of the said affidavit of Dan Muhumuza annexure "V" to the Plaintiffs reply to second Defendants states that on 26th of Nov 1987 the respondent/Plaintiff received communication that the second Defendant Kampala District Land Board (KDLB) considered an application for plot 4/M9 and wanted a commitment for withdrawal of HCCS 637 of 1994. Letter was annexed as "A" to the affidavit. The paragraph that follows avers that the Plaintiff (Middle North) responded and on 30th Dec 1997 received communication from KDLB that the board had granted an extension of lease for 14 years with effect from 1st May 1998. In the same affidavit the deponent deposes that on 29th April 1998 a consent judgment was entered into by KDLB and a certificate of title obtained on 8th June 1998. The question therefore is what the relationship of title being held by the Middle North Agencies Vis a Vis its claim by General Parts (U) Ltd and consent judgment that was set aside is.

Defence exhibit No. 3 at page 40 of the scheduling memorandum are minutes of KCC (Kampala City Council) regarding reallocation or extension of lease to Middle North Agencies (The 1st Defendant). Minutes at page 40, on the plot M459 Nakawa industrial area reminded the City Advocate to prepare a report on the case and provide facts about Middle North Agencies Ltd. They noted that allocation to General Parties was fraudulent and they have no claim. Secondly, that the claim was in court. Thirdly Messrs Middle North Agencies showed intention to withdraw the case if the decision of the board was in their favour. City Advocate was told to get a firm commitment from Middle North Agencies that they would withdraw the case and land

would be registered in their names. The application was deferred on that basis. In the same minute at page 42 (Page 14 of Min) when the Board reconvened, it was informed by the City Advocate that Middle North Agencies confirmed that they would not pursue an action for damages regarding delay of development on the above plot. The City Advocate reported on the shareholding of Middle North Agencies. The shareholders include one Mr. Shukla Mukesh.

The Board made observations at pages 14 – 15 and 16 of minutes. What is relevant and important is the resolution where they state that the lease for Middle North Agencies should be renewed for another 14 years with effect from May 1st 1988 and this is in line with defence exhibit D2 at page 132. The title deed was admitted by consent and demonstrates that the lease term ran from 1st May 1988 for 14 years. Subsequently the 14 years was crossed and amended to read 19 years. Notable is the date of instrument number which is the 8th June 1998 consistent with the date mentioned in the affidavit of Dan Muhumuza Paragraph 6 and annexure "V" thereof. A consent judgment was entered and a certificate of title obtained on 8th June 1998 which title is LRV 2633 and is the same copy of title as exhibit D2.

The Plaintiff's Counsel submitted that the question is whether this is the title that was set aside by the consent judgment. In the plaint by Middle North Agencies Ltd vs. General Parts (U) Ltd there is reference to a consent judgment. The effect of the consent judgment is that the limitation period was set aside and it restored the interest of General Parts (U) Ltd in the suit property (if any). Secondly the consent judgment being set aside nullified the title of Middle North Agencies Ltd. In that regard the first Defendant has no basis in law and fact to claim the property and the issue of limitation cannot arise. In conclusion the Plaintiff's Counsel disagrees with the submission that the title of Middle North Agencies Ltd takes priority as a title/interest registered prior in time. This is because Middle North Agencies Ltd withdrew its claim of interest on the suit property by consent of parties for a consideration. There was no other interest that General Parts compensated Middle North Agencies Ltd for. Withdrawal of interest is with regard to LRV 1538 plot M459 Nakawa Industrial Area. They had a two year lease. This withdrawal overrode any interest Middle North Agencies Ltd had over the suit property.

The Plaintiff's Counsel further contends that the sections quoted by his learned friend Counsel for the first Defendant were irrelevant. In the counterclaim by Middle North Agencies against General Parties U Ltd has no prayer for the withdrawal of interest to be declared null and void or ineffective. It is only averred that the withdrawal was executed by people who are not known to the company thereby making it an issue for trial on the merits.

The Plaintiff's Counsel submitted that section 12 of Limitation Act deals with actions for recovery of land. The Plaintiff's action is not time barred and it seeks declarations based on a ruling delivered by court in HCCS 637 of 1994 between Middle North Agencies Ltd, Kampala City Council General Parts U Ltd. It is averred in the plaint that the said suit was withdrawn unilaterally. The question of recovery of land does not apply because the action is not for

recovery land. They averred that General Parts (U) Ltd is forcefully in possession of the suit property.

On the issue of whether the suit is frivolous and vexatious the Plaintiff's Counsel relies on **Black's Law Dictionary** which defines a frivolous suit as one which lacks legal basis or merit. Plaintiff's action does not fit in this definition as its claim has a legal basis. The Plaintiff was allocated the suit land and claims that the first Defendant withdrew its interest and that it compensated the Middle North Agencies Ltd. The lease of the Plaintiff was stopped by the controlling authority pending disposal of suit. There is no malice involved in instituting the suit and it is not vexatious as it is the Defendants who are causing trouble. He further submitted that the authorities cited by his colleague are inapplicable. In those cases there were two titles running concurrently and the first in time has a better title. They do not apply where one party has withdrawn its interest.

In summary and conclusion the Plaintiff's Counsel submitted on how the dispute arose. It is averred that this followed withdrawal of HCCS of 1994 and application for reinstatement was filed and when the Plaintiff complained, he was advised to file a fresh action. He prayed that the court overrules the objection and directs that the long standing dispute since 2003 be heard on the merits as directed by the Supreme Court with costs.

First Defendant's submissions in rejoinder

In rejoinder the first Defendant's Counsel Mathias Sekatawa submitted that the objection was on limitation and another was based on whether there was any land to allocate to the Plaintiff in the first place.

Counsel with reference to observation 1 of the council at page 44 of the trial bundle concluded that from the beginning the land title issued was null and void since there was no land available for leasing and the Plaintiff had no interest in the suit land. These were the findings of the second Defendant who is the lessor of the suit property. On the alleged surrender of the lease by the first Defendant, there is reference to IP 35 found at page 41 of the reply to second Defendant's amended written statement of defence in the document entitled Registration of Titles Act, Plot M459 on "Withdrawal of interest". Firstly he submitted that the document did not amount to surrender of a lease in law. The question is whether a surrender of lease can be made by letter or otherwise? The Plaintiff wanted the court to believe that there was a surrender of interest by the first Defendant. The letter was an attempt at regularising an incurably defective title when they realised that there was a running lease title.

Section 108 of the Registration of Titles Act on this question is instructive. A lease may be surrendered as by the word "surrendered" and signed by the lessee and his or her transferee and by the lessor and attested by a witness. IP35 was never executed by the lessor. It is not a surrender of lease. The registrar is required to enter a memorandum in the register and no such

entry exists or has been brought before this court. Under 108 (3) of the Registration of Titles Act, upon entry the estate and interest of the lessee shall vest in the lessor on surrender of lease. It cannot be surrendered to a third party. It can only be proved by production of a lease bearing the endorsement.

Furthermore the Plaintiff wanted the court to believe it had purchased the interest of the first Defendant. There is no evidence of transfer of a leasehold interest. General Parts (U) Ltd got no interest from Middle North Agencies Ltd. As an alleged transferee any transfer of that property ought to be evidenced by a transfer deed as well as the title deed.

As far as the document IP35 is concerned, if it has any value, it has a date of 21st April 1989and the time of 12 years computed from that time could have expired on 20th April 2001 but the suit was filed in 2003. There are letters IP37, IP34, IP25 and IP28 all showing that are all dated April 1989. To that extent, General Part (U) Ltd cause of action arose in April 1989 when it alleges to have purchased interest the interest of Middle North Agencies Ltd. The Plaintiff never pleaded any disability and therefore, its action is time barred.

As far as the Plaintiff's Counsel emphasised the ruling of Hon. Lady Justice Caroline Okello, it only affected extension of pre-existing earlier granted lease. To that extent, it is irrelevant in determining whether the suit is time barred. Counsel submitted that if the Plaintiff wants to challenge the rights of the lessor Messrs KDLB over its own land, its remedy lies in judicial review of a decision taken by a quasi judicial body and not by way of a suit. With reference to the amended written statement of defence of the second Defendant, the amendment is pivotal to determination of the two points raised by the Defendants. Under paragraph 3 thereof KDLB says that the Plaintiff had no protectable interest in the suit property. In the premises the first Defendant's Counsel reiterated submissions made earlier and invited the court to strike out the plaint for being time barred, frivolous and vexatious and for costs to be awarded to the Defendants.

Ruling

I have carefully considered the two objections on which Counsels for the parties submitted and further perused the pleadings as well as authorities on the matter. The first objection is that the Plaintiff's plaint is frivolous and vexatious and ought to be rejected under the provisions of Order 7 rule 11 (e) of the Civil Procedure Rules which provides that the plaint shall be rejected if the suit is shown by the plaint to be frivolous or vexatious. The second objection may also come under Order 7 rule 11 (d) of the Civil Procedure Rules which also provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Consequently the question of whether the plaint is barred by the law of limitation can be considered only on the basis of the pleadings.

The provision that the plaint shall be rejected under Order 7 rule 11 of the Civil Procedure Rules on any of the grounds set out under rule 11 has been held by the East African Court of Appeal to be mandatory in the case of **Auto Garage versus Motokov [1971] EA 514.**

The facts in support of a preliminary point of law must be disclosed in the plaint or be agreed to or must be facts which are not in dispute. The first Defendant's first objection is made under Order 7 rule 11 (e) which that the plaint shall be rejected in the instances set out under rule 11. Specifically rule 11 (e) provides that the plaint shall be rejected where the suit is shown by the plaint to be frivolous or vexatious or Under Order 7 rule 11 (d) where it is shown by the plaint that the suit is barred by law. According to **Odger's 'Principles of Pleading and Practice in Civil Actions of the High Court of Justice' 22nd edition page 148**, an application to reject a plaint on the ground of being frivolous or vexatious relies only on the facts pleaded and no evidence is admissible. In the case of **Winlock versus Maloney [1965] 2 All ER 871** the court considered a similar rule to the Ugandan Order 6 rule 30 which prescribes inter alia that a plaint may be struck out for being frivolous or vexatious. Danckwerts LJ stated at page 874:

> "The practice under the former rule, b RSC, Ord 25, r 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the Plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed."

Similar considerations for rejection of a plaint for being frivolous or vexatious apply under 7 rule 11 (e) as well as Order 6 rule 30 (1) of the Civil Procedure Rules where it is shown by the pleadings that the suit is frivolous or vexatious. In **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Wambuzi CJ as he then was held at pages 2 and 3 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 29 (before revision of the rules now order 6 rule 30) only the plaint can be looked at.

> I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at..."

The Supreme Court further defined what a cause of action in the case of **Major General David Tinyefunza vs. Attorney General of Uganda Const**. **Appeal No. 1 of 1997** and cited with approval the definition in Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206 that:

> "A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant... *But it has no relation whatever to the defence*

which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It is a media upon which the Plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit." (Emphasis added)

The facts for disclosure of a cause of action must be alleged in the plaint. Similarly facts showing that the suit is barred or is frivolous must be disclosed by the plaint. It was held in **Attorney-General v Oluoch [1972] 1 EA 392** at page 394 that:

> "In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."

In the East African Court of Appeal case of **Jeraj Shariff & Co vs. Chotai Fancy Stores [1960] 1 EA 374** Windham JA at page 375 held that:

> "The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true."

In **Iga v Makerere University [1972] 1 EA 65** the Court of Appeal of East and Africa sitting in Kampala held that a plaint barred by limitation is barred by law and shall be rejected under Order 7 rule 11 (d) of the Civil Procedure Rules. Similarly a point of law of a preliminary nature must be based on uncontested facts or facts not in controversy as held in **NAS Airport Services Limited vs. The Attorney-General of Kenya, [1959] 1 EA 53** per Windham JA page 58 of the judgment in considering order 6 rule 28 which permits a point of law to be set down for hearing preliminarily that:

> "...the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end."

If the facts are not averred in the plaint, the facts must either be admitted or should not be in dispute. This is emphasised by the East African Court of Appeal in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696** per Sir Charles Newbold P at page 701 where he said:

> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

A point of law can be set out for trial as an issue under Order 15 rule 2 of the Civil Procedure Rules. It has however to arise from the pleadings. A point of law whose effect is to resolve the dispute without adducing further evidence saves time of the court and saves the parties unnecessary expenses. A point of law can be set down for hearing under Order 15 rule 2 of the Civil Procedure Rules as well as Order 6 rule 28 of the Civil Procedure Rules.

On the first point that was submitted in favour of the Defendants is that the title of the first Defendant Middle North Agencies Ltd was issued by the second Defendant prior to the title of the Plaintiff and therefore the second title is a nullity. Where the title of the Plaintiff is a nullity, the Plaintiff cannot bring an action against the Defendants. On the other hand it is submitted for the Plaintiff in answer that the first Defendant Middle North Agencies Ltd withdrew its interest and settled it in favour of the Plaintiff. The question of whether the first Defendant obtained a title prior to that of the Plaintiff is a question of fact. Before considering the question of fact the Defendants rely on the provisions of section 48 of the Registration of Titles Act cap 230 laws of Uganda which provides as follows:

> "48. Instruments entitled to priority according to date of registration.
>
> (1) Every instrument, excepting a transfer, presented for registration may be in duplicate and shall be registered in the order of and as from the time at which the instrument is produced for that purpose, and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.
>
> (2) Upon the registration of any instrument not in duplicate, the registrar shall file and retain it in the office of titles, and upon the registration of any instrument in duplicate, the registrar shall file one original and shall deliver the other, hereafter called the duplicate, to the person entitled to it."

Instruments are entitled to priority according to the date of registration and not the date of the instrument. So registration prior in time takes precedence over registration subsequent to the prior registration. The argument of the Defendants is supported by section 48 read together with the provisions of section 176 (e) of the Registration of Titles Act. Section 176 (supra) provides that no action of ejectment or other action for recovery of land shall lie or be sustained against a person registered as the proprietor thereof except under the exceptions listed under the section and particularly (e) which provides that an action can be brought in the case of a registered proprietor claiming under a certificate of title prior in date of registration under the Act in any case in which two or more certificates of title may be registered under the Act in respect of the same land.

As noted in the case of **Jeraj Shariff & Co vs. Chotai Fancy Stores [1960] 1 EA 374**, questions of fact can be determined by a perusal of the plaint alone and any attachments which forms part of the plaint. So the first issue is whether it is apparent from a perusal of the plaint that the title of the first Defendant was registered prior in time.

Under paragraph 3 of the plaint which was filed in March 2003 by the Plaintiff, it is averred that the Plaintiffs claim against the Defendant is for a declaration that the allocation of the suit land to the Defendant by Kampala City Council was fraudulent or illegal. Secondly a declaration that the certificate of title of the suit land comprised in LRV 2633 folio 1 plot 26 Mukabya road was acquired fraudulently; an order for the revocation or cancellation of the Defendant's lease offer; an order for the cancellation of the certificate of title issued to the Defendant; an order directing Kampala District Land Board as successor in title to issue to the Plaintiff a lease extension in respect to the suit land; a permanent injunction restraining the Defendant, its agents or successors in title from trespassing upon the Plaintiffs land or claiming any interest in the suit land. General damages and costs of the suit.

The facts averred in the plaint in paragraph 4 thereof are that on 21 July 1987 the Plaintiff applied for and was allocated land comprised in LRV 1538 Folio 18 Plot No. M 459 Nakawa Industrial Area by Kampala City Council on 1 September 1987. After the allocation of the suit land to the Plaintiff, a lease offer was made to the Plaintiff for an initial period of two years and further extensions of the lease by Kampala City Council were registered. The Plaintiff was registered as proprietor on 1 September 1987 and a certificate of title was issued to it. At the time of allocation of the suit land to the Plaintiff, the land was vacant, unoccupied and undeveloped and upon allocation the Plaintiff commenced development thereof to wit the erection of a wall fence, construction of drainage and an office block. While the Plaintiff's lease was still subsisting the Defendant started claiming an interest in the suit land, which the Plaintiff purports to dispute claiming to have a lease thereon from Kampala City Council. It is averred that the matter was amicably settled between the Defendant and the Plaintiff whereupon the Defendant surrendered, relinquished and abandoned its purported claim of interest in the said land for a consideration of **Uganda shillings 1,500,000/=** paid by the Plaintiff to the Defendant according to the agreement attached annexure "D". It is further averred that in 1994, the Defendant in disregard of the relinquishment, surrender and abandonment of the claim of interest, lodged a caveat on the property. Later the Defendant instituted HCCS No. 637 of 1994 against the Plaintiff and the City Council of Kampala, which was by consent fraudulently settled between the Defendant and Kampala City Council to the exclusion of the Plaintiff although a party to the suit. A copy of the consent judgment dated 29th of April 1998 is annexed as "E". Furthermore it is alleged that during the pendency of HCCS No. 657 of 1994, Kampala City Council purportedly by letter dated 12th of July 1996 withdrew and suspended the Plaintiff's lease until the determination of HCCS No. 637 of 1994. The letter is annexed as "F". It is alleged that the Defendant pursuant to the said consent judgment fraudulently had itself registered as proprietor of and in respect of the suit land under instrument number 294546 dated 8th of June 1998 and

always known as LRV 26 3341 plot 26 Mukabya road Kampala according to the next certificate of title "G". Particulars of fraud are pleaded and include an averment of obtaining a certificate of title with the knowledge that the Plaintiff had a subsisting lease on the suit land. The Defendant obtained title after withdrawal of its claim of interest in the suit land in favour of the Plaintiff. The Defendant got registered pursuant to a fraudulent and illegal consent judgment that was eventually set aside. The Defendant acquired title in disregard of the Plaintiff's interest with an intention to defeat the Plaintiff's proprietorship. Applying for and obtaining registration in respect of land belonging to the Plaintiff. Acquiring land in respect of which the Defendant had no legal or equitable interest, claim or estate. It is further averred that the consent judgment was set aside in High Court Miscellaneous Application Number 589 of 1998 according to the copy of the order annexure "H". In July 1998 after the order setting aside the consent judgment between the Defendant and Kampala City Council in respect of the suit land, the Plaintiff applied to the Registrar of Titles for rectification of the register, which application was refused by the registrar advising that HCCS No 637 of 1994 should first be determined or an order for rectification of the register obtained. Later on the Defendant withdrew HCCS No 634 of 1994 according to copies of the intention, notice and order granting withdrawal of HCCS No 67 of the demand for all of which are shown to be annexed as "K", "L" and "M" respectively. The Plaintiff avers that the setting aside of the consent judgment rendered the certificate of title issued on the strength of the consent judgment null and void and further that despite numerous demands the Defendant refused to surrender the certificate of title. The Plaintiff avers that the Defendant's actions were intended to deprive it of its legal interest in the suit property in as far as the Defendant with the help of Kampala City Council through grant of extension of an illegal lease has created a mortgage on the suit land under instrument number 308323. The Plaintiff further pleads facts in support of the claim for damage, injury and loss. The Plaintiff avers in paragraph 8 of the plaint that since its lease and certificate of title were suspended pending the determination of the suit they were revived upon withdrawal of the suit and thus Kampala City Council granting of lease extension the Defendant in 2002 created a lease in favour of the Defendant running concurrently in respect of the suit land with that of the Plaintiff which extension is suspect. The letter of extension of lease is annexure "N". The Plaintiff avers and contends that despite the setting aside of the consent judgment, the Defendant has continued to attempt to forcefully takeover of the suit land thereby trespassing upon the property in its possession.

I have carefully considered the averments in the plaint. It is apparent that the Plaintiff avers that it was registered prior in time to the Defendant. The burden of proof is on the Plaintiff to prove that it was registered prior in time and that the Defendant was fraudulently registered on the suit property. The assertion that the first Defendant was registered prior in time is not supported by the plaint. I will however carefully review the correspondence attached to the plaint before considering the agreed facts and documents pursuant to the facts contained in the joint scheduling memorandum. This is because the consideration of whether a plaint discloses a cause of action is based not only on the averments in the plaint but also on attachments forming part of it.

I have had difficulty trying to trace the Plaint in HCCS No. 107 of 2003. Apparently the original file was not forwarded from the land division. The only original file on record concerns HCCS No 462 of 2003 between the Middle North Agencies Ltd as Plaintiff and Uganda New Securiko Ltd as Defendant. Consequently the only plaint in HCCS 107 of 2003 is that contained volume 2 of the Plaintiff's documents/trial bundle. However the plaint was photocopied without the attachments as marked. The documents can only be traced by their description in the plaint. I have particularly been unable to trace application by General Parts (U) Ltd for the plot in question.

It is averred that the Plaintiff applied for and was allocated the property on 1 September 1987. After the allocation of the property a lease offer was made to the Plaintiff for an initial period of two years. Subsequently the Plaintiff was registered as proprietor on 1 September 1987. This averment is in paragraph 4 (b) of the plaint where it is averred as follows:

> "That after allocation of the suit land to the Plaintiff, a lease offer was made it for an initial period of two years and further extensions of the lease by KCC and was registered as proprietor 1 September 1987 and a certificate of title issued to it. Copies of the lease offer, and certificate of title are annexed hereto and marked "B" and "C" respectively."

Even without considering the application of the Plaintiff which is supposed to be annexed as annex "A" to the plaint in paragraph 4 (a) thereof, it is clearly averred that the Plaintiff was registered as proprietor on 1 September 1987. Certain documents have been admitted in the joint scheduling memorandum. The first of these documents is exhibit P1 which was marked by consent of the parties and included in the joint scheduling memorandum executed by Counsel involved in this case giving the agreed facts. The joint scheduling memorandum was filed on court record on the 2nd of May 2014. Before dealing with the documentation admitted by the Counsel for the parties, it would be necessary to set out the agreed facts based on the scheduling conference held by the parties on 14 April 2014.

The agreed facts are as follows: "…

1. The suit land is presently Leasehold Register Volume Number 2633, Folio 1, Plot 26, Mukabya road, Kampala originally Plot M459, Nakawa Industrial Area, Nakawa.

2. The Plaintiff was granted a lease of two years by City Council of Kampala from the 1 September 1987 and the lease was registered under Leasehold Register Volume number 159 642, Plot Number 459, Nakawa Industrial Area.

3. The Plaintiff's lease was extended by the City Council of Kampala for a period of three years effective the 1 September 1989, registered on the 28th of May 1990 under LRV 1846, Folio 21 Plot No 459, Nakawa Industrial Area.

4. The Plaintiff's lease was further extended by the City Council of Kampala for a period of three years effective 1 September 1992, registered on the 22 April 1994 and LRV 2229, Folio 18, Plot No M 459, Nakawa Industrial Area. No further extension was granted to the Plaintiff.

5. On the 1st of May 1986, the 1st Defendant was granted a lease of the land comprised in LRV 1538 folio 19, plot M4 59 Nakawa Industrial Area, and a certificate of title was issued to the 1st Defendant for a period of two years.

6. Pursuant to a letter reference number KDLB/EXT/97 dated 30 December 1997, and its minute number KDLB.20/20.19/97 of the meeting held on 23 December 1997, the 2nd Defendant extended the 1st Defendant's lease of this suit land for a period of 14 years.

7. Pursuant to the extension in (6) above, the 2nd Defendant executed a new lease agreement in favour of the 1st Defendant, which was registered under LRV 2633, Folio 1 Plot 26, Mukabya Road.

8. The lease of the 1st Defendant was further extended by the second Defendant for a period of 5 years from the 1st of May 2007, LRV 2633 Folio 1, Plot 26 Mukabya Road, which title is mortgaged to Allied Bank International Ltd to secure the borrowing of the 1st Defendant.

9. The suit land is presently undeveloped."

From the agreed facts endorsed by Counsels for the parties, it is revealed that the Plaintiff was granted a lease of two years by the City Council of Kampala from 1 September 1987. The lease was extended by the City Council of Kampala for a period of three years effective 1st of September 1999 and registered on the 28th of May 1990. It is also the agreed fact No. 5 that on the 1st of May 1986, the 1st Defendant was granted a lease of the land comprised in LRV 1538 Folio 19 Plot M 459. There seems to be no dispute that the two titles relate to the same piece of land. The first Defendant's Counsel based his arguments for the assertion that the first Defendant was registered prior in time on the agreed facts and certificates of title admitted in evidence. I have duly considered the certificates of title. Exhibit P1 concerns plot M459 Nakawa Industrial Area, Kampala measuring approximately 0.557 ha giving a lease term commencing 1 September 1987 for two years and it is issued to Messieurs General Parts (U) Ltd PO Box 30898, Kampala. It is registered on 1 September 1987 at 2:30 PM under Instrument Number 231955 by the Registrar of Titles. The lease instrument was executed on 31 August 1987 between the parties. The extension of the lease for three years exhibit P2 concerns the same piece of land and the area is approximately 0.578 ha also registered in the names of the Plaintiff and registered on the 28th of May 1990 at 8:55 AM under Instrument Number 243843 it is also in respect of plot number M459 Nakawa Industrial Area. Exhibit P3 concerns the same piece of property whether an area

of approximately 0.578 ha giving a lease extension from 1 September 1992 for the lease term of three years. It is registered on 22 April 1994 in the names of the Plaintiff under instrument number 062680 at 10 AM. The plot number remains the same.

On the other hand exhibit D1 is a registered title of the first Defendant Messieurs Middle North Agencies Ltd of PO Box 3330, Kampala registered on 11 February 1987 at 2:30 PM under instrument number 229268 registered at 2:30 PM. It is for plot M 459 Nakawa industrial area in the City of Kampala measuring 0.557 ha for a term commencing 1st of May 1986 for two years. I have compared exhibit P1 and exhibit D1. Exhibit P1 which is the title of the Plaintiff gives a lease term effective 1 September 1987 and was registered on 1 September 1987 under instrument number 231955. The title was issued on 1 September 1987. Exhibit D1 on the other hand was registered on 11 February 1987 at 2:30 PM under instrument number 229268 at 2:30 PM and the date of issue of the certificate of title is 12th of February 1987. As a question of fact the certificate of title of the first Defendant was issued prior in time to that of the Plaintiff namely as demonstrated by exhibit P1 and exhibit D1.

The above fact seems to support the first Defendant's argument based on the provisions of section 48 of the Registration of Titles Act. However the Plaintiff has clearly averred in the plaint that the first Defendant relinquished its interests in favour of the Plaintiff. In other words the fact of prior registration of the first Defendant would not matter if the first Defendant sold its interest to the Plaintiff as pleaded in paragraph 4 (d) and (e) of the plaint wherein the Plaintiff avers as follows:

> "(d) That while the Plaintiff's lease was still subsisting, the Defendant started claiming an interest in this suit land, which the Plaintiff purports to dispute claiming to have a lease thereon from Kampala City Council."
>
> (e) That the matter was amicably settled between the Defendant and the Plaintiff whereupon the Defendant surrendered, relinquished and abandoned its purported claim of interest in the suit land for a consideration of shillings one million five hundred thousand (shillings 1,500,000/=) paid by the Plaintiff to the Defendant. A copy of the agreement for sale and correspondences related thereto are annexed as annexure "D"."

It is a principle of law in considering pleadings as to whether a plaint discloses a cause of action that it is assumed for purposes of that consideration that whatever is averred in the plaint is true. Reference may be made for this proposition to the case of **Jeraj Shariff & Co vs. Chotai Fancy Stores [1960] 1 EA 374** per Windham JA at page 375 that:

> “The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”

Secondly reference may be made to the case of **Attorney-General v Oluoch [1972] 1 EA 392** at page 394 that:

> "In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."

The question of whether the first Defendant relinquished its interest was not only pleaded but documents were attached to support the averment. The approach taken by the first Defendants Counsel is that the documents involved namely IP 35 does not amount to surrender of a lease. IP 35 is entitled "withdrawal of claim of interest" and is dated 21st of April 1989 purporting to have the stamp of Middle North Agencies Ltd. It is also said to have been executed by the directors of the first Defendant. By the document it is written that for a consideration of the sum of Uganda shillings 1,500,000/= the first Defendant withdrew all its claim of interest or proprietorship in the suit property which is described therein as leasehold register volume 1538 folio 19 plot M459. Additionally in evidence from the documents is a letter from Messieurs Katongole and Mukasa Advocates addressed to the Town Clerk dated 20th of April 1999 claiming to have instructions from the first Defendant that their clients have withdrawn all claim of interest or proprietorship in favour of the Plaintiff. The letter is copied to the Commissioner of Lands Ministry of Lands and as well as Kampala District Land Board. Most importantly the plaint alleges that there is an agreement to that effect.

I do not agree that it is sufficient to argue that the document relied upon by the Plaintiff does not amount to the surrender of a lease. The document does not purport to be a surrender of lease. Secondly representations were made to the Commissioner for land registration as well as Kampala City Council. Finally it is averred that there was an agreement between the Plaintiff and the first Defendant in which the first Defendant relinquished its interest. Final submissions cannot be made on the basis of contested facts and the matter remains an issue for trial. A point of law cannot depend on facts which need to be proved or facts which are in dispute. For instance if there was an agreement between the Plaintiff and the first Defendant, it remains a matter to be established through evidence. I agree with the Plaintiff's Counsel that the issue remains to be tried and the court cannot determine the point of law based on section 48 of the Registration of Titles Act where there is an assertion that the person registered prior in time had actually relinquished its interest in favour of the person registered second in time. This approach is supported by judicial precedents and particularly the East African Court of Appeal case of **NAS Airport Services Limited vs. The Attorney-General of Kenya, [1959] 1 EA 53** per Windham JA page 58 of the judgment:

> "...the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved;"

Secondly in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696** the East African Court of Appeal per Sir Charles Newbold P at page 701 held that:

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained..."

Certain facts still remain to be ascertained. Was there an agreement in which the first Defendant relinquished its interest in favour of the Plaintiff? What is the evidence for or against that assertion? The matter cannot be resolved as a preliminary point of law and accordingly the trial of the issue on a point of law is postponed until after trial of questions of fact.

On the second objection which is that the Plaintiff's action is time barred on the basis of the accrual of a cause of action, that objection likewise cannot be resolved if it is the case that remains to be tried whether the first Defendant relinquished its interest. Secondly proceedings had commenced between the parties that culminated in a consent judgment which was eventually set aside. The suit between the parties has generated a lot of allegations which are clearly reflected in the correspondence sought to be relied upon by the parties. The dispute between the parties ought to be resolved after both sides have given their side of the story and have been subjected to cross examination on relevant facts. It is therefore my conclusion that even the question of time bar cannot be raised unless and until the question of whether the first Defendant has an interest in the suit property is resolved after adducing evidence.

On the strength of the above findings it is unnecessary to consider the several other arguments for and against the limitation issue. Limitation cannot be tried as a preliminary point of law because there are several other facts that need to be established through leading evidence in the ordinary course. In the premises the preliminary objections on points of law cannot be resolved as pure points of law or under the provisions of Order 7 rule 11 of the Civil Procedure Rules. The points require the adducing of evidence and cannot be based on the pleadings or even the agreed facts which are not sufficient to resolve the issues. The issues are overruled as preliminary points without prejudice to having them addressed as points of law after evidence has been adduced. Costs of the preliminary objections shall be borne by the Defendants.

Ruling delivered in open court the 22nd day of August 2014

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Moses Kuguminkiriza for the Plaintiff

Sekatawa Mathias for the first Defendant and holding brief for Counsel Sendege for the second Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

22nd August 2014