

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION No. 1047 of 2022**

5 **(Arising from Civil Suit No. 0108 of 2022)**

1. **BANK OF UGANDA** } .....
- APPLICANTS**
2. **GREENLAND BANK LIMITED (IN LIQUIDATION)** }

10 **VERSUS**

1. **KaweESI SULAIMAN** }
2. **YAHAYA MAYIGA** }
3. **MUSTAFA MUTYABA** }
4. **NSUBUGA AHMED** }
- 15 5. **Haji ABbas KANGAVE** }
6. **JUMA WALUSIMBI** }
7. **JAMADA LUTTA MUSOKE** }
8. **YOUNUS KAMULEGEYA** }
9. **ERIAS SSEVIRI** }
- 20 10. **ABbas K. MAWANDA** }
11. **MASERUKA MOHAMMED** }
12. **IBRAHIM SEGUYA** }
13. **JUMBA MASAGAZI** } .....
14. **SULLY NAIGA MATOVU** } **RESPONDENTS**
- 25 15. **ABbas LUYOMBO** }
16. **SAFIINA KIBIRIGE** }
17. **TWAHA ABU MU KASA** }
18. **FAIZAL JINGO KASUJJA** }
19. **HARUNA SSEBAGGALA** }
- 30 20. **ABDU OBED KAMULEGEYA** }
21. **KIWANUKA KASSIM** }
22. **SEREMBA SULAIMAN** }
23. **PROF. BADRU KATEREGGA** }
24. **YUSUF NSIBAMBI** }
- 35 25. **SAKINA KAGGA** }
26. **SYDA BUMBA** }
27. **SULAIMAN WALUGEMBE** }

**Before: Hon Justice Stephen Mubiru.**

**RULING**

a. Background.

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The 2<sup>nd</sup> applicant was incorporated on the 3<sup>rd</sup> August, 1990 and operated as a commercial bank up to 1<sup>st</sup> April, 1999 when the 1<sup>st</sup> applicant seized it and put it under liquidation. The respondents are shareholders of the 2<sup>nd</sup> applicant, M/s Greenland Bank Limited (in Liquidation), which is undergoing a process of liquidation by the 1<sup>st</sup> applicant. As part of that process, the 1<sup>st</sup> applicant  
10 caused the closure of companies commonly known as the “Greenland Group of Companies” that were associated with the 2<sup>nd</sup> applicant, which were established with the funds from the 2<sup>nd</sup> applicant and were directly under the control of the 2<sup>nd</sup> applicant. All the assets of those companies were consolidated into assets of the 2<sup>nd</sup> applicant. On 18<sup>th</sup> October, 1999 the 1<sup>st</sup> applicant appointed receivers and managers of M/s FIBA Uganda Limited, the majority  
15 shareholder of all those companies.

Concerned by the drawn out process of liquidation, the respondents on or about 10<sup>th</sup> February, 2022 filed a suit seeking a declaration that the continued liquidation of the 2<sup>nd</sup> applicant for more than twenty-one (21) years without accountability to the respondents is irregular, unreasonable  
20 and in bad faith; an order requiring the 1<sup>st</sup> applicant to fully account to the respondents for the entire period it has been liquidating the 2<sup>nd</sup> applicant which commenced on 1<sup>st</sup> April, 1999 to date; a declaration that the sale of secured and unsecured loans of the 2<sup>nd</sup> applicant by the 1<sup>st</sup> respondent to M/s Nile River Acquisition Company, was unlawful, irregular, fraudulent and in bad faith; a declaration that the sale of loans of 2<sup>nd</sup> applicant by the 1<sup>st</sup> applicant at a discount of  
25 93% was irregular, fraudulent and in bad faith; a declaration that the entire process of liquidation of the 2<sup>nd</sup> applicant is marred by massive fraudulent acts committed by officials of the 1<sup>st</sup> applicant; a declaration that properties belonging to the 2<sup>nd</sup> applicant, to wit Plot 30 on Kampala Road and Plot 66 William Street, were sold below the market value and that the sale was irregular and in bad faith; a declaration that the consolidation of all companies under the  
30 “Greenland Group of companies” and their assets was irregular and in bad faith.

As part of their claim the respondents further seek an order requiring the 1<sup>st</sup> applicant to render a true account of the management of the properties that belonged to the companies that were associated with the 2<sup>nd</sup> applicant which were all consolidated at the time of closure of the 2<sup>nd</sup> applicant by the 1<sup>st</sup> applicant, to wit; a) Fiba Uganda Limited, b) Fiba Coffee Uganda Limited, c) Entebbe Resort Beach Limited, d) Rock Hotel Tororo Limited, e) GG Towers Limited, f) Greenland Insurance Company Limited, g) NBA Roses Limited, h) Kampala University Limited, i) Sapoba Printers Limited, j) Greenland Clearing and Forwarding ltd, k) Lenman Clinic Limited, l) Greenland Bank Tanzania Limited, m) Greenland Towers Limited, n) Greenland Investments Limited, o) Greenland Forex Bureau Kenya Limited, p) Uganda Grain Milling Company Ltd, and q) Greenland Finance ltd; a declaration that the 1<sup>st</sup> applicant has a conflict of interest in the process of liquidation; an order that the 1<sup>st</sup> applicant compensates the respondents for any loss occasioned to the respondents by commissions and omissions of the 1<sup>st</sup> applicant; a declaration that the liquidation of the 2<sup>nd</sup> applicant is redundant and an order that the same be put to an end by this Court; punitive damages; general damages; exemplary damages; interest at the existing bank rate, and the costs of the suit.

b. The application.

This application is made under the provisions of Order 6 rules 29 and 30; Order 7 rule 11 (a), (d) and (e) and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicants seek an order striking out the plaint / dismissing the suit for being barred by limitation, not disclosing a cause of action, being barred by *res judicata*, and being frivolous and vexatious. It is the applicants' case that the respondents' claims set out in paragraphs 5 (c), (d), (e), (f), (g), (i), (j), (l), (m), (n) and (o) of the plaint are time barred as the matters complained of to which they relate occurred between the years 1999 and 2007 being over 15 years ago and accordingly fall outside the six (6) year limitation period; the respondents have no cause of action in law in relation to the seventeen (17) companies alleged to be associates of the 2<sup>nd</sup> applicant set out in paragraphs 5 (h) (a) to (q) of the plaint and any cause of action for alleged wrongs to those companies as pleaded in paragraph 6 (xiv) to (xx) of the plaint lie with the companies and not with the respondents. Further and in any event, those causes of action are time barred as they all occurred prior to the year 2007 being over 15 years ago;

The applicants contend further that the claim in relation to the sales of Plot 30 Kampala Road and Plot 66 William Street were completed in the year 2003 over 19 years ago and the proceeds of sale were duly appropriated and accounted for in the liquidation accounts and accordingly, any claims in relation to those sales is time barred. More specifically the claim in relation to Plot  
5 30 Kampala Road is also barred by *res judicata*; the claim relating to accountability for the liquidation process and proceeds is frivolous and vexatious as it is a claim for the unpaid creditors to make and not a claim for the respondents who are responsible for the insolvency of the 2<sup>nd</sup> applicant.

10. The affidavit in reply;

In the respondents' affidavit in reply, it is averred that the claims contained in the plaint are valid due to the discovery of fraud in the liquidation process of the 2<sup>nd</sup> applicant and not time barred as alleged by the applicants. The respondents instructed their lawyers to file the suit at the right  
15 time after obtaining reports of the Auditor General dated August, 2018 and the Parliamentary Committee on Commissions, Statutory Authorities and State Enterprises (COSASE) dated February, 2019, which reports unearthed the fraudulent activities of the 1<sup>st</sup> applicant. The discovery of fraudulent actions of the agents of the 1<sup>st</sup> applicant warrants investigation and accountability from the 1<sup>st</sup> applicant by producing the lists of all the verified, unverified, paid  
20 and unpaid creditor claims to this Court. The limitation period only starts to run the day fraud is discovered and discovery of fraud is an exception to the limitation of six years. The liquidation process of the 2<sup>nd</sup> applicant is still continuing. The crux of the case is based on the shs. 14,091,238,475/= which the applicants plan to distribute to contested, disputed creditors due to the fraudulent incidents involving the applicants that have been discovered in the liquidation  
25 process of the 2<sup>nd</sup> applicant. Once a company is under receivership or liquidation and there is fraud, the shareholders have a right to sue.

By averments contained in the application, it has come to the knowledge of the respondents that the issues regarding the 17 entities were handled and certain consent agreements were entered  
30 into unknown to the respondents. The respondents shall agree to sever the issues regarding the 17 entities because they are separate from the 2<sup>nd</sup> applicant and in any case, they are merely

statements of fact in the Plaintiff. The application is incompetent in as far as it concerns matters of facts majorly that require evidence and investigation by this Court which cannot be dealt with as preliminary points of law. The suit is neither barred by limitation, *res judicata* nor is it frivolous and vexatious.

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d. Submissions of counsel for the applicants.

M/s MMAKS Advocates on behalf of the applicants submitted that the respondents' compliant in paragraphs 5 (c) and (d) of the plaintiff relates to the 5<sup>th</sup> November, 2007 M/s Nile River acquisition of the 2<sup>nd</sup> applicant's loan and mortgage portfolio the contention being that it was 10 sold by the 1<sup>st</sup> applicant at under value, fraudulently and unlawfully. The sale in question was 15 years ago, and all the claims relating to it are barred by limitation. The respondents also complain about activities that occurred between the commencement of the liquidation in 1999 (22 years ago) and the 5<sup>th</sup> November, 2007 takeover of the loan and mortgage portfolio by M/s 15 Nile River. Those complaints include the sale in 2003 of Plot 30 Kampala Road and Plot 66 William Street (paragraph 5 (f) of the plaintiff), the foreclosure on various mortgage securities of some of the 17 corporate entities said to be associated companies of the 2<sup>nd</sup> applicant (paragraph 5 (g) and (h) of the plaintiff), the general conduct by the 1<sup>st</sup> applicant of the liquidation prior to the M/s Nile River disposal (paragraph 5 (i) of the plaintiff) and consequential losses said to arise from 20 the foregoing alleged unlawful acts (paragraphs 5 (j), (l), (n), and (o) of the plaintiff. All these events complained of invariably occurred on varying dates between 1999 and the sale to M/s Nile River of the 2<sup>nd</sup> applicant's portfolio on 5<sup>th</sup> November, 2007. Those events are over 15 years ago and the claims relating to them are time barred.

25 A perusal of this respondent's complaint to COSASE presented in November, 2018 at pages 347 and 351 as well as the several appendices listed at page 368 of the plaintiff indicates that it included several allegations of alleged fraud in the conduct of the liquidation. Having so reported the alleged fraud to COSASE, it is disingenuous for the Respondents to now claim that the complaints in the plaintiff were the outcome of COSASE findings of fraud when in fact it is the 30 respondents that put forward the fraud allegations and therefore were in their knowledge all along. The Respondents issued a Statutory Notice on the 1<sup>st</sup> applicant on 28<sup>th</sup> May, 2015 which

mirrors the claims put forward in the plaint. Although the claims were already time barred by the time the Statutory Notice matters to which they relate having occurred between 1999 and 2007, nonetheless, the respondents did not file the Plaint in this suit until over 7 years after the said Statutory Notice. Accordingly, even by this measure, the claims in the Plaint are barred by  
5 limitation.

As a matter of law, the causes of actions for wrongs to the 17 entities lie with the entities and not with the alleged shareholders who have no cause of action in relation to those wrongs. Matters relating to Plot 30 Kampala Road were resolved by a Consent Judgment to which the  
10 respondents were parties. The respondents even received, pursuant to that judgment, part of the proceeds of sale and the sale was conducted under the supervision of Court. The claim in this regard is thus clearly *res judicata* and has been since 4<sup>th</sup> September 2003, nearly 20 years ago. The respondents having been parties to that litigation in their own names cannot now claim to have only recently learnt of the litigation as they attempt to do in paragraph 15 of the affidavit in  
15 reply.

The complaint relating to the duration of the liquidation has no basis in law as there is no statutory stipulation as to the duration of a liquidation under *The Financial Institutes Statue, 1993*. The main liquidation activity came to an end on 5<sup>th</sup> November, 2007 when the whole  
20 liquidation portfolio was sold. The party with *locus standi* to complain about the final distribution of the residual balance of the liquidation proceeds are the unpaid creditors not the respondents as shareholders/contributories. The insolvency of the 2<sup>nd</sup> applicant is not disputed and accordingly, the respondents as shareholders/contributories do not have any claim in the insolvency liquidation,

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e. Submissions of counsel for the respondents.

M/s Semuyaba, Iga & Co. Advocates together with M/s Nyanzi, Kiboneka, Mbabazi and Co. Advocates on behalf of the respondents submitted that there are grounds in the application that  
30 are not pure points of law to be dealt with at the preliminary stage of the trial. This Court will need more evidence in order to determine the claims of fraud, misrepresentation, bad faith and

conflict of interest which warrant a critical analysis of the evidence and investigation in order to adjudicate the matter/dispute between the parties to finality which cannot be done at the preliminary stage. Points of law pertain to matters that are determinable purely on the basis of law and not evidence or a mixture of law and evidence. They exclude matters that entail a clash  
5 of facts, production of evidence and assessment of testimony. It is not true that the liquidation process continued for eight (8) years until 5<sup>th</sup> November, 2007. By a letter dated 14<sup>th</sup> July, 2020 the 1<sup>st</sup> applicant stated that the winding up process of Greenland Bank Limited was yet to be concluded, since there were significant pending matters related to the verification and resolution of creditor claims. The COSASE report from which the respondent's cause of action arose is  
10 dated February, 2019 and also counsel for the 1<sup>st</sup> applicant's letter dated 14<sup>th</sup> July, 2020 from clearly states that the liquidation process is still ongoing. All the respondents' claims are as a result of the discovery of fraud, misrepresentation, bad faith and conflict of interest that was discovered by the respondents from the above report. The respondents' case is based on the right of action being concealed by the fraud or misrepresentation of the applicants. The facts on basis  
15 of which exemption from the law of limitation is claimed appear from the face of the pleadings which constitutes sufficient compliance. Where the exemption is not specifically pleaded it would be enough if the ground of exemption is apparent on the face of the record. The law did not intend and it was never the intention of the Legislature that liquidation of a company/financial institution should be indefinite.

20

A prudent liquidator must appreciate that he occupies a position of trust in relation to the company in liquidation. Given that a liquidator is in a fiduciary position in relation to the affairs of the company which he holds on trust for both the contributories and creditors, a liquidator, in the discharge of his must act in accordance with the law and its Rules, and owes fiduciary duties  
25 to preserve the company's assets, and transact or dispose of the liquidation process promptly or expeditiously or as soon as practicable. It is for breach of that duty that the respondents are suing the applicants in the main suit. There is no limitation period specifically directed at a suit for declaratory judgment. The statements regarding the seventeen entities are mere statements of fact and that none of the seventeen entities is a party to the main suit and they are not seeking  
30 any orders of this Court. The sale of Plot 30 Kampala was not under the process of liquidation

while the sale of Plot 66 William Street was never litigated upon. Where consent judgments were entered, the issues of fraud were not dealt with between the parties.

f. The decision.

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Under Order 6 rules 28 and 29 of *The Civil Procedure Rules*, a point of law may be set down for hearing and disposed of at any time before the hearing. If it substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just. A preliminary objection should consist 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 (*Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*).

The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of a suit because there is a point of law that will dispose of the matter summarily. A preliminary objection must raise a point of law based on ascertained facts and not evidence. It should be a matter that is capable of determination based only on examination of the pleadings without reference to any evidence. Even when such a matter is raised, the Court may defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether a cause of action is disclosed or not. It is a matter of discretion of the Court as regards when to make a ruling on the objection (*The Attorney General v. Major General David Tinyefunza, S. C. Constitutional Appeal No.1 of 1997*).

It is trite that preliminary objections draw a distinction between the merits of the suit and the subject matter of the objection. An objection should bear the character of matter that can be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. It should relate to a matter which can be disposed of by the Court at an early stage without examination of the merits. It should therefore be based on pure points of law or on ascertained, undisputed facts and any reasonable inferences that may be drawn from those facts. Objections should be sustained only in cases which the facts on which they are based are clear



and free from doubt. Where an objection is inextricably linked to facts that are disputed or have to be proved during the trial, then it goes to the merits of the suit and it should be joined to the merits.

5 When considering a preliminary objection, the court will not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. The court will not decide as part of a preliminary objection, facts that require analysis beyond the pleadings. The court should not reach a determination based upon its view of the controverted facts, but must resolve the dispute by receiving evidence thereon. The applicants' multifaceted  
10 objections rotate around limitation, *res judicata*, and lack of *locus standi*.

i. Lack of *locus standi*.

It is Counsel for the applicants' contention that the foreclosure on various mortgage securities of  
15 some of the 17 corporate entities said to be associated companies of the 2<sup>nd</sup> applicant, and the alleged consequential losses said to arise from the alleged unlawful acts in relation thereof, vest in the respective companies and not the respondents. Furthermore, that the party with *locus standi* to complain about the final distribution of the residual balance of the liquidation proceeds are the unpaid creditors not the respondents as shareholders/contributories. The objections are  
20 premised on the respondents' prayer in the plaint for an order requiring the 1<sup>st</sup> applicant to render a true account of the management of the properties that belonged to the 17 companies that were associated with the 2<sup>nd</sup> applicant which were all consolidated at the time of closure of the 2<sup>nd</sup> applicant by the 1<sup>st</sup> applicant. The respondents contend the assets of those companies were undervalued at the time of sale, causing a loss to the respondents. They therefore seek a  
25 declaration that the consolidation of the companies and sale of their assets was irregular and in bad faith.

To this submission counsel for the respondents replied that the statements regarding the seventeen entities are mere statements of fact and that none of the seventeen entities is a party to  
30 the main suit and they are not seeking any orders of this Court. I find this response to be evasive. The averments relating thereto are not pleaded as mere historical facts that occurred in the

process of the impugned litigation. The respondents clearly in their pleading seek affirmative orders and reliefs for wrongs committed in respect of those companies and their assets. I have not found though incorporated into the respondent's claim, any challenge to the final distribution of the residual balance of the liquidation proceeds as submitted by counsel for the applicants.

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The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding (see *Njau and others v. City Council of Nairobi [1976–1985] 1 EA 397 at 407*). To say that a person has no *locus standi* means the person cannot be heard, even  
10 on whether or not he has a case worth listening to. In Uganda's judicial system, any person who suffers some damage or injury from the act of a private individual or of the state can approach the court.

To have a *locus standi*, a claimant must have sufficient interest in the matter to which the claim  
15 relates. What constitutes "sufficient interest" will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. Important to the exercise of the Court's jurisdiction are the questions whether the party seeking relief is directly affected by the act or omission in question or whether the party has a real stake in the validity of such act or omission. One must justify such right by showing that one has a direct and substantial interest  
20 in the outcome of the litigation. Such an interest is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court. A party must have a direct financial or legal interest in the outcome of the suit.

In order to determine whether or not the claimant has *locus standi*, the Court starts by separating  
25 the claimant's legal conclusions (legally operative factual conclusions) from its factual allegations (supporting facts). The Court then assumes the factual allegations are true (even if doubtful in fact), and asks whether those factual allegations state a valid legal claim. To establish a cause of action, a plaintiff must allege facts suggestive of illegal or wrongful conduct and also demonstrate a plausible entitlement to relief above the speculative level. Conclusory allegations,  
30 with no factual support, are insufficient to state a claim. In the instant case the material factual allegations are that the 1<sup>st</sup> applicant consolidated the assets of the seventeen companies with

those of the 2<sup>nd</sup> applicant and disposed of them. The conclusory allegation is that the sale was at an undervalue, while the claimed basis of entitlement to relief is that the consolidation and sales were to the detriment of the respondents as shareholders in the respective companies.

5 The respondents' suit against the 1<sup>st</sup> applicant is in its capacity a liquidator. In broad terms, the role of a liquidator is primarily to realise the insolvent company's assets for the benefit of the creditors, investigate the company and its directors, and distribute funds to creditors in the statutory order of priority. The fundamental duties of a liquidator therefore are to take, in a reasonable and expeditious manner, all steps necessary to; - (a) collect; (b) realise as  
10 advantageously as reasonably possible; and (c) distribute, the assets or the proceeds of the assets of the company in accordance with the law (see section 99 (1) of *The Insolvency Act*). Powers with respect to the company and its property vest in the liquidator who may carry on the business of the company so far as is necessary for the beneficial disposal or winding up of the business.

15 The accusation by the respondents is that while undertaking the liquidation of the 2<sup>nd</sup> applicant, the 1<sup>st</sup> applicant committed a series of wrongs against the seventeen corporate entities associated with the 2<sup>nd</sup> applicant, to the detriment of the respondents. Just as the fiduciary duties owed by directors to the company arise from the relationship between the directors and the company directed and controlled by them, so do those of liquidators. It is the fact that they are directors or  
20 liquidators of the company's affairs which by itself gives rise to their fiduciary duties. In general, the directors and liquidators do not, solely by virtue of their office of director or liquidator, owe fiduciary duties to the shareholders, collectively or individually (see *Percival v. Wright [1902] 2 Ch 421* and *Peskin, Milner v. John Anderson and others [2000] 2 BCLC 1*). This is in essence no more than an application of the principle established by *Salomon v. A Salomon & Co Ltd [1897]*  
25 *AC 22* that a company is distinct from its members. The directors and liquidators direct and control the affairs and assets of the company; they do not direct or control the affairs or assets of the members. They owe their duty to the company as a whole, and are not trustees for individual shareholders or owe them a fiduciary duty merely by virtue of their offices. By agreeing to act as director or liquidator, one necessarily agrees to act in the interests of the company. But that  
30 appointment does not bring him into any direct relationship with the shareholders.

Only the company, not its members, can sue for wrongs done to the company (see *Foss v. Harbottle* (1843) 2 Hare 461). Where a wrong has been done to a company, individual shareholders are not able to sue for losses which are merely derivative or reflective (see *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)* [1982] Ch 204 and *Stein v. Blake* [1998] 1 AER 724). It is only when the company is not willing to pursue such claims in its own right that individual shareholders, acting on behalf of a company, may sue the company's directors or liquidator in respect of wrongs committed against the company, where a wrong committed against the company would otherwise go unaddressed if the derivative claim was not brought because the wrongdoers are themselves in control of the company (see *Edwards v. Halliwell* [1950] 2 All ER 1064 see *Rai and others v. Rai and others* [2002] 2 EA 537).

For a minority shareholder to succeed in being permitted to bring a derivative suit, that minority shareholder must first be granted leave by the Court to do so (see section 250 (2) (c) of *The Companies Act, 2012*). At the leave application, a minority shareholder must demonstrate that: (i) a wrong has been done to the Company whilst under the control of the wrongdoers; (ii) from which the wrongdoers have benefited; (iii) there is no other way of remedying this state of affairs save for permitting the minority shareholder to bring the derivative action; and (iv) the action is reasonable, prudent and in the interests of the Company, and there is a realistic prospect of the derivative action being successful at a full trial (see *Estmanco (Kilner House) v. Greater London Council* [1982] 1 All ER 437; *Fang Min v. Uganda Hui Neng Mining Ltd (Nominal Defendant) and five others, H.C. Civil Suit No. 318 of 2016*; *Kagurusi Remmy Nowiitu and another v. Baguma Cyprian Begumanya and two others, H.C. Civil Suit 392 of 2014* and *Prudential Assurance Company Limited v. Newman Industries Limited and others* [1982] 1 All ER 364).

In exercising its discretion to grant permission to continue a derivative claim, the Court will consider whether the shareholder is acting in good faith; the importance a director acting for the benefit of the company would attach to continuing the suit; the likelihood of prior approval or subsequent ratification by the company; whether the company has decided not to pursue the claim; whether the shareholder could bring a personal claim; and the views of those who have no personal interest in the matter. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation.

In the absence of any pleading of facts that justify this as a derivative claim on behalf of any of the seventeen companies, e.g., that the directors of the seventeen companies are themselves responsible for the wrongdoing, or that the minority shareholders in the seventeen companies cannot muster sufficient voting power at a general meeting to compel the directors to institute proceeding, therefore this aspect of the respondents' claim is misconceived; the objection is sustained and accordingly this aspect of the respondent's claim is struck out.

However, as regards the rest of the claims, it is trite that a liquidator acts on behalf of the company to administer its affairs. By virtue of section 100 (d) and (e) (ii) of *The Insolvency Act, 2011* a Liquidator has the duty to keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the liquidation, and retain the accounts and records of the liquidation and of the company for not less than six years after the liquidation ends, and where the court so orders, permit those accounts and records and the accounts and records of the company, to be inspected by any creditor or shareholder. Fundamentally, the Liquidator has the duty to collect, preserve and distribute the assets, giving proper attention to their administration, acting with due despatch and ensuring adequate knowledge and understanding of the affairs of the company. He must, at all times, be independent and hold an even hand in dealing with the often-competing interests of creditors, contributories and his appointers and not place himself in situations where he may be in a conflict of interest. The liquidator has to ensure that the assets of the company are only distributed to creditors who have debts that have been genuinely created and remain legally due. The law regards those duties as fiduciary such that they are exercised in trust for both contributories and/or creditors.

A liquidator occupies a position of trust in relation to the company in liquidation. The shareholders or creditors may sue a liquidator for improper conduct based on causes of action derived from breach of statutory duties and also other fiduciary duties imposed on a liquidator, including the duty to act with complete impartiality, independence and transparency in conducting and discharging his duties, and to transact or dispose of the liquidation process promptly or expeditiously or as soon as practicable. Failure to take reasonable steps to bring the

liquidation process to an early conclusion may constitute improper conduct which entitles the creditors and shareholders to bring a suit against a liquidator on behalf of the company. On such an application the court may, if it thinks the allegations warrant investigation, examine the conduct of the respondent and order appropriate compensation to be paid to the company.

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The liquidator is the only person who can act for the company as its agent when it is in the course of liquidation. At common law, a culpable failure by a liquidator to collect in or preserve or take control of the assets of a company in liquidation may diminish the value of the fund available for distribution *pro rata* among the creditors but is not a breach of a duty owed to each  
10 creditor as an individual (see *Johnson v. Gore Wood & Co* [2001] 1 All ER 481; *Oldham and others v. Georgina Kyrris and another* [2003] EWCA Civ 1506; [2004] 1 BCLC 305; *Grand Gain Investment Ltd v. Cosimo Borrelli*. [2006] HKCU 872 and *Hague v. Nam Tai Electronics Inc and others (British Virgin Islands)* [2008] UKPC 13). In the absence of a special relationship, a liquidator does not owe a duty of care to individual creditors in respect of its  
15 conduct of the liquidation. It is considered that if any wrong is committed at all during that process, it is not a wrong done to the shareholders of the company, whose shareholding remains unaffected by the legal breach of duty, but against the company.

The fiduciary duties owed to the company arise from the legal relationship between the  
20 liquidator and the company directed and controlled by the liquidator. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the liquidator and the shareholders in the particular case (see for example *White v. Jones* [1995] 2 AC 207 para 92). Events may take place which bring the liquidator of the company into direct and close contact with the shareholders in a manner capable  
25 of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the liquidator in that office, for the benefit of the shareholders, and not to prefer and promote its own interests at the expense of the shareholders.

30

However, a shareholder can prosecute for the benefit of the company a cause of action belonging to the company once it can be shown that the alleged wrongdoers are in control of the company and wrongly preventing the prosecution by the company of its cause of action. Occasionally a liquidator may be liable directly to an individual shareholder for a loss which is suffered by that person rather than by the company (see *Re Hill's Waterfall Estate and Goldmining Co.* [1896] 1 Ch 947). In any event, the fiduciary duties owed by the liquidator to the company do not necessarily preclude, in special circumstances, the co-existence of additional duties owed by the liquidator to the shareholders. In such cases individual shareholders may bring a direct suit, as distinct from a derivative action, against the director or liquidator for breach of fiduciary duty (see *Stein v. Blake* [1998] 1 All ER 724 at 727D and 729G; *Coleman v. Myers* [1977] 2 NZLR 225; *Brunninghausen v. Glavanics* [1999] 46 NSWLR 538; *Allen v. Hyatt* (1914) 30 TLR 444 at p. 445; *Peskin v. Anderson* [2001] 1 BCLC 372 at [33] and *Howard Smith Limited v. Ampol Petroleum Limited* [1974] AC 821 at pp.834, 837-838).

When dealing with the law relating to the relationship between a company and its shareholders the courts recognise that a company is a separate legal entity from its shareholders and, accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares. The plaint does not contain any averment to the effect that the loss allegedly suffered by the respondents as shareholders is separate and distinct from that suffered by the 2<sup>nd</sup> applicant, nor that it arose from a breach of legal duty independently owed to them as shareholders. Although the present suit is premised on alleged breach of fiduciary duties of a liquidator owed to shareholders and contributors, it can be justified more as a derivative action than a suit on founded on breach of fiduciary duties of a liquidator owed to shareholders and contributors. Section 250 (2) (c) of *The Companies Act, 2012* allows shareholders a derivative suit to either compel the company to recover its own losses, or to do so on its behalf. In that case the remedies granted are for the company and not the shareholders.

By the suit, the respondents seek a total of eight (8) declaratory orders; two (2) orders for rendering a true account; an order of compensation for loss occasioned by breach of the liquidator's duties; punitive damages; general damages; exemplary damages; interest at the

existing bank rate, and the costs of the suit. The respondents have pleaded particulars of fraud, bad faith and illegality in the plaint. The fact that the applicants do not in their plaint specifically state that they filed the suit as a derivative action is not fatal. When a similar scenario arose in *Estmanco (Kilner House) v. Greater London Council [1982] 1 All ER 437*, rather than striking  
5 out the plaint the court ordered that the applicant be substituted, suing as plaintiff on behalf of herself and other shareholders, with the company joined as a nominal defendant, and the action allowed to continue in her name as a derivative suit. I am persuaded by the decision to conclude that the respondent's suit is a derivative suit filed for the benefit of the 2<sup>nd</sup> applicant who is nominally named as 2<sup>nd</sup> defendant in the suit.

10

In the circumstances, I find that save for the claim in respect of the seventeen associated companies of the 2<sup>nd</sup> applicant which is misconceived, the respondents have *locus standi* in respect of the rest of the claims. This objection is consequently overruled only in part.

15

ii. The claim in respect of Plot 30 Kampala Road being *res judicata*;

The respondents seek a declaration that Plot 30 Kampala Road and Plot 66 William Street, which belonged to the 2<sup>nd</sup> applicant, were sold irregularly, in bad faith and below the market value. It is contended by counsel for the applicants that this claim is *res judicata* by virtue of the fact that it  
20 is on basis of a Consent Judgment dated the 29<sup>th</sup> April, 2002 in H.C. Civil Suit No.473 of 2001 (OS) and a consent order dated the 4<sup>th</sup> September, 2003 in H.C. Misc. Application No.006 of 2002 that this property was sold. In paragraph 1 (a) of the Consent Judgment, M/s FIBA (U) Limited permitted the 1<sup>st</sup> applicant to sell its 75% share in that property, and it was further agreed in paragraph 1 (b) thereof that the 1<sup>st</sup> applicant was to sell as mortgagee, M/s Greenland Bank  
25 (U) Ltd.'s 25% interest in the said property. The proceeds of the sale were duly paid out to the specified beneficiaries on 5<sup>th</sup> September, 2003. The respondents contend the parties to the previous suit were different and the issue of fraud was never part of the consent judgment.

According to section 7 of *The Civil Procedure Act*, no court may try any suit or issue in which  
30 the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim,



litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

The basis of the rule of *res judicata* is that an individual should not be vexed twice for the same  
5 cause. A person should not be twice vexed in respect of the same contest as to his or her rights  
and on the other hand, the time of the Courts should not be wasted by trying the same matter  
several times. The plea of “*res judicata*” is in its nature an “*estoppel*” against the losing party  
from again litigating matters involved in previous action but does not have that effect as to  
matters transpiring subsequently. The judgment in first action operates as an “*estoppel*” only as  
10 to those matters which were in issue and actually or substantially litigated. It is matter of public  
concern that solemn adjudications of the courts should not be disturbed. Therefore, where a  
point, question or subject-matter which was in controversy or dispute has been authoritatively  
and finally settled by the decision of a court, the decision is conclusive as between parties in  
same action or their privies in subsequent proceedings. A final judgment or decree on merits by  
15 court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits  
on points and matters determined in the former suit. In short, once a dispute has been finally  
adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in  
another suit afresh (see *In the Matter of Mwariki Farmers Company Limited v. Companies Act  
Section 339 and others* [2007] 2 EA 185). By *res judicata*, the subsequent court does not have  
20 jurisdiction.

For the doctrine to apply, it must be shown that; a) there was a former suit between the same  
parties or their privies, i.e. between the same parties, or between parties under whom they or any  
of them claim, or parties who claim through each other, litigating under the same title; b) a final  
25 decision on the merits was made in that suit, i.e. after full contest or after affording fair  
opportunity to the parties to prove their case; c) by a court of competent jurisdiction, i.e. a court  
competent to try the suit; and, d) the fresh suit concerns the same subject matter and parties or  
their privies, i.e. the same matter is in controversy as was directly and substantially in issue in a  
former suit (see *Ganatra v. Ganatra* [2007] 1 EA 76 and *Karia and another v. Attorney-General  
30 and others* [2005] 1 EA 83 at 93 -94).

Four factors are considered in determining the validity of a plea of *res judicata*: (i) was the claim decided in the prior suit the same claim being presented in the current suit? (ii) Was there a final judgment on the merits by a court of competent jurisdiction? (iii) Was the party against whom the plea is asserted a party or in privity with a party to the prior suit? and (iv) Was the party  
5 against whom the plea is asserted given a fair opportunity to be heard on the issue? Being a question of mixed law and fact, the proper practice is for the trial Court to try that issue and receive some evidence to establish that the subject matter has been litigated upon between the same parties, or parties through whom they claim (see *Karia and another v. Attorney-General and others* [2005] 1 EA 83).

10 The requirement that a judgment, to be *res judicata*, must be rendered “on the merits” guarantees to every plaintiff the right once to be heard on the substance of his claim. Ordinarily, the doctrine may be invoked only after a judgment has been rendered which reaches and determines “the real or substantial grounds of action or defence as distinguished from matters of practice, procedure, jurisdiction or form.” The *res judicata* consequences of a final, un-appealed judgment on the  
15 merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. An erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of *res judicata* (see *Federated Dept. Stores v. Moitie*, 452 U.S. 394 (1981). i.e., a judgment need not be right to preclude further litigation, it need only be final and on the merits.

20

*Res judicata* applies to all matters that were “directly and substantially in issue,” which means the matter should not have been merely incidental only to the substantial issue. The expression “directly and substantially in issue” is used in contradistinction to “incidentally or collaterally in issue.” The implication is that the issue presented for the determination in both sets of  
25 proceedings should be identical or substantially identical. *Res judicata* is not confined to the issues which the court is actually asked to decide, but it also covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It includes all matters which might and ought to have been made a ground of attack or  
30 defence in the previous suit, that are now being raised, more or less as an afterthought.

Constructive *res judicata* can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so, raised therein.

5 In the instant case, it is undisputable that this suit and the previous one, involve the same parties or their privies and that it was determined by a court of competent jurisdiction. In the previous suit, the 1<sup>st</sup> applicant had by originating summons in H.C. Civil Suit No.473 of 2001 obtained an order of foreclosure against the 2<sup>nd</sup> applicant, which the 2<sup>nd</sup> applicant together with the respondents unsuccessfully sought to be reviewed, but nonetheless had by H.C. Misc.  
10 Application No.007 of 2002 obtained an order of stay of execution by way of attachment and sale of Plot 30 Kampala Road. The consent judgment settled all issue relating to the process leading to and involving the foreclosure. What is sought to be challenged now is the process thereafter, involving the sale of the property. The claim concerns events alleged to have occurred after the execution of the consent judgment; relating to its execution. The facts and questions  
15 now being raised were never actually litigated and determined in the prior suit and could not have been made a ground of attack or defence in the previous suit.

I find that this condition has not been satisfied with regard to constructive *res judicata*, as there can be no hearing and decision respecting a matter never raised before a Court, and which could  
20 not have been made a ground of attack or defence in the previous suit. This objection is consequently overruled.

iii. Whether all the claims made are barred by limitation,

25 Statutory provisions imposing periods of limitation within which actions must be instituted seek to serve several aims. In the first place, they protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well have no accurate recollection. Evidence may largely depend on the recollection of witnesses, which deteriorates over time. It  
30 may depend on the preservation of written records which may be lost or destroyed. Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is

reasonably possible for them to do so. Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he or she may regard as finally closed an incident which might have led to a claim against him or her (see *Birkett v. James* [1977] 2 All ER 801). The legislature must be taken to have sought, and achieved, proper balance between all these  
5 competing interests in enacting that, if actions are to be heard at all, they must be instituted within the various specified periods from the accrual of the cause of action.

Public interest has always been concerned that litigation should be brought within a reasonable time. This enables cases to be dealt with properly and justly. Moreover the public interest  
10 requires the principle of legal certainty, defendants may have changed their position or conducted their businesses in the belief that a claim would not be made. It is for these and other reasons that limitation statutes have been described as “acts of peace” or “statutes of repose”. People should be free to get on with their lives or businesses without the threat of stale claims being made. *The Limitation Act* also encourages claimants to bring their claims promptly and  
15 not, in the old phrase, “to sleep on their rights.” The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he or she had lost evidence for his or her defence from being disturbed after along lapse of time. It is not to extinguish claims (see *Dhanesvar V. Mehta v. Manilal M Shah* [1965] EA 321; *Rawal v. Rawal* [1990] KLR 275, and *Iga v. Makerere University* [1972] EA  
20 65). Once limitation begins to run, it will not be suspended by the subsequent disability of any of the parties unless specified by statute.

The whole idea of *The Limitation Act* is to prevent stale claims. Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is *interest reipublicae ut sit finis*  
25 *litium*, meaning that litigation is automatically stifled after a fixed length of time, irrespective of the merits of a particular case (see *Re-Application of Mustapha Ramathan*, (1996) KALR 86 and *Hilton v. Sutton Steam Laundry* [1946] 1 KB 61 at 81). The periods of limitation reflect the legislative policy of balancing between the needs of plaintiffs to have sufficient time to ascertain and commence their claims and the interest of defendants in not having to defend stale claims.

The period of limitation begins to run as against a plaintiff from the time the cause of action accrues until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. One of the important principles of the law of limitation is that once time has begun to run, no subsequent disability or inability to sue stops it. A period of limitation within which a suit may be commenced is computed from the time that the cause of action accrues until the suit is commenced. A cause of action accrues when there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.

10 a) The eight (8) declaratory orders sought;

By virtue of Order 2 rule 9 of *The Civil procedure Rules*, no suit may be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. Under *The Limitation Act*, there is no limitation period specifically directed at a suit for declaratory judgment. A relief or redress by way of a declaration is not founded on tort or contract but is a cause of action in itself akin to specific performance, injunction or other equitable relief and is therefore exempted from the limitation periods prescribed by *The Limitation Act* (see *Western Highland Creameries Ltd. and another v. Stanbic Bank Uganda Ltd. and two others*, H. C. Civil Suit No. 462 of 2011).

It is an established principle in equity that where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by a statute of limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords, the same limitation because “it would have been a blot on our jurisprudence if those self-same facts give rise to a time bar in the common law courts but none in a court of equity” (see *Knox v. Gye HL* (1872) LR 5 HL 656; *Couthard v. Disco Mix Ltd. [2001] 1 WLR 707 at 730* and *Companhia De Seguros Imperio v. Heath (REBX) Ltd. and others [2001] 1 WLR 112*). Although in such cases the equitable claim is not expressly subject to the same limitation period imposed by *The Limitation Act* as claims in tort or contract, a court exercising an equitable jurisdiction should apply similar periods.

According to section 3 (6) of *The Limitation Act*, the prescribed periods of limitations do not apply to any claim for equitable relief, except insofar as any of the prescribed periods may be applied by the court by analogy in like manner as the periods of limitation in force before the commencement of the Act have heretofore been applied. Consequently, when claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim. Laches may be defined as neglect to assert a claim for an unreasonable and unexplained length of time which misled the adverse parties causing prejudice. It essentially is the neglect to assert a right or claim which, for an unreasonable and unexplained length of time, under circumstances permitting diligence, which taken together with the lapse of time and other circumstances, causes prejudice to the adverse party. Mere lapse of time alone does not constitute laches but if delay has misled other parties to their prejudice, the bar of laches may be invoked.

Suits for declaratory judgment are unique, in that the Court will actually examine the substantive nature of the claims and the relief sought to determine which limitation period applies. Where a declaration can be made with no consequential relief, issues of limitation need not arise (see *Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536* and *Gouriet v. Union of Post Office Workers and others [1977] 3 All ER 70*). But where consequential relief is sought in addition to the declaration, and the Court determines that the underlying dispute could have been resolved through another proceeding for which a specific limitation period is statutorily provided, the Court will apply that limitation period. Where the consequential relief sought flows from the declarations of right prayed for, the applicable period of limitation in the declaratory judgment suit is determined by the substantive nature of the claim. Therefore, a suit barred by limitation cannot lead to a declaratory judgment.

In a purely equitable action for declaratory orders, where there is no corresponding legal right or remedy, *The Limitation Act* does not apply at all. The doctrine of laches alone will defeat the cause of action. For the defence of laches to succeed, a defendant must satisfy his initial burden

of showing evidence of; - (a) neglect on the part of plaintiff to assert his claim; (b) that the lapse of time was unreasonable and unexplained; (c) that he was misled by the lapse of time; and (d) that he was prejudiced by the lapse of time. Where there is a corresponding legal right or remedy, although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity ordinarily will apply the statute of limitations by analogy; a court of equity will by analogy follow statutory limits when the claim is raised in an equitable proceeding rather than applying the doctrine of laches. However, if *The Limitation Act* applies to the claim, then laches does not apply. Laches fills the vacuum for causes of action where there is no applicable statutory limitation period and no corresponding legal right or remedy governed by *The Limitation Act*. When a statute enacted by the Legislature specifies a limitation period by which time an action must be commenced, that period should govern.

In order for laches to apply, there must be an unreasonable and inexcusable delay. There is, however, no defined length of delay that will trigger the defence, yet mere delay, however long, absent the necessary elements to create an equitable estoppel, does not preclude the granting of equitable relief. While delay and prejudice are important elements of the doctrine, a plaintiff who has no knowledge of the facts giving rise to the cause of action cannot be charged with laches. However, where a plaintiff knows or has reason to know about his/her claim, he/she must act diligently to protect his/her rights. The equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case. Therefore, whether or not a particular claim may be defeated by reason of laches is a question of fact which may be decided only after hearing evidence. It is a fact intensive inquiry into the conduct and background of both parties in order to determine the relative equities. It thus cannot be determined, as a preliminary point of law, that the respondents' claim for declaratory orders is barred by laches. This objection is misconceived and is accordingly overruled on that account.

b) The two (2) orders sought for rendering a true account;

Section 3 (2) of *The Limitation Act* provides that a suit for an account is not be brought in respect of any matter which arose more than six years before the commencement of the suit. The date of the accrual of a right of action is to be construed as the date on which the matter arose in respect

of which an account is claimed (see section 1 (8) (a) thereof). From this formulation, there exists three possible points in time where the court could find that a claimant's cause of action has accrued: (i) the time of the objectionable act or omission; (ii) the time of the injury or loss to plaintiff; and (iii) the time when the plaintiff discovers his injury or loss.

5

Generally, it is considered that a cause of action ordinarily does not accrue until some damage has been done. Both the objectionable act or omission and the fact of resultant injury or loss must take place before a cause of action can be said to have accrued. Thus, for a cause of action to accrue there must be an objectionable act or omission, causation, and injury. Where the  
10 objectionable act or omission and accompanying injury do not manifest themselves at the same time, or where the date of injury does not coincide with the date of the objectionable act or omission, the cause of action accrues on the date the injury or loss was discovered or, in the exercise of reasonable diligence should have been discovered.

15 While it is the applicants' case that liquidation of the 2<sup>nd</sup> applicant commenced on 1<sup>st</sup> April, 1999 and the main liquidation activity came to an end on 5<sup>th</sup> November 2007 when the liquidation portfolio was sold to M/s Nile River such that time began to run then against the respondents, Counsel for the respondents contend the liquidation has never ended and continues to-date. They contend instead that the cause of action arose in February, 2019 upon the publication of the  
20 COSASE report. Counsel for the applicant refutes this and counterargues that it arose much earlier since in the respondents' submission to COSASE during its inquiry they alluded to facts on basis of which they now lay claim of the 1<sup>st</sup> applicant's alleged misdeeds and incorporated them in their Statutory Notice of 28<sup>th</sup> May, 2015 that was served upon the 1<sup>st</sup> applicant.

25 It is clear from the pleadings and arguments of both parties that the actual date of accrual of the cause of action is contested. Establishing the actual dates of the alleged illegal or wrongful conduct constituting a failure to account, is a pre-requisite to determination of when the cause of action accrued. It is a matter that cannot be determined without hearing or reference to evidence, yet on the pleadings it is a contested fact. Issues of fact arise when material propositions of fact  
30 are affirmed by one party and denied by the other. It is only in cases where specific facts are admitted, on basis of which a question of law arises which is dependent upon the outcome of the



facts so admitted, that it is open to the court to pronounce a decision based on preliminary points of law. However, in the event of a dispute as to the facts, where it is necessary that the disputed facts be determined first in order to make a finding on a question of law, such question cannot be decided as a preliminary issue.

5

In light of the disputed facts necessitating, first, a determination based on evidence before the question of limitation can be decided, it cannot be argued as a preliminary point of law, that the respondents' claim for rendering a true account is barred by limitation. This objection is misconceived and is accordingly overruled on that account.

10

c) The claims for compensation, punitive damages, general damages, exemplary damages, interest, and the costs of the suit founded on alleged loss occasioned by breach of the liquidator's duties.

15

Similarly, establishing the actual dates of the alleged breaches of the liquidator's duties, is a pre-requisite to determination of when the causes of action justifying these claims, accrued. Apart from being fact intensive too, and therefore not a proper subject for a preliminary objection, the respondents advance the fraud exception, in the alternative, as a justification for tolling time in their favour, in respect of the claim for rendering an account as well as the rest of the mentioned substantive reliefs of compensation, punitive damages, general damages, exemplary damages, interest, and costs.

20

25

One of the exceptions to the general rules of limitation is that if by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. Therefore, if a person is under no legal disability when the right to sue accrues to him but a legal disability intervenes before expiry of the limitation period, then such person can avail himself or herself of the provisions of section 21 (1) (c) of *The Limitation Act*. This section applies to those persons who suffer from a legal disability subsequent to the time when they are entitled to institute a suit, and the concession made to them by the Legislature is that they are entitled to file a suit within six years after the disability has ceased.

30

On the other hand, section 25 (a) of *The Limitation Act* and section 6 (1) (a) of *The Civil Procedure and Limitation (Miscellaneous Provisions) Act* provide that where the suit 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 does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.

What section 21 (1) (c) does is not to give a fresh starting point of limitation, but to extend the prescribed period of limitation prescribed. The section shows that, though time begins to run against minors, lunatics and persons under disability, an extended period of limitation is given. The provision that the suit may be filed within that period after the disability has ceased does not mean that limitation will not run at all during the continuance of the disability. What Sections 21 (1) (c) postulates is an extension of the period of limitation from the cessation of disability and not a postponement of the starting point to the cessation of disability. On the other hand, section 25 (a) of *The Limitation Act* and section 6 (1) (a) of *The Civil Procedure and Limitation (Miscellaneous Provisions) Act* toll the time until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it. Determination of when the party pleading this exception could with reasonable diligence have discovered the illegal or wrongful act constituting the cause of action is another issue whose resolution is necessarily based on the circumstances peculiar to each case. Therefore, it is a question of fact which may be decided only after hearing evidence. It is a fact intensive inquiry into the conduct and background of both parties in order to determine the relative diligences. It thus cannot be determined, as a preliminary point of law, that this exception is not available to the respondents.

To invoke these exceptions, a litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim (see *Iga v. Makerere University* [1972] EA 65). This disability must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*. It is trite law that a plaintiff that does not plead such disability where the cause of action is barred by limitation, is bad in law. Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, requires rejection of a plaintiff where the suit appears from the statement in the plaintiff to be barred by any law.

On the other hand, Order 7 rule 6 of *The Civil Procedure Rules* provides that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff should show the grounds upon which the exemption from that law is claimed. This requirement was considered by the Court of Appeal in *Uganda Railways Corporation v. Ekwaru D.O and 5104 others, C.A. Civil Appeal No.185 of 2007 [2008] HCB 61*, where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaintiff, the plaintiff must be rejected (see also *Murome Sayikwo v. Kuko Yovan and another [1985] HCB 68*).

10 Although the respondents did not expressly state that they shall be invoking this exception, they pleaded the factual grounds upon which they can claim the exemption as required by Order 7 rule 6 of *The Civil Procedure Rules*. That they never included in their plaintiff the conclusory statement of such reliance is not fatal to the claim. Under the substantive justice doctrine, courts are prohibited from striking out a plaintiff or dismissing a suit, based on a technicality, unless it is clear that there are no set of facts that the plaintiff could prove to establish the claim. Since the basic requirements of pleading material facts on basis of which the exemption may be claimed has been met, this objection too is accordingly overruled.

In conclusion, it is only the preliminary objection regarding the respondents' claim in respect of the seventeen corporate entities associated with the 2<sup>nd</sup> applicant that has been sustained. Since the determination of the issue of limitation in this case in respect of the rest of the claims is not a pure question of law, it cannot be decided as preliminary issue. The rest of the objections therefore stand overruled. The costs of the application shall abide the outcome of the suit.

25 Delivered electronically this 17<sup>th</sup> day of January, 2023  
**Mubiru**.....

.....**Stephen**

Stephen Mubiru  
Judge,  
17<sup>th</sup> January, 2023.

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