

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCALLENOUS APPLICATION NO. 192 OF 2002

{Arising out of Civil Suit No. 196 of 2002}

TATU NANTEZA

APPLICANT/PLAINTIFF

VERSUS

ADMINISTRATOR GENERAL

RESPONDENT NO.1/DEFENDANT

ABDUL WASSWA

RESPONDENT NO.2/DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. When this application was called for hearing, Mr. Kulumba Kiingi, learned counsel for the Respondent No. 1/Defendant No.1, raised two preliminary points of law, which he said would dispose of not only the application before me, but the head suit too. The first of the two main contentions advanced by Mr. Kulumba Kiingi is that this suit is res judicata. There exists a previous suit, H.C.C. S. No. 354 of 1997 in which the parties to the present suit were the only parties, and the subject matter of that suit was the subject in this present suit. That suit was settled by consent of the parties.
2. Mr. Lubega Matovu, learned counsel for the applicant/plaintiff, concedes the existence of the previous suit between the same parties, over the same subject matter. However, he contends that the previous suit was prosecuted in the plaintiff's names without her authority and knowledge, and that the settlement that followed was obtained by fraud. He argues that this matter is not res judicata as it seeks to challenge the judgment granted in the previous suit. When asked to provide authority for this procedure he produced none at the hearing but later forwarded to court the decision of the High Court of Tanganyika in *Ramdev Malik v. Lionel Albert Callow* [1958] E.A. 99.
3. I think this matter is covered by Section 42 of the Evidence Act, which states, "Any party to a suit or other proceeding may show that any judgement, order or decree which is

relevant under section 38, 39, or 40, and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.”

4. Section 38 states, “The existence of any judgement, order or decree which by law prevents any court from taking cognisance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognisance of such suit or to hold such trial.” This section makes relevant, in any proceeding, any facts that show the existence of a decree which would render a suit in such proceeding, barred by *res judicata*.
5. And when it is contended that a suit is barred for the reasons set out in Section 38 of the Evidence Act, Section 42 of the said Act, grants to any party the right to show that the judgement or order or decree referred to in Section 38 aforesaid, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion. And once it can be shown that a judgement was delivered by a court not competent to deliver the same, or was obtained by fraud or collusion, such a judgement is void ab initio, and cannot be saved by pleas of *res judicata* or other ground.
6. It would appear to me, at the same time, that Section 42 of the Evidence Act makes it permissible, to contend in another suit, and not by way of a proceeding in the suit in which the impugned judgement, order or decree arose, that such judgement, order or decree was obtained by fraud or collusion. The High Court of Tanganyika was of the same view in *Ramdev Malik v. Lionel Albert Callow*, (*Supra*); though it was of the view that if the fraud complained of was contained in something which had already been adjudged, reopening the matter in a new hearing would be *res judicata*.
7. Paragraph 14 and 17 of the plaint contain references to the previous suit. I shall set them out.
8. “14. The plaintiff contends that she has never instructed M/S Kasirye & Co. Advocates to file civil suit no. 354 of 1997 Tatu Nantenza Vs The Administrator General or withdrew the same and the counter claim thereon against her and the plaintiff has never been a party to both the consent judgement and decree. Photostat copies of the plaint counter claim and consent decree are attached hereto and marked L3, L4, and L5 respectively.”

9. “16 The plaintiff further contends that the purported consent judgement and decree is a conspiracy by Moses Wakaabu Kigozi and Ruth Nantume represented by the 1st Defendant as administrator of the estate of Abdalla Kigozi and the 2nd defendant to divest the plaintiff of her suit land.”
10. From these two paragraphs it appears to me that the applicant/plaintiff is at least setting out a claim of collusion against the two defendants and another in obtaining the consent judgement and decree in the previous suit. This would allow it, in my view, to pass the hurdle or bar of res judicata. I suppose that if applicant never in the first place instituted HCCS No. 354 of 1997, she ought to have a choice to either intervene directly in that suit or bring a fresh proceeding.
11. I now turn to the second objection by Mr. Kulumba Kiingi. He asserted that the head suit is barred by limitation. The cause of action arose in 1977 and the suit has been brought in 2002, a period of over 20 years. He referred to Section 6 of the Limitation Act. It was incumbent on the plaintiff to plead a disability if She intended to rely on one as against the period of limitation. She had not done so in her pleadings, and the suit is therefore statute barred.
12. In response to this contention, Mr. Lubega Matovu, replied that though the alleged fraud took place in 1977 the time starts to run only after the fraud is discovered and this had been discovered in 1999.
13. Order 7 Rule 6 of the Civil Procedure Rules states, “Where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show the grounds upon which exemption from such law is claimed.”
14. Section 6 of the Limitation Act states, “No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some through whom he claims, to that person.”
15. The head suit is essentially a claim for land. It is alleged that the applicant was defrauded of her title to the suit land in 1977. Since then to the date of filing of this suit, it is more than a period of twelve years. Clearly the cause of action arose more than twelve years from the date of presenting this claim to court.

16. The plaint does not at all allude to a limitation period and the reasons why this action is exempted from the limitation period. It may be possible that there are reasons for exemption. However, these are not disclosed in the plaint. Apart from stating that she was told of the theft of her land title, on a date she does not mention, the plaint does not state when she became aware of transfer of the suit land from her names into the names of one Abdalla Kigozi, and subsequently Respondent No. 2/Defendant no. 2.
17. I agree with Mr. Lubega Matovu that in case of fraud preventing the discovery of the cause of action, the date of discovery of the fraud, or the date upon which fraud would have been discovered with reasonable diligence, is the date upon which the cause of action will start to run. This is provided by Section 26 of the Limitation Act. But for this provision to be relied upon, fraud in my view would have to be pleaded, and particularised, setting out in the plaint the date upon which the fraud was discovered or ought to have been reasonably discovered. This would then show the exemption, in case of fraud, to the period of limitation or the postponement of the period of limitation. Unfortunately the plaint does not show when the fraud was discovered or ought to have been reasonably discovered.
18. Mr. Lubega Matovu suggested that this can be inferred from the provisions of paragraph 13 of the plaint. I have read and re-read paragraph 13 of the plaint. I am unable to glean from it any indication of when the plaintiff discovered the fraudulent transfer of the certificate of title to the suit land or that other than the theft of the certificate of title to the suit land, there is any other matter she complained of to the police. Neither am I able to conclude that paragraph 13 of the plaint does show that the cause of action did not start to run from 1977 when the acts giving rise to the cause of action in this suit commenced.
19. Order 7 Rule 11 of the Civil Procedure Rules obliges this court to reject a plaint in a number of circumstances, which include, “(d) where the suit appears from the statement in the plaint to be barred by any law”. In accordance with Order 7 Rule 11(d) of the Civil Procedure Rules, I reject the plaint in the head suit, with the result that the present application before me collapses. It is accordingly dismissed with costs.

Dated, Signed, Delivered at Kampala this 10th July 2002.

FMS Egonda-Ntende
Judge
10/07/02