

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-047-2008

WILSON NUWAMANYA.....PLAINTIFF

VS

1. MRS. MARY MUGYENYI)

2. MBARARA DISTRICT LAND BOARD).....DEFENDANTS

BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU

R U L I N G

This is a Ruling on 3 preliminary objections raised by the defence.

- (i) That the suit is Resjudicata
- (ii) That the suit is barred by limitation
- (iii) That there was no service of the statutory Notice.

Mr. Enos Tumusiime for the 1st Defendant argued the first 2 objections while Mr. Ndibarema for the 2nd Defendant argued the 3rd objection.

On the 1st objection, counsel argued rather strongly that the matter is resjudicata the same having been dismissed by court vide C.S. 375/98 in Kampala. The present Plaintiff was the first Plaintiff in Civil Suit 375/98 and the defendants in that suit included the 1st Defendant and her deceased husband. That the issues in C.S. 375/98 which was dismissed on 7/3/2000 are the same as those raised in the present suit and the subject matter is

the same i.e. Plot 64 Block 36 land at Katenga, Bubaare, Kashari, Mbarara.

Mr. Anthony Ahimbisibwe for the Plaintiff disagreed and submitted that the matter is not resjudicata because it was not adjudicated upon but was dismissed due to absence of both parties in court. Without much ado, the relevant provision is section 7 of the C.P.A.

S.7 “No court shall try any suit or issue in which the matter directly or 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 proceedings of C.S. 375/98 were tendered during the objection and the relevant order reads:-

“It is now coming to 9.30 a.m. This matter was adjourned in the presence of counsel for the Plaintiff. He is not here and there is no message or no one to explain why -----In accordance with O. 15 r.3 and O. 9 r. 14 of CPR with costs.”

Order 15 is now order 17 and Rule 3 provides for the disposal of the suit in the modes prescribed in Order 9 once the parties fail to turn up. O. 9 r. 14 of that time is now O. 9 r. 17 which provides for dismissal of the suit if neither party appears.

Consequently, what happened on 7/3/2000 is that C.S. 375/98 was dismissed because both parties were absent. Should that case which was dismissed be treated to have been **heard and finally decided by**

that court?

I would answer in the negative. The suit (375/98) was never heard at all and was never decided finally because under Rule 18 of Order 9, the Plaintiff could bring a fresh suit subject to the law of Limitation.

For resjudicata to stand, the dismissal should have been upon hearing evidence or upon considering the matter on the merits. On the contrary, C.S. 375/98 was dismissed because both parties were not present to be able to be heard. Consequently, the objection about resjudicata is misconceived and fails.

See Salem Ahmed Hassan Zaidi vrs. Faud.H. Humeidan (1960 EA 92. See also D.S. Mbaabali vrs. M. Kiiza & A.G. (1992-1993) HCB 243.

The second objection is that the present suit is barred by limitation.

It was the defence submission that should the Defendant No.1 obtained a title in 1991, it was incumbent upon the Plaintiff to sue her within 12 years and that the present suit failed in 2008 is more than 12 years from the date of the cause of action and therefore offends the Limitation Act cap. 80.

Again, counsel for the Plaintiff disagreed and contended that under S. 25 of the Limitation Act, the Plaintiff is except by virtue of fraud on the part of the Defendants. Further, that the Plaintiff discovered the fraud in 1996 when he acquired Letters of Administration and was registered on the title as administrator and that the suit having been filed in May 2008, 12 years had not elapsed i.e. between July 1996 and May 2008.

The pleadings before me reveal that the Plaintiff is suing as an administrator of the estate of the late Zaburoni Kutayo and was registered as an administrator the title comprised in Plot 64 Block 36 -

Kashari - Mbarara on 17/7/96 having obtained Letters of Administration.

In his plaint in C.S. 375/98 which was dismissed for non- attendance of court, the present Plaintiff complains that the suing Defendant No. 1 encroached on 42.9 hectares of his land in 1989 and in 1991 had the same portion surveyed off.

In the current suit, the Plaintiff complains that in March 1992, the Defendants connived to lease off approximately 46 hectares of his land. It is trite law that Limitation begins to run from the date of the causes of action to the date of filing the suit (See *F. X. S. Miramaqo vs AG. f19791 HCB 24*). In this case, the time of limitation began to run in 1992 when the 1st Defendant obtained a title to the land.

Under section 5 of the Limitation Act, the suit should have been filed before the end of 2004. However, it was submitted for the Plaintiff that he learnt of the fraud in July 1996 when he got registered as an administrator and therefore, that is the period when limitation begins to run by virtue of S. 25 of the Limitation Act.

Paragraphs 7 and 8 of the plaint do not plead that the Plaintiff discovered fraud only after obtaining Letters of Administration and getting registered on the title. Indeed Para. 7 of the plaintiff is clear that the Plaintiff was aware of the deprivation of his land in March 1992. The paragraph about fraud does not reveal any disability on the part of the Plaintiff in failing to detect the fraud. Besides, section 192 of the Succession Act (cap. 162) provides that Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death and when this section is read together with

section 15 of the Limitation Act which provides that an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of Letters of Administration, leaves the plaintiff's argument that he came to know of the fraud or trespass after getting letters of Administration, futile.

From 1992 when the 1st Defendant acquired a title, the time of Limitation under section 5 of the Limitation Act started to run and the death of Zaburoni Kutayo cannot exempt the Plaintiff from the Limitation Act in view of section 15 of the said Act.

Consequently, a suit filed after 2004 is time barred by virtue of section 5 of the Limitation Act since it is 12 years after the accrual of the cause of action.

The present suit is filed in 2008 which is 16 years or 4 years outside the limitation period.

I have already faulted the pleadings for failing to plead an exception. Order 7 Rule 6 CPR makes it mandatory to plead exception if a suit is filed outside limitation. See *E. Otabona vrs AG.* (1991) ULSLR. 150

In the present case, no exemption has been pleaded. Even if it had been pleaded, sections 15 of the Limitation Act and 192 of the Succession Act would render such pleadings futile.

The result is that the objection is upon held on limitation and the plaint is struck off with the attendant costs.

My holding on this objection renders the last objection redundant though I would say it was a feeble one since a copy of the statutory notice was produced and had been duly received by the 2nd Defendant. Finally, am not sure why a gamble was made at filing a fresh suit

instead of applying to set aside a dismissal order of C.S. 375/1998.
That remains a secret between counsel and the Plaintiff.



Lawrence Gidudu
J u d g e
25/03/2010

25/3/2010 Plaintiff absent Defendant No. 1
absent Defendant No. 2 absent Ahimbisibwe
Anthony for Plaintiff Enos Tumusiime for
Defendant No. 1 Ndibarema Mwebaze for
Defendant No. 2 Rutazaana clerk
Court:
Ruling delivered in open court.

Lawrence Gidudu J u d g e 25/3/2010