

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**HCCS NO. 100 OF 2012
[ARISING FROM ADMINISTRATION CAUSE NO. 12 OF 1995]
IN THE MATTER OF THE ESTATE OF THE LATE NAMADOWA BUTANDA
BRUHAN**

ADAM NAMADOWA AND SIX OTHERS.....PLAINTIFFS

VERSUS

- 1. HAKIM KAWAIDHANAKO**
- 2. SHAFFIQ BUTANDA**
- 3. MUSA NAMADOWA**
- 4. BADRU NAMADOWA**

**[Administrators of the estate of the late NADOWA BUTANDA BRUHAN)
.....DEFENDANTS**

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

The claim by the plaintiffs in this suit is for an order for the revocation of Letters of Administration in respect of the estate of the late Namadowa Butanda Bruhan (hereinafter called the deceased) that were granted to the defendants (and one other deceased person) vide Probate and Administration cause N0.12/1994 on 14/8/1996, and pursuant to a consent judgment of this court dated 14/4/1996 in which some of the parties to this suit were involved. The suit is proceeding *ex-parte* against the 1st defendant and the 2nd defendant consented to the entire claim. None the less, the agreement between the plaintiffs and 2nd defendant does not discharge the claim against the other defendants

When the suit came up for hearing on 25/10/2017, counsel for the 3rd and 4th defendants raised two preliminary points of law that the suit is *res judicata* because it raises issues already heard and determined in HCCS NO. 22/1994, and it is also time barred. I allowed both counsel to file written submissions with authorities which I have closely studied and will consider in this ruling.

Issue 1 - Whether the suit is *res-judicata*

The statutory bar of *res-judicata* is contained in section 7 of the Civil Procedure Act (hereinafter referred to as the Act) that I will produce here:-

“No Court shall try any suit or issue in which 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 principles relating to the doctrine have been enunciated in many cases for example in the case of **Ganatra vs. Ganatra[2007] 1 EA 76 at P 82** where Justice Nyamu held that;

*“...for *res judicata* to be established, three conditions have to be fulfilled. Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings was litigated. Secondly, that the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matters in controversy between the parties in the former suit...”*

For the purposes of this suit, that test should be read subject to the explanations in **Section 7** of the Civil Procedure Act [CPA], in particular **Explanation 6** which stipulates that;

*“Where persons litigate **bona fide** in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”*

To simplify the above provision, under Section 7, for a claim for *res judicata* to succeed, the defendant must prove that:-

- i. The same parties litigating in the former suit should be the same parties litigating in the latter suit or parties under whom they or any of them claim
- ii. A final decision on the merits has been given in the former suit by a competent court

- iii. The suit or its subject matter must have been directly or substantially in issue in a former suit
- iv. The parties should be litigating under the same title
- v. The earlier suit must have been decided by a competent court and that court fully resolved the dispute.

Further, my understanding of Explanation No. 6 is that the defendant needs to prove the following:-

- i. That the litigation was *bonafide*
- ii. The rights claimed in the two suits should be in common with the litigants for themselves and others
- iii. All persons interested in the right are deemed to claim under the persons so litigating.

Again, according to **Explanation No. 4** any matter which might or ought to have made a ground of defence or attack in the former suit is deemed to have been a matter directly and substantially in issue in that suit.

It was submitted for the defendants and not disputed that, HCCS 22/1994 is the former suit as opposed to the current suit before me. It was submitted further that the parties in the former suit are the same as in the current suit and vice versa. That the matter in controversy in the former suit was the issue of distribution of the deceased's estate and nothing else and that that issue was fully settled in the consent judgment in that, the estate was distributed and therefore closed.

Conversely, plaintiff's counsel argued that the provisions of section 7 had not been satisfied in that, the parties in the two suits are not the same. Counsel conceded that the subject matter in both suits is the deceased's estate but that in the former suit, the claim was to have a caveat against the application for a grant of Letters of Administration to be lifted which was done through a consent judgment. That in the current suit, the claim is for an order to revoke that grant with reasons expounded in the plaint.

The contrasting submissions would require an investigation of the pleadings in both suits

Mwamadi Butanda and Shafiq Butanda the plaintiffs in HCCS N0.22/1994 (hereinafter referred to as the former suit) sued Amini Butanda, Abasi Mugonvu, Rehema Namadowa, Hajati Bayati Naigaga, Zaituna Nakasolo and Yusufu Musa Namadowa in respect of the deceased's estate. The plaintiffs had in Administration Cause No. 22/1994, applied for Letters of Administration in respect of the deceased's estate, and the defendants lodged a caveat against the grant. The former suit was accordingly filed to seek an order to vacate the caveat and have the grant made. That suit was on 11/4/1996 settled by a consent judgment by which Letters of Administration were granted to Madina Nabutanda, Yusuf Musa Namadowa, and the 1st , 3rd and 5th defendants, and a distribution of the deceased's estate made. The only outstanding issue was for the appointed administrators to transfer land titles in the names of respective beneficiaries.

In the current suit, Adam Namadowa, Halima Nabutanda, Salim Butanda, Yusuf Butanda, Salama Nabutanda, Majib Butanda Namadowa and Farouk Namadowa, all stating to be the deceased's children, sued the current administrators of the deceased's estate seeking an order for revocation of the grant that had been made by consent in the previous suit. The reasons advanced for the claim are that the defendants as administrators have never distributed or formerly transferred to them their respective entitlements for the estate, they did not disclose certain properties in the consent judgment, and have since signing the consent judgment, put those undisclosed properties and other properties of the estate to their personal and exclusive use all which has resulted into mismanagement and wasting of the deceased's estate. In addition to the prayer for revocation, the plaintiffs sought an order for the grant to be made in their favour, and for the defendants to be ordered to file an inventory and account of the deceased's estate and to pay them compensation for loss sustained.

I am prepared to believe and it was not contested that the subject matter in the two suits is the same. In both cases, the parties as beneficiaries sought declarations with respect to the deceased's estate.

However, as rightly argued by plaintiff's counsel, the parties are not the same. I noted some confusion in submissions of defendants' counsel on this point. However, my own evaluation is that it is only Shafiq Butanda who is the apparent common party to both suits. Yusuf Musa Namadowa, the 6th defendant in the former suit, is not Musa Namadowa in the current suit. He may be one and the same person but in law, due to the varying names he cannot be the same person except where he makes an affirmation to admit as much. It was admitted that Rehema Namadowa the 3rd defendant in the former suit, did not reappear in the current suit. All the other parties that I have not mentioned do not appear in both suits.

It was stated by defendants' counsel and not denied, that Rehema Namadowa is the mother of the 1st, 2nd and 4th plaintiffs in the current suit. It may be that those particular plaintiffs as beneficiaries can make a claim in their own right as beneficiaries, however, as stated in the plaint, at the point the consent judgment was signed, they were still minors. Further in the consent judgment, it is clear that a distribution was made for their benefit through Rehema Namadowa. They are thereby estopped in law to resurrect any issues for which Ms. Rehema Namadowa their mother agreed to and signed for in the consent judgment. I hasten however to stress that only Rehema Namadowa's biological children mentioned in the consent judgment would be bound by her signature.

It is correct for plaintiffs' counsel to argue that since there were was no actual litigation on the merits of the dispute in the former suit, the consent judgment which resolved it cannot be taken to be a judgment on merit, as envisaged by section 7 of the Act, However, the contents of the caveat or pleadings of HCCS N0.22/1994 were never made part of this suit to enable my court to make an informed decision on that point.

That said, I am prepared to believe that in law, the consent judgment in the former suit substantially closed the matter of who should administer the deceased's estate as well as distribution of what was then known to be the estate assets. In my estimation therefore, defendants' counsel would be correct to say that the issue of distribution was closed. If after the consent judgment was signed, new properties were discovered as concealed, then it would

have been open for the aggrieved parties to have reopened the proceedings in the former suit to challenge the *bonafides* of the consent judgment, but not to file a fresh suit on those issues.

That said, the proviso under clause 6 of section 7 of the Act states that the doctrine will apply only if the parties litigated bonafide. The persons so litigating and those claiming under them will only be barred from filing a new suit in respect of a particular right (in this case a right to a share in the deceased's estate) if the negotiations and signing were free from any type of malafides like fraud etc.

I see nothing in the current suit which seems to suggest that the administrators signed the consent judgment malafide or that certain properties were deliberately not mentioned in the consent judgment. The issue of malafides or fraud and their particulars are certainly not mentioned in the current suit as required by O.6 rr.3 CPR. Only a list of the estate properties is given without any explanation attendant to it. Clause 6 would thus not be helpful to the plaintiffs.

On the other hand, I would find merit in the submissions by plaintiff's counsel that a plaintiff may file successive actions in respect of the same circumstances, provided that those circumstances give rise to different causes of action and there is no merger of the two causes of action. **Jadva Karsan Vs Harnam Singh Bhogal (1953) 20 EACA 17.**

The circumstances of these two cases are such that clause No. 4 in the consent judgment did not conclusively close the issue of administration or the powers of the administrators generally. It is provided that the defendants in the current suit (as administrators of the deceased's estate) were responsible for the transfer of the land titles into the names of the respective beneficiaries. This would entail signing transfer forms for those properties that were registered. The contest in the current suit is that they have not done so to date and they have even not prepared and filed an inventory in the Court, as required by law

Administration of an estate is usually an on-going responsibility up and until the estate is formerly distributed and an inventory and account filed. Section 278 of Succession Act provides for a period of six to twelve months and sanctions and even revocation of the grant if

that is not achieved. I believe the five prayers in the current suit are meant to address those grievances which could not have reasonably been addressed in the former suit because at the point it was signed, administration was only deemed to be commencing and indeed, the grant was made on 14/08/1996, after the consent judgment was sealed.

I would conclude on this point that the issue that a grant was made to the defendants in the current suit and a distribution of the deceased's estate was concluded in the former suit, and is now *res judicata*. The discovery of undisclosed properties following signing of the consent judgment, can only be addressed by challenging it on grounds of discovery of new important information or malafides e.g. fraud, misrepresentation etc. This of course will depend on any statutory limitations to raise it.

On the other hand, the issue of how the defendants have administered the estate and executed their powers as administrators is not *res judicata* and can be addressed in the current suit.

Thus, the first objection succeeds only in part.

Issue 2 - Whether the current suit is time barred

It was submitted for the defendants that the current suit is time barred because as beneficiaries, they could only receive a share of the deceased's estate 12 years from the date that the grant for Letters of Administration was made. Conversely, plaintiff's counsel argued that the defendants as administrators are bound by Order 6 rr 8 CPR to raise limitation as a point of law in their pleadings. They argued further that the claim in the current suit is exempted from limitation, because it is one made by beneficiaries of a trust property on contention that there has been fraud or fraudulent breach of trust to which the defendants as trustees was party or privy or a claim to recover trust property or its proceeds. The decision in **Royal Norwegian Government Vs Constant and Constant (1960) 2 Lloyds Rep 431 at 443** refers.

Limitation against actions involving estates of deceased's persons is contained in Section 20 Limitation Act which provides that:

*“Subject to section 19(1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or intestacy shall be brought after the expiration of **twelve years** from the date when the right to receive the share or interest accrued and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due”*

It is provided in Section 19(1) that;

No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action;

- a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
- b) To recover from the trustee, trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and converted to his or her use.*

The joint written statement of defence did not disclose the two preliminary objections under discussion here. My observation is not disputed and it was argued for the defendants that limitation is a point of law, which can be raised even if not pleaded.

By the use of the word ‘*shall*’, Order 6 rr 28 CPR appears to be cauched in mandatory terms. However, the long accepted practice in our courts has been to entertain preliminary points of law whether pleaded or not preferably, at the commencement of a suit before evidence is led. Not all provisions written in mandatory terms are treated as such and guidance was given in the decision of *Edward Byaruhanga Katumba vs. Daniel Kiwalabye Musoke (Electoral Petition NO. 2/1998)* citing *secretary of State for Trade & Industry vs. Langridge (1991) 3 A11 EC*. It was held there that not all procedure rules are to be regarded as mandatory. A statute will only be directory and not mandatory if non compliance can be treated only as a mere irregularity especially where there has been substantial compliance and 2A what has been done does not affect the validity of the provision.

Including a point of law in pleadings is of course a prudent practice, step for it will give the other party the earliest warning of the intended objection against their claim. In my view, however, it is enough that is raised at the earliest point at the hearing for what is important is that the party against whom an objection is raised, is given ample notice of it and time to prepare a reply to it. Interpreting that law otherwise would create an absurdity whereby a court will be expected to conduct a full hearing which could have otherwise been decided summarily on a preliminary point simply because it was not pleaded. Limitation is certainly a point of law which when raised requires only consideration being given to the facts of the claim contained in the plaint and its attachments.

There was sufficient notice to the plaintiffs and indeed their counsel managed to prepare and address the preliminary points of law raised by the defence. With due respect, I decline to be bound by the authorities cited by plaintiffs' counsel and accordingly reject the objection by plaintiff's counsel.

The provisions of Section 20 of the Limitation Act are clear. Any claimant under a will or intestacy is allowed 12 years only to present their claim. Going by the facts as related in the plaint, I agree with defendants' counsel that any claim by the plaintiffs would accrue from the date the grant for Letters of Administration was made i.e. from 14/8/96 to 13/8/2008. The suit being filed on 12/6/2012 would be nearly four years late. Defendants' counsel did not dispute that fact, only arguing that the exemption in Section 19(1) is open to his clients.

With due respect, the provisions of section 19 would not apply in this case because they are clearly restricted to claims with respect to trust property and not estates of deceased's persons. The two are different and governed by distinctly different statutes. Under Section 1 (n) of the Limitation Act, the trusts contemplated therein are those provided for under the Trustees Act Cap 164. I do not agree with plaintiff's counsel that the properties in question were the subject of a trust. The defendants were appointed administrators of a deceased person's estate by Court order, and not a trust deed and in fact, none exists and none was pleaded in either two actions.

The plaintiffs state in the plaint that the deceased passed away on 8/2/1994 when they were all still minors and that the consent judgment was signed during their minority. They would ordinarily qualify to plead disability under section 21 of the Limitation Act. However, such disability would cease once any one or all of them attained majority age and the action would still be time bad if not filed within six years after the last of them attained majority age.

According to O. 7 rr 6 CPR, disability as an exemption from limitation must be specifically pleaded. It would therefore have been necessary for the plaintiffs to have specifically pleaded disability and attached to their pleadings evidence to show that they qualified to claim it and also show at what point they attained majority age. They did not do so, and cannot, if their claim is time barred, have a cause of action against the defendants. See for example **Arua Motor Dealers Vs AG HCCS No. 1451/1980**.

I conclude to hold that the suit is time barred and the second objection succeeds. It follows that although certain aspects of the plaintiffs' claim were not res judicata, the entire suit is time barred. I am mandated to strictly enforce that benefit in favour of the 3rd and 4th defendants. **Mohammed Kasasa Vs Jasper Buyonga Sirasi Bwogi CACA N0.42/2008** refers.

The suit is therefore dismissed with costs to the 3rd and 4th defendants.

I so Order

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EVA K. LUSWATA
JUDGE
DATED: 12/04/18