

1 **THE REPUBLIC OF UGANDA**
2 **IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**
3 **HCT-14-LD-MA-0072-2019**
4 **ARISING FROM HCT-14-CV-CS-0216-2017**
5 **FORMERLY HCT-00-FD-CS-173/2013**
6 **KATENDE SEMPEBWA& CO. ADVOCATES AND ANOR:::::::::::::::::::::::::::::::::APPLICANTS**
7 **VS**
8 **NABACWA BARBARA AND 3 ORS::::::::::::::::::::::::::::::::: RESPONDENTS**
9 **BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT**

10 **RULING**

11 This application is brought under Section 98 of the Civil Procedure Act Cap 71, 0.6 rules 28, 29
12 and 30, 0.7 rule 1 (a) (d) and (e) 0.52 rule 1, 2 and 3 of the Civil Procedure Rules SI 71-1 and
13 Section 20 of the Limitation Act.

14 Katende Sempebwa and Co. Advocates as executors of the estate of the late Geresom Mpande
15 Kamoga and Emmanuel Wamala herein referred to as applicants are seeking for orders that:

- 16 a) High Court Civil Suit No. 173 of 2013 Nabacwa Barbara and 3 others Vs Katende
17 Sempebwa & Co. Advocates and Anor is barred by limitation of time
- 18 b) Civil Suit No.173 of 2013 Nabacwa Barbara and 3 others Vs Katende Sempebwa and Co.
19 Advocates and anor is frivolous and vexatious and an abuse of the court process.
- 20 c) Costs of this application be in the cause.

21 The application was supported by an affidavit of Frank Sewaggudde in which he laid out the
22 grounds of the application as follows:

- 23 1) that on the 20th day of November 2013, the Respondents filed C.S No 173 of 2013,
24 Nabacwa Barabara and 3 others VS Katende Sempebwa and Co. Advocates and Anor.
- 25 2) That the above Civil Suit No. 216 of 2017 that arose from HCCS No. 173 of 2013 is time
26 barred.

27 3) That the above suit is frivolous and vexatious and an abuse of court process and should
28 be struck off the record.

29 4) That it is in the interest of justice that this application is granted.

30 The application was against Nabacwa Barbara, Nabaziga Sarah, Namuyimba Edith and
31 Nabukeera Birabwa herein referred to as 1st, 2nd, 3rd and 4th Respondents.

32 It was contested through the affidavit in reply of the 2nd Respondent dated 6th May 2019, the
33 relevant paragraphs being contained in paragraphs 2, 3, 4 and 5, 6 and 7 of her affidavit which
34 are reproduced herein as follows:

35 a) That paragraph 1,2,3,4,5,6,7 and 8 are admitted and the respondent replies that the 1st
36 applicant has been and is still administering the estate.

37 b) That in reply to paragraph 9, as biological children, beneficiaries and members of the
38 family of the late Gerosom Kamoga have never at any time convened a meeting with the
39 1st applicant and we are not aware of any minute authorizing the 1st applicant to transfer
40 the suit property to the 2nd applicant/defendant.

41 c) That in further reply to paragraph 9, I have been informed by our lawyers which advice I
42 verily believe to be true that in the absence of the meeting minutes duly signed by us as
43 the family members authorizing the 1st defendant/Applicant to transfer the suit property,
44 it becomes a matter to be investigated by this court which can only be done through a
45 trial of the case on its merits.

46 d) That in reply to 10,11,12 and 13, it wasn't within our knowledge since we were never
47 consulted that the suit property had been transferred into the names of 2nd defendant/
48 applicant not until the year 2012 when the 1st defendant filed an inventory in court.

49 e) That in further reply, we are informed by our lawyers which information we verily
50 believe to be true that the cause of action arose on the day we discovered the illegalities/
51 fraud committed by the 1st defendant while dealing with the suit property.

52 f) That in further reply, the 1st defendant deliberately refused to disclose to the family
53 members about its dubious dealings with an intention of defeating justice.

54 Counsel Frank Ssewagudde together with Counsel Serwanga Sserwagudde appeared for the
55 applicants while Counsel Songoni Mustapha appeared for the Respondents.

56 Counsel for both parties filed written submissions which I have carefully read and
57 comprehended. I will refer to them as and when necessary as I do not have to reproduce them
58 vabertim.

59 **Brief facts**

60 This application arises from Civil Suit No. 216 of 2017 formerly Civil Suit No. 173 of 2013
61 where the respondents filed a civil suit against the applicant's jointly and severally.

62 The first applicants were appointed as executors of the Will of the late Geresom Mpande
63 Kamoga and were granted letters of probate vide Administration Cause No. 90 of 1986 by the
64 High Court.

65 They are still holding the letters of probate as administration of the estate which fact is alluded to
66 in paragraph 6 of their Written Statement of Defence dated 21st/01/2014

67 The relevant parts of paragraph 6 in as far as this application is concerned are the following:

68 6 (c) (v) that ***“the first defendant could not distribute and wind the estate until provision is
69 made for payment of administration costs incurred over the years and professional fees.”***

70 6(c) (iii) ***“that plots 403, 405, 407, 410, 412, 414, 415, 416, 417 and 419, fall under 4(a) (ii) of
71 the Will, had a proviso which stated that after each of the above persons has taken a plot, the
72 rest of the plots listed above shall be held by the executors who shall dispose the same.”***

73 6(c) (vii) ***“that the first defendant has been dragged to court over the years by a one Namutale
74 Joseph in respect of the said estate which has delayed the process of finalizing distribution of
75 the remainder of the said estate.”***

76 In the counter claim, the applicant claimed payment for their professional fees and a declaration
77 that the respondents and a one Joseph Namutaale Kamoga have intermeddled with the estate by
78 giving it to squatters.

79 In their plaint dated 18th /11/2013 the respondents stated under paragraph 4 that “the plaintiff’s
80 action against the defendant jointly and severally is for the declaration that the 1st defendant
81 grossly mismanaged the estate of the late Geresom Mpande Kamoga,

82 An order for revocation of letters of probate granted to the first defendant vide high court
83 administration cause no. 90 of 1986.

84 An order granting to the plaintiffs letters of administration to the estate of the late Geresom
85 Mpande Kamoga.

86 A declaration that the transfer of land comprised in block 110 plot 226 by the first defendant to
87 the 2nd defendant was fraudulent, illegal and or unlawful and therefore null and void,

88 An order of cancellation of the certificate of title comprised in block 110, plot 226, that was
89 transferred by the 1st defendant to the 2nd defendant and have the same transferred and handed
90 over to the administrators of the estate of the late Michael Kizza Matovu, to whom it was
91 bequeathed ,

92 An order directing the first defendant to provide a true statement of account of the proceeds from
93 the estates,

94 A declaration that the 1st defendant is unlawfully withholding the distribution of the land
95 comprised in Kyaggwe Block 110 Plot 386, 387, 403, 405, 406, 407, 410, 412, 414, 415, 416,
96 417, 418 and 419 belonging to the estate of the late Geresom Mpande Kamoga, among others ,

97 An order that the first defendant hands over the said plots to the lawful beneficiaries,

98 A permanent injunction restraining the 1st defendant and its agents from interfering with the
99 estate of the Late Geresam Mpande Kamoga, general damages, interest, costs of the suit.

100 The facts constituting the cause of action are well contained under paragraph 5 of the plaint and
101 particulars of fraud and illegality were pleaded under 8 of the plaint. I will not go into the details
102 but partly under paragraph 8 (d) (e) and (g) wherein they state:

103 Para 8 (d) illegally transferring land that belongs to the estate of Michael Kizza to the 2nd
104 defendant without the consent of the other beneficiaries.

105 Para 8(e) transferring ancestral land and burial grounds to the 2nd defendant without the consent
106 of the family members.

107 Para 8(g) filing a false and fraudulent inventory after 25 years

108 Para 9 that the plaintiff shall contend that the 2nd defendant illegally and fraudulently obtained
109 and registered the suit land belonging to the estate of Kizza Michael in his name well knowing it
110 is ancestral land and burial ground.

111 It is alleged that the 2nd defendant has now denied the plaintiff access to their ancestral land
112 contrary to the will of their late father.

113 With the above background, let me revert to the issue for court's determination.

114 **4. *Whether High Court civil Suit No. 216 of 2017 formerly 173 of 2013 between Nabachwa***
115 ***Barbara and 3 others versus Katende Sempebwa and Co. Advocates and Emmanuel Wamala***
116 ***is time barred.***

117 **5. RESOLUTION OF THE ISSUE**

118 It was submitted for the applicants that the plaintiff's suit is time barred because as the
119 beneficiaries, they could only claim a share of the deceased's estate within 12 years from the
120 date that the grant of probate was made. In this case probate was granted on the 30th May 1986 as
121 per the copies of the letters of probate.

122 That the current suit was filed on the 20th of November 2013, and on that account alone, the suit
123 is 27 years out of time. Counsel for the applicants relied on Section 20 of the Limitation Act to
124 support his submission that the suit was time barred.

125 **Section 20 of The Limitation Act** provides as follows:-

126 ***“Subject to Section 19(1), no action in respect of any claim to the personal estate of a deceased***
127 ***person or to any share or interest in such an estate whether under a Will or intestacy shall be***
128 ***brought after expiration of 12 years from the date when the right to receive the share or***
129 ***interest accrued and no action to recover arrears of interest in respect of any legacy or***
130 ***damages in respect of those arrears shall be brought after the expiration of 6 years from the***
131 ***date on which the interest became due.”***

132 Counsel for the applicants/ defendants further relied on the authority of the case of **Adam**
133 **Namaduwa and 6 others V Hakim Kawaidhanako and 3 others**, where **Justice Eva Luswata**
134 **held** that,

135 *‘the provisions of section 20 of the Limitation Act are clear. Any claimant under a will or*
136 *intestacy is allowed 12 years only to present their claim. Going by the facts as related in the*
137 *plaint, I agree with the defendant’s counsel that any claim by the plaintiffs would accrue from*
138 *the date the grant for letters of administration was made i.e. from 14th /08/1990 to 13th /*
139 *08/2008. The suit being filed on 12th /06/2012 nearly four years late.’*

140 She ruled that the suit was time barred.

141 He submitted that the suit that was filed 15 years out of time should be struck off because it
142 should have been filed by 29th / 05/1998. He concluded the suit was barred by **Section 20 of the**
143 **Limitation Act** and should be rejected under **0.7, r.11 of the Civil Procedure Rules.**

144 In response Counsel for the Respondents submitted that the plaintiff’s case is founded on fraud
145 and that **Section 25(a) (b) and (d) of the Limitation Act** applies to this case. They prayed that
146 the case be heard on merit.

147 In Rejoinder, Counsel for the applicants relied on the case of **Madhivani International VS AG**
148 **CA. NO 23/ 2010** where Justice C.N Kitimbo JSC held that, *‘the above statute of Limitation is*
149 *a statute of Limitation which is strict in its nature and inflexible and not concerned with*
150 *merits.*

151 She quoted the decision of **Lord Greene M.R in Hilton vs. Sultan Steam Laundry [1946] 1**
152 **KB pg. 18** where it was held that *‘but the statute of Limitation is not concerned with merits.*
153 *Once the axe falls and a defendant who is fortunate enough to have acquired the benefit of the*
154 *statute of Limitation is entitled of course to insist on his rights.’*

155 He submitted that the sum total of the above is that the statute of Limitation is not concerned
156 with merits. Once the suit is time barred it must be struck down.

157 *With the above submissions in mind, it should be noted that the law on Limitation will be*
158 *applicable pursuant to an analysis of the pleadings and the prayers made in the suit for the*
159 *administration of an estate. In other words the period of limitation in a suit depends on the*
160 *cause of action and the nature of reliefs sought therein and the parties to the suit.*

161 The applicants are relying on Section 20 of the Limitation Act. Court observed that Section 20 of
162 the Act is subject to Section 19(1) of the same Act.

163 The caption under Section 19 is “**Limitation of action**” in respect of trust property. The section
164 provides that:

165 “**No period of Limitation prescribed by this Act shall apply to an action by a beneficiary under**
166 **a trust being an action:**

167 **(a) In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy**

168 **(b) To recover from the trustee trust property or the proceeds of the trustee property in the**
169 **possession of the trustee or previously received by the trustee and converted to his or her use.”**

170 When Sections 19(1) and 20 of the Limitation Act are read together, where Section 20 is subject
171 to 19(1), the word subject should be interpreted from the perspective of an adverb. The limitation
172 period prescribed under Section 20 is conditionally upon the provisions of Section 19(1) which
173 provides exceptions to property held in trust or where acts of fraud are alleged.

174 Section 19(1) introduces the word trust which simply means ‘**a three party fiduciary**
175 **relationship in which the first party, the trustor or settlor transfers (settles) property (often but**
176 **not necessarily a sum of money, could be land) upon the second party (the trustee) for the**
177 **benefit of a third party (the beneficiary)**

178 Under the above described trust, there’s a testamentary trust which is created by a will and arises
179 after the death of the trustor.

180 In our legal system, where a trust is created by a will, the named executors of the will (trustees)
181 obtain letters of probate like in the instant case and get registered as legal owners of the property
182 in trust as fiduciary for the beneficiaries or beneficiary who are / is the equitable owners of the
183 trust property.

184 Holders of letters of probate or trustees thus have a fiduciary duty to manage the trust to the
185 benefit of the equitable owners. In regard to their duties, they must provide regular accounting of
186 trust, income and expenditures. In cases of testamentary trust, where the trustor has spelt out how
187 the property should be managed including distribution, the trustee (executor) has the primary
188 duty of being loyal, prudent and impartial while dealing with the estate/trustee property.

189 When disputes arise between the beneficiaries and the trustees or executors of the Will and
190 holders of letters of probate, then the matter is referred to a competent court for resolving.

191 *In view of the above, it is my considered opinion that reference of Section 19(1) in Section 20*
192 *of the Act that provides for Limitation of action in respect of claims to the personal estate of*
193 *the deceased person or any share of or interest in such estate whether under a will or*
194 *intestacy, was intended to protect the rights of the beneficiaries against administrators of*
195 *estate or holders of letters of probate who do manage estate property in trust for the*
196 *beneficiaries.*

197 My opinion is premised on the fact that Administrators of estates of deceased persons whether
198 under probate/Will or intestacy automatically fall under trust law and are accountable to the
199 beneficiaries and the courts that issued them with the grant or letters of probate. that is why with
200 due respect I do not agree with my sister's view in the case of **Adam Namudowa and 6 others**
201 **supra** where she held that ‘

202 *’with due respect the provision of Section 19 wouldn’t apply in this case because they are*
203 *clearly restricted to claims with respect to trust property and not estates of deceased*
204 *persons.’...I don’t agree with the Plaintiffs’ Counsel that the properties in question were*
205 *subject of trust.’*

206 Certainly administrators of estates whether under probate or intestacy manage property of the
207 deceased in trust for the benefit of the beneficiaries.

208 The deceased may or may not mention all his assets in a will. If he doesn’t, the executor once
209 granted letters of probate has the responsibility of gathering and securing all properties belonging
210 to the deceased so that beneficiaries or family members or other persons do not simply take off
211 with estate property.

212 When all assets have been recovered and identified, the executor has the responsibility to
213 maintain and distribute them to the beneficiaries even if they weren’t distributed in the Will. The
214 executor then submits a report to the court listing all assets mentioned and not mentioned in the
215 will plus all liabilities of the estate.

216 She/he then embarks on the distribution exercise for the properties that were clearly bequeathed
217 and applies the principal of impartiality while dealing with the bequeathed property and files
218 final accounts to court detailing all the transactions he made on behalf and in trust for the estate.

219 If the judge is satisfied then the estate is wound up and the executor is discharged of his
220 responsibility.

221 ***Looking at the context of Section 20 of the Limitation Act, its main objective is to prevent any***
222 ***person from claiming what has been given away by the administrators or executors, through***
223 ***the due process of the law or exercising a legal right after a party decides to sit on his own***
224 ***right after 12 years.*** The section presupposes that the plaintiff was aware of the existence of a
225 right but through negligence or inaction on his or her part wakes up after 12 years to commence
226 an action against persons who were discharged from their responsibilities.

227 The period of limitation therefore will depend on the cause of action, the nature of the reliefs
228 sought therein and the parties.

229 I am afraid that in the instant case according to the pleadings, the applicants who are executors
230 have never wound up the estate as they admit they are still executors in their written statements
231 of defence.

232 The plaintiffs are seeking for revocation of letters of probate on allegations of fraudulent
233 transactions with the estate. The estate property under contention is still registered in the names
234 of the Applicants and not yet distributed or accounted for. Some other property was alleged to
235 have been fraudulently transferred by the applicants to the 2nd applicant/ 2nd defendant.

236 The claim in short is that the applicants have acted fraudulently and in breach of the trust as
237 executors of the will of their late father. The reliefs sought and the cause of action in my view do
238 not fall under the ambit of **Section 20 of the Limitation Act.**

239 **Section 19(1) (a) of the Limitation Act** holds the administrator of estates whether under probate
240 or intestacy accountable to the beneficiaries since they hold the properties in trust for the
241 beneficiaries. It cannot be said that the law was intended to protect the holders of letters of
242 probate or administration who fail to perform their statutory duty under Succession Laws and
243 Administrator Generals Act by managing the estate beyond 12 years without distributing and
244 filling final accounts and then plead the law of limitation which legally is not concerned with
245 merits of the case.

246 That administrators of estates who fail to comply with the law after registering estate property in
247 their names like it is admitted in the instant case cannot benefit from the law of limitation.

248 The question to be asked is:

249 ***What should happen to the properties registered in the names of the administrators/probate***
250 ***holders who have failed to distribute after 12 years? Should they take the property as their own***
251 ***to the detriment of beneficiaries? Certainly the answer is in the negative.***

252 Until the executors/holders of probate file final accounts with the probate court which accounts
253 must be approved by court, they remain liable to be sued by beneficiaries for either revocation,
254 declarations for breach of statutory duty and trust, recovery of the held property etc.

255 In conclusion, the period of Limitation in a suit really depends on the cause of action and the
256 nature of the reliefs sought.

257 It applies to parties that were aware of their rights and did not bother to pursue them. The
258 Respondents in this case are interested in investigating the fraudulent transfer of land bequeathed
259 to another person though now deceased by the applicants to the 2nd applicant/defendant. The
260 respondents are interested in estate property that was not bequeathed to any one and is now held
261 in trust by the Applicants who have failed to distribute and wind up the estate.

262 My humble view is that the nature of the cause of action and reliefs sought in HCT-14-CV-CS-
263 0216 FORMERLY HCT-00FD CS-173/2013 do not fall under the provisions of Section 20 of
264 the Limitation Act.

265 The suit is therefore not barred by the law of limitation.

266 In the result the application is dismissed and since the case is not yet concluded, the costs of this
267 application will abide by the results in the main suit.

268 I so direct.

269 Dated this.....day of October 2019.

270 _____

271 Margaret Mutonyi

272 **RESIDENT JUDGE**

273

274 Delivered on the 19th day of September 2019.