

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CIVIL SUIT NO. 008 OF 2020**

**NYOMBAYABO WILLIAM ::: PLAINTIFF**

5

**VERSUS**

**BUNDIBUGYO DISTRICT LOCAL GOVERNMENT ::::::: DEFENDANT**

**BEFORE ME: HON. JUSTICE VINCENT WAGONA**

**RULING**

10

**Introduction:**

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The plaintiff brought this suit against the defendant in trespass seeking vacant possession, permanent injunction and general damages in respect of land located at City Square Cell, Hamutiti Ward, Bundibugyo Town Council, Bundibugyo District measuring 1 acre.

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The plaintiff contended that he is aged 71 years and the surviving beneficiary of Kabamba Kabutoso Issaya a son to Esibaki Ngibaki who was a customary owner of the said land. That the alleged trespass and encroachment took place around 1966 by constructing thereon Bundibugyo Hospital and Kitchen. He sought the following prayers; (a) Recovery of the suit land, (b) Compensation, (c) An order for vacant possession, General damages, costs and any relief courts deems fit.

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When this case came up for hearing, learned counsel Mr. Kawalya Ronald for the defendant indicated that he had points of law to raise and court gave the parties



directions to file written submissions. Both Counsel filed written submissions which I have considered.

**Representation:**

- 5 **Mr. Mukasi Alfred of M/s Mukasi & Co. Advocates** appeared for the plaintiff while **Mr. Kawalya Ronald of M/s Attorney General’s Chambers** appeared for the defendant.

**Submissions:**

- 10 Learned counsel for the defendant raised two points of law that is: non-disclosure of a cause of action and the suit being barred by limitation.

**Issue one: Whether the plaintiff has a cause of action against the defendant.**

- 15 It was submitted for the defendant that a cause of action is every fact which is material to be proved to enable the plaintiff succeed on every fact which if denied, the plaintiff must prove in order to obtain a judgment as was observed in *Tororo Cement Co. Ltd Vs. Frokina International Limited, SCCA No. 02 of 2001*. That a cause of action is disclosed if it is shown that the plaintiff had a right, and that right was violated resulting in damage and he defendant is *liable (Cooke Vs. Gull LR*  
20 *SE. P116)*. That the question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of the same (*Kebirungi vs. Road Trainers Ltd & 2 others (2008) HCB 72*).

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It was submitted that the plaintiff alleged in paragraph 4 of the plaint that he is the surviving beneficiary of Kabamba Isaya son of Esibaki Ngibaki, the customary owner of land comprised in City Square Cell, Hamutiti Ward, Bundibugyo Town Council measuring an acre. That he alleged that the suit land was trespassed on and  
5 encroached by the defendant around 1966 by constructing thereon three staff quarters of Bundibugyo Hospital and Kitchen.

That the plaintiff has for a long time known the defendant as the owner of the suit land since 1966 and even when the land was brought under the operation of the Registration of Titles Act Cap. 230, the plaintiff never raised any claims over the  
10 same and thus has no cause of action against the defendant. That the defendant did not violate any rights enjoyed by the plaintiff and therefore does not have any claim of right against the defendant and the plaint does not disclose a cause of action. Counsel thus asked court to have the plaint struck out for non-disclosure of a cause of action.

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**Issue Two: Whether the suit is barred by law of limitation.**

Learned counsel submitted that Section 5 of the limitation Act limits actions for recovery of land to 12 years. That the 12 years starts running from the time a party is dispossessed of the land and that after 12 years the person's title to the land is  
20 deemed to have extinguished. That the act defines an action as any proceedings in a court and that section 1(1)(6) of the act reference to a right of action to recover land shall include reference to a right to enter possession of the land.

Counsel invited court to the court of Appeal decision of *Kiwanuka Fredrick  
25 Kakumutwe vs. Kibirige Edward where Justice Kibedi W. JAC.A Civil Appeal*

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*No. 272 of 2017* where it was stated thus: “*Since the tort of trespass to land deals with possessory rights to land, an action for trespass to land falls squarely within the scope of ‘actions to recover land’ whose limitation period is prescribed by the limitation Act. Said differently, the limitation Act applies to actions in trespass to* 5 *land.*”

He also invited court to the supreme court decision of ***Justine E.M.N Lutaya Vs. Stirling Civil Engineering Company Limited, SCCA No. 11 of 2002*** where it was observed thus: “*Where trespass is continuous, the person with the right to sue may,* 10 *subject to the law of limitation of actions, exercise the right immediately after the trespass commences, or anytime during the continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect to trespass to land, may prosecute that cause of action parting with possession of the land*”

15 Counsel submitted that the plaintiff’s action to trespass to land accrued in 1967 when the alleged trespass started. It was contended that the defendant has been in occupation of the land for over 46 years without any interference or being challenged by the plaintiff or any person whatsoever. Counsel also invited court to 20 section 16 of the limitation Act which is to the effect that after the expiration of the period of limitation prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished. That after the lapse of 12 years, the title to the land extinguishes by inaction of the party.



It was submitted that in **FX Miragago Vs. Attorney General [1979] HCB 24** it was observed that the period of limitation begins to run as against the plaintiff from the time the cause of action accrued until when the suit is actually filed. That once a cause of action accrued, for as long as there is capacity to sue, time begins to run against the plaintiff. That 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. It was submitted that the plaintiff's claim is barred by limitation having been brought way after the lapse of 12 years' period. It was submitted that a plaintiff which is barred by limitation, the plaintiff is barred by law. That in *Dr. Arinaitwe Raphael & 37 ors vs. Attorney General HCCS No. 201 of 2012* Justice Stephen Musota relied on the decision of *Hilton Vs. Sultan Laundry (1964) 161, 81* where lord Green held that the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled of course to his rights.

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That the question whether a suit is barred by limitation can be considered by a perusal of the plaint only by virtue of order 7 rule 11(d) of the Civil Procedure Rules which is to the effect that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Counsel submitted that the plaintiff did not plead any disability. That in any case, the late Kabamba Kabutosa or Esibaki Ngibaki ought to have filed the case early as 1960s when the cause of action is alleged to have arisen.

Counsel also invited court to the decision of *Odyek Alex & Ocen Constatino Vs. Gena Yokonani & 4 others, Civil Appeal No. 009 of 2017* where it was held thus;

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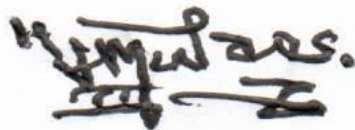
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“There are two major purposes that underlie statutes of limitation; protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits, and requiring plaintiffs to diligently pursue their claims. That statutes of limitation are designed to protect defendants from plaintiffs who fails to diligently pursue their claims. Once the time period limited by the Limitation Act expires, the plaintiffs’ right of action will be extinguished and becomes unenforceable against the defendant. It will be referred to as having become statute barred... moreover uninterrupted and uncontested possession of land for a specific period, hostile to the rights and interest of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land.”

That the defendant pleaded in his written statement of defense that he has at all material times occupied the suit land unchallenged by the plaintiff since 1967. That furthermore, Bundibugyo Hospital carried out a survey of the suit land in 1967 and a cadastral map was produced pending production of a land title. It was contended that no compliant was brought to the attention of the defendant when the survey was done. That the defendant has both legal and equitable interest and possession of the suit land since 1967. Counsel submitted that the suit at hand is barred by limitation and the plaint should be rejected.

### **Issue three; Remedies available to the parties**

Counsel submitted that a litigant puts himself or herself within the limitation period by showing grounds which he or she could claim exception failure of which the suit is time barred and court cannot grant any relief sought and the claim must

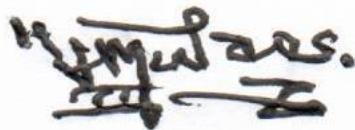


be rejected (*Iga vs. Makerere University [1972] E.A 65*). It was submitted that a plaintiff that does not plead such exception is bad in law. It was contended that the plaintiff in the current suit did not plead exceptions that occurred after 1967 and would have justified extension up to the year 2020 when the case was filed. That it is over 50 years and no exception was pleaded to that effect. It was submitted that the defendant maintains that the suit is bad in law, frivolous and vexatious. Counsel asked court to have the plaintiff rejected and to have the case dismissed with costs.

10 **Plaintiff's submissions:**

In response to issue one, learned counsel for the plaintiff submitted that plaintiff's claim against the defendant is an action for trespass, vacant possession, permanent injunction, general damages, mesne profits or compensation. That the defendant unlawfully and without permission entered the suit land in 1966. That the defendant trespassed and encroached on the suit land by constructing thereon three staff quarters of Bundibugyo Hospital and Kitchens.

That the plaintiff suffered distress and has tried all means to have the defendant vacate or compensate him for the suit land for which he prays for judgment to be entered against the defendant for recovery of the suit land, compensation or an order for vacant possession. That the plaintiff thus has a cause of action being in trespass and hence recovery of the suit land as the surviving beneficiary of Kabamba Isaya son of Isebaki.

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As regards the second issues, learned counsel submitted that the plaintiff's claim is in trespass to land which is a continuing tort. He submitted that trespass occurs when there is an unauthorized entry upon land and thereby interfering with one's lawful possession of that land. Counsel invited court to the decision of *Odyek Alex & Anor Vs. Gena Yokonani & others Civil Appeal No. 009 of 2017* where it was held that an action for trespass is an enforcement of possessory rights rather than proprietary rights. That it was further observed that the fact of possession for purposes of an action to land is proved by evidence establishing physical control by way of sufficient steps taken to deny others from accessing the land. It was contended that the plaintiff led evidence of the steps he has taken to deny the defendants from accessing the land in paragraph 7 of the reply to the defense.

Learned counsel invited court to the case of *Konskier Vs. Goodman ltd (1928)1 KB 42*, it was held that with the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass to which an action lays for each day that passes. Learned counsel also referred court to the case of *Lutaya Vs. Uganda Posts and Telecommunication Corporation (1994) KALR 372* where it was observed that reckoning backwards from the time the action is initiated, if the unlawful possession has continued for more than six years, that in such events the plaintiff could recover for such portion in the tort of trespass.

It was contended that the plaintiff pleaded exceptions to limitation in the reply to the written statement of defense. That he contended in the reply that he joined the forces in 1972 and could not have brought the action on time. That in 1976 he was shot in the right eye and he had to undergo treatment in different hospitals like





Tororo, Mbuya and Kagando in Kasese. It was submitted that the plaintiff thus pleaded disability which is justified as an exception to limitation.

5 Counsel also added that the dispute at hand is a land matter which should be heard on the merits. That land matters have become a conduit of murder cases and so they should not be concluded on technicalities. Counsel implored court to invoke article 126 of the 1995 Constitution as amended and have the case heard on merits. Counsel asked court to overrule the preliminary points of law and have the matter heard on merits.

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### **CONSIDERATION BY COURT:**

#### **Whether the suit is barred by the law of limitation.**

15 *The Black's Law Dictionary* 4<sup>th</sup> edition at page 2716 defines limitation as a statutory period after which a lawsuit or prosecution cannot be brought in court.

*Meriam Webster, Online Dictionary* defines limitation as a certain period limited by statute after which actions, suits, or prosecutions cannot be brought in the  
20 courts.

Section 5 of the Limitation provides that: ***“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some***

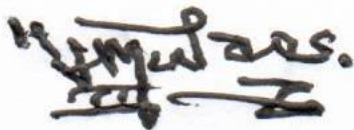


*person through whom he or she claims, to that person.”* The time prescribed under section 5 starts running from the time the right of action accrued.

5 In cases of recovery of land Section 11 (1) provides that: *“No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right*  
10 *of action shall not be deemed to accrue until adverse possession is taken of the land.”*

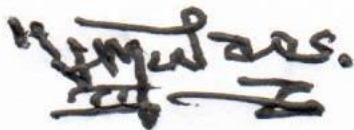
The period of limitation starts to run from the time the person is dispossessed of the land in dispute. This is because recovery of land is an action by which a person  
15 not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title. The limitation under Section 5 of the Act is applicable to all suits in which the claim is for possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights. (*See Odyek Alex & Anor Vs. Gena Yokonani, Civil 20Appeal No, 09 of 2017 & Kasoya Justine & Anor Vs. William Kaija & 3 others Civil Suit No. 6 of 2015*).

The Major Import of the statute of limitation was considered by the Hon. Justice Stephen Mubiru in *Odyek Alex & Anor. Vs. Gena Yokonani & 4 others Civil Appeal No. 09 of 2017* thus: *“Two major purposes underlie statutes of limitations; protecting defendants from having to defend stale claims by providing notice in*  
25 *time to prepare a fair defence on the merits, and requiring plaintiffs to diligently*



pursue their claims. Statutes of limitation are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. Once the time period limited by The Limitation Act expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having  
5 become statute barred. Moreover, uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold* [1907] AC 73, at 79). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to  
10 terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of The Limitation Act. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa*, H.C. Civil Suit No. 508 of 2012). As a rule, limitation not only cuts off the owner's right to  
15 bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto."

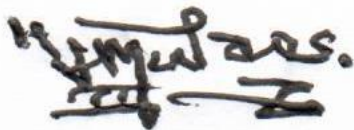
In ***Kasoya Justine & Anor Vs. William Kaija & 3 others Civil Suit No. 6 of 2015***  
20 this court observed thus: "The statute of limitation therefore is a sword used by one in possession to cut and kill whatever claim a person may have over land. The sword cares not about how valid the claim could be, how touching the case may be. It has no mercy to whoever it finds, it pays no attention to the age of the claimant or tribe or stature of people or their social, cultural or economic  
25 background. Once it falls, it cuts all with no mercy, and leaves no such claim



*standing. Therefore, for one to avoid such sword of vengeance, they should bring their claim within the time provided for under the Limitation Act or must plead exceptions as provided for under the Act.”*

5 Learned counsel for the plaintiff contended that the plaintiff’s claim is in the tort of trespass to land which is a continuing tort and not barred by limitation. He cited the decision of **Odyek (supra)**. The defendant’s counsel on the other hand submitted that a tort of trespass is barred by limitation and he cited the decision of **Kiwanuka Fedrick Kakumutwe Vs. Kibirige Edward, Civil Appeal No. 272 of 2017** where  
10 Justice Kibeedi observed that trespass to land deals with possessory rights to land which falls under recovery of land and thus the limitation act applies to the tort of trespass.

In *Odyek Alex & Anor (supra)* the Hon. Justice Stephen Mubiru noted in relation  
15 to trespass that: *“An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of his property. The cause of action for  
20 trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. An action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of an action for trespass is violation of possession, not challenge to title. To sustain an action for trespass, the plaintiff must be in actual physical possession.”*

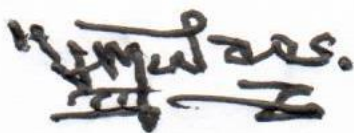


He added that; *“The fact of possession for purposes of an action in trespass to land is proved by evidence establishing physical control over the land by way of sufficient steps taken to deny others from accessing the land. Actual possession therefore is established by evidence showing sufficient control demonstrating*  
5 *both an intention to control and an intention to exclude others. In order to disclose a cause of action of the tort of trespass to land, the plaintiff had to plead facts to show that; (a) he was in possession at the time of the entry complained of; (b) there was an unlawful or unauthorised entry by the respondents; and (c) the entry occasioned him damage. Whereas the tort of trespass to land is a*  
10 *continuing tort, such that the law of limitation does not apply to it in the strict sense (Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10) maintenance of that action is available to a person in possession. In Nakagiri Nakabega and two others v. Masaka District Growers [1985] HCB 38, it was held that only a party in possession is entitled to sue for trespass.”*

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Therefore, a cause of action for trespass to land only accrues to a person who was in possession of the suit land at the time he or she was dispossessed of the same.

In the present case, the plaintiff alleges under paragraph 4(a) & (b) that; *“The plaintiff aged 71 years is the surviving beneficiary of Kabumba Kabutosa Issaya son of Esibaki Ngibaki a Mundibugyo mundi kilibha by clan and the customary owner of land comprised of approximately one acres situate at City Square cell, Hamuatiti Ward, Bundibugyo Town Council that was trespassed on and encroached by the defendant around 1966 by constructing thereon three staff*  
20 *quarters of Budibugyo Hospital and kitchens thereof. That none of the original*  
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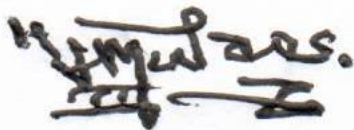


owners of the suit land and the plaintiff has [never] been compensated by the defendant despite several reminders and dialogue over the same.”

The plaintiff stated under paragraph 4(c) and (d) that: *That the defendant unlawfully and without permission entered the suit land and constructed three staff quarters and constructed kitchens on the understanding that they will compensate the late kabamba Issaya father to the plaintiff who died before he could get compensated. That the plaintiff as the direct and only surviving son to Kabamba Issay and beneficiary to the estate including the suit land”.*

10 It is comprehensible from the above paragraphs that the plaintiff was not in possession of the suit land in 1969 when the alleged trespass happened. He indicated that the defendant entered unto the suit land and commenced developments on the suit land on the understanding that they would compensate his father the late Kabamba Issaya which they failed. The clear account from  
15 paragraph 4(c) of the plaint is that the late Kabamba Issaya was the one allegedly in possession of the suit land at the time of the alleged trespass and as such the cause of action rested on Kabamba who was allegedly in possession of the suit land at the time of the alleged trespass and not the plaintiff who is a mere beneficiary not in possession and not an administrator.

20 In addition to the above, it is clear from the pleadings that the plaintiff’s claim was based on recovery of land or compensation in the alternative and it was not necessarily trespass. Trespass appears to have been pleaded as a cover up to circumvent the limitation period which had expired. Notably, in the prayers the  
25 plaintiff pleaded that: **“WHEREFORE the plaintiff prays for judgment to be**

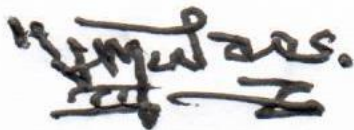


*entered against the defendant for; (a) Recovery of the suit land, (b) Compensation, (c) An order for vacant possession, (d) General damages, (e) any relief that the court deems fit and (f) the costs of the suit.”* These remedies make it crystal clear that the claim by the plaintiff was for recovery of land or compensation in the alternative and not trespass and as such the limitation Act applies to the claim herein.

In the question as whether a suit is barred by limitation or not, reference is made to the plaint and the annexure thereto. The timelines stated in the plaint and the annexure act as a guide to court in ascertaining the date when the cause of action arose for purposes of computation of time under the limitation Act.

In *Ababiri Muhamood & 4 others Vs. Mukomba Ananstasia T/a Taita Wilfred, HCCS No. 22 of 2015*, it was observed that; *“I would agree with plaintiff’s counsel that for matters of time and rights to sue, the Court is bound to consider the pleadings of the plaintiffs alone. It may well be that the defendant has in their defence, raised facts that would support the argument that the case is time barred or has no cause of action but those are facts still in contention and subject to litigation. The authorities appear to strongly support the principle that the Court should only consider the plaint and its attachments, and nothing more.”* (Emphasis added).

I therefore reject the submissions by the plaintiff’s counsel which make reference to the reply to the written statement of defense. The plaintiff’s cause of action and the time when the same arose should be in the plaint and once none exists,

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reference cannot be made to the reply to the written statement of defense as those are facts still in contention and subject to litigation.

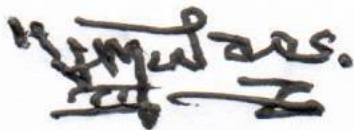
If there are exceptions to the Limitation Act, then the same must be stated in the  
5    plaint. Order 7 rule 6 provides that; *“Where the suit is instituted after the  
expiration of the period prescribed by the law of limitation, the plaintiff shall show  
the grounds upon which exemption from that law is claimed”*. Therefore, any  
exceptions to limitation must be pleaded in the plaint and not in a reply to the  
defense as insinuated by the plaintiff’s counsel.

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In paragraph 4(a) of the plaint, the plaintiff indicated that the defendant encroached  
on the suit land in 1966 when the defendant constructed staff quarters for  
Bundibugyo Hospital and Kitchens thereof. It is thus clear that the claim for  
recovery of the said land arose in 1966 when the defendant took over the suit land  
15    and dispossessed the one who was in possession per the plaintiff’s case. Therefore,  
the 12 years within which the plaintiff was to bring this action started running in  
1966. It is thus my conclusion that this suit was brought outside the limitation  
period and it is time barred. The plaintiff did not plead any exceptions to the  
Limitation Act in the plaint thus there is no justification to warrant admitting the  
20    plaint outside the period of limitation. I thus agree with the Counsel Kawalya  
Ronald that the plaintiff’s suit is time barred and I uphold this point of law.

**Whether the plaintiff has a cause of action against the defendant.**

It is settled law that for one to satisfy court that he or she has a cause of action, he  
25    or she must show that they enjoyed a right; the right was violated and that the

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defendant is the one who violated it and as a result of the violation he suffered loss or damage. (*Tororo Cement Co. Ltd vs Frokina International Ltd SCCA No. 2 of 2001.*).

- 5 It is also trite law that in the question as to whether a plaint discloses a cause of action or not, reference must be made to the plaint and the annexures thereto and nothing else. (*See Kebirungi vs. Road Trainers ltd & 2 others [2008] HCB 72.*

It is my view that once a suit is time barred, the plaintiff's cause of action abates.  
10 The plaintiff loses a cause of action against a defendant since there is no right that he enjoys at law which the defendant is said to have violated. Therefore, since the plaintiff's suit is barred by limitation, his cause of action against the defendant is abated by limitation and as such he has no cause of action against the defendant. I agree with the submissions of the defendant's counsel that the plaintiff has no  
15 cause of action against the defendant and I accordingly uphold this point of law.

### **Remedies available to the parties**

Since both points of law have been upheld, I do hereby reject the plaint in Civil Suit No. 006 of 2020 under Order 7 rule 11 of the Civil Procedure Rules for being  
20 time barred and for non-disclosure of a cause of action. Consequently, the plaint in HCT-FORTPORTAL – LD – CS – 008 of 2020 is hereby struck out with costs awarded the defendant. It is so ordered.



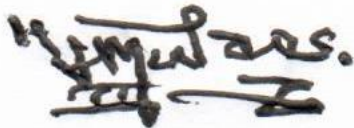
Vincent Wagona



**High Court Judge**

**FORT-PORTAL**

**20.03.2022**

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