

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 255 OF 2018

CORNELIUS MUKIIBI SSENTAMU-----PLAINTIFF

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. DIANA KIWANUKA-----DEFENDANTS**
(Administrator of the Estate of the Late Dishan W Kiwanuka)

COUNTERCLAIM

- 1. DIANA KIWANUKA**
- 2. HOSEA MUYIRA KIWANUKA=====PLAINTIFFS BY COUNTERCLAIM**
(Suing as Administrators of the Estate of Late Dishan W Kiwanuka)

VERSUS

- 1. CORNELIUS MUKIIBI SSENTAMU**
- 2. ABU AYUB SEKITO KASULE =====DEFENDANTS**
- 3. NATIONAL HOUSING & CONSTRUCTION COMPANY LTD**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The original plaintiff brought this suit against the two plaintiffs seeking; A declaration that the defendants' actions of instigating baseless and malicious proceedings against the plaintiff amount to malicious prosecution for which he sought general damages and compensation of 350,000,000/= for time wasted defending false and malicious charges, inconvenience, psychological and mental suffering.

This was brought after the plaintiff (Cornelius Mukiibi Ssentamu) was found not guilty of the charges of Uttering a False Document and Conspiracy to commit a felony at Buganda Road Court.

The 2nd defendant against whom the plaintiff brought the original suit upon service with the plaint filed and defence and added a counterclaim and introduced other parties in their claim to wit; Abu Ayub Sekitto Kasule, Peter Paul Kusiima and National Housing & Construction Corporation.

The plaintiff to the counter-claim sought among others to recover property and land comprised in Kyadondo Block 221, Plot 931, Plot 931 at Naalya or to jointly and severally compensate the Administrators of the Estate of the Late Dishan Kiwanuka for the property at its current value.

There were a number of court cases filed between the late Dishan Kiwanuka and other parties out of which resulted execution proceedings and the 4th defendant to the counter-claim bought the said land from a court appointed bailiff (Hammer Falls Auctioneers & Court Bailiffs) on 15th September 2004.

The late Dishan Kiwanuka challenged the said sale in several applications which were all dismissed in favour of the 4th defendant. The 4th defendant contended in its defence that the counter-claim offends the rules of res judicata and that the counter-claim is barred by Limitation.

Withdrawal of Original Suit

The plaintiff (Cornelius Mukiibi Sentamu) decided to withdraw his suit and this court granted him leave to have the suit withdrawn. This left this court with the counter-claim to determine.

In the course of the trial the 3rd defendant to the court-claim (Counsel Peter Paul Kusiima) passed and proceedings against him were accordingly terminated.

The 4th defendant raised a preliminary point of law which this court decided to consider; *Whether the plaintiffs (Counter-claimants) cause of action is barred by the Limitation Act?*

The plaintiffs (Counterclaimants) were represented by *Counsel Lydia Tamale* while the 1st Counter-defendant was represented by *Counsel Sembuya Magulu Douglas* holding brief for *Counsel Asaph Agaba* and the 4th defendant was represented by *Counsel Ruth Kisakye*

At the trial both parties filed submissions based on their pleadings and annexures attached without any oral evidence. I have considered the submission of all parties.

Whether the plaintiffs' (Conter-claimants) cause of action is barred by the Limitation Act?

The 4th defendant's counsel submitted that plaintiffs filed their counterclaim on 13th September 2018 against the 4th defendant and yet the 4th defendant's claim originates from the sale agreement executed on 15th September 2004.

Counsel contended that their right to this property arose out of a sale agreement and therefore any action of impeaching the title was supposed to within the 6 years prescribed by the limitation Act.

Further counsel for the 4th respondent contended that the suit for recovery of land under the limitation Act is supposed to be brought before the expiration of 12 years. Therefore, any title or interest of the counterclaimant had in the said suit was extinguished at the expiry of 12 years.

The counter-claimants' counsel submitted that their claim is not time barred and he submitted that where the plaintiff pleads facts from which reasonable inferences can be made that the suit is not time barred, then the issue of limitation is a triable issue, which could only be determined after hearing the evidence of the matter.

Counsel contended that they pleaded facts which alluded to fraud and that when the late Dishan Kiwanuka lodged a complaint to police to investigate the fraud and a police report was made on 28th April, 2011 long after the late Dishan Kiwanuka had passed on. Secondly, the counterclaimants only discovered the fraud when they got the certified copies from court.

Analysis

Where the issue of limitation is raised in defence of an action, it is only proper that the issue should be addressed first, as it makes no sense to decide the merit of a matter that is statute barred. In the event of a successful plea of limitation law against a plaintiff's right of action, the action becomes extinguished and unmaintainable at law.

The purpose of limitations, like equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber. Once the action is stale and statute barred, no matter how well it is conducted and determined all the efforts put in it comes to naught and the court has no jurisdiction to deal with it.

The plaintiffs/counterclaimants filed this suit by way of counterclaim on 13th September 2018 and this may mean that if they had not been sued by Cornelius Mukiibi Sentamu over malicious prosecution they would not have come to court to seek the remedies. The late Dishan Kiwanuka was involved in several cases against persons he believed were trying to grab or steal his land and this culminated in several rulings which were dismissed against him including the last attempt to seek to seek leave to appeal against the dismissal for review.

The counter-claimants opted to have criminal prosecutions against the lawyers and yet the time was running against him for the recovery of land. The late Dishan Kiwanuka passed on in 2005 and the administrators continued to pursue the late kiwanuka's interest in criminal proceedings. It is not true that they discovered the fraud in 2011 when they received the police report. At all times when they took over the administration of the estate they knew that the land had been allegedly taken over by third parties and this would be obvious that lost it through dubious means which would be fraudulent.

The 4th defendant-National Housing & Construction Company Ltd acquired this 2004 and the late Dishan Kiwanuka made attempts to recover the said land from hem through an application for revision which was dismissed by Justice Faith Mwendha and later leave to appeal which was denied by Justice Musalu Musene.

The pleadings have sufficient facts and documentary evidence to determine the issue of whether this suit is barred by limitation and there is no need to make any inferences outside the documentary evidence. The fact of when the 4th respondent acquired the land in 2004 is not in dispute and the counterclaimants have at all material times known this fact. It is not that they discovered it much later in order to take benefit of the exception of fraud to the limitation period of 12 years.

The plaintiffs/Counterclaimant in their pleadings or counterclaim they refer to documents and information within their knowledge as way back as 13th November 2001 and 9th December, 2002 when the late Dishan Kiwanuka was served with eviction notices. In addition, the facts presented were all within the knowledge of the late Dishan Kiwanuka and this was the basis of the challenge in the courts.

The matter of postponement of the limitation duration was ably cited by counsel for the counterclaimants in ***Hamman Ltd & Another v Ssali & Another HCMA No. 449 of 2013*** where court was of the view that:

“ The main thrust of the provision is essentially that in actions founded on fraud the limitation does not begin to run until such a time when the plaintiff is invariably aware, or could have with reasonable diligence been aware of the fraud. This must be pleaded, and it is premised on such a plea that court may exercise its power under section 2(supra) not to reckon with the period the plaintiff was unaware of the fraud in computation of the limitation period.”

The above position of the law does not support the counter-claimants case since they do not specifically plead that they learnt of the fraud in 2011 and in my humble view it was an afterthought to use the police report dated 2011 as the time they purport to have learnt of the fraud. The documentary evidence on attached to the pleadings is obvious that they knew about all this before 2011.

Section 25 provides for postponement of limitation of fraud; The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.

'but nothing in this section shall enable any action to recover, or enforce any charge against, or set aside any transaction affecting, any property which-

(d) in case of fraud, has been purchased for valuable consideration by a person who is not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed;'

The 4th defendants in this case as a public body purchased the said land (kibanja) from the court bailiffs ordered by court. The sale was effecting a court order and the said purchase cannot be impeached and the counterclaimants do not in their pleadings give any facts to infer that National Housing and Construction Corporation Ltd was in any way involved in the alleged frauds. The 4th defendant purchased this land (kibanja) from Hammerfalls Auctioneers & Court Bailiffs at a sum of 50,000,000/=for a valuable consideration.

This court should not aid the plaintiff to resuscitate such a claim which is time barred. The essence of a limitation law is that the legal right to enforce an action is not perpetual right but a right generally limited by statute. A statute of limitation is designed to stop or avoid a situation where a plaintiff can commence action anytime he feels like doing so, even where human memory would normally have faded and therefore failed. Put in another language, by statute of limitation, a plaintiff has no freedom of air to sleep or slumber and wake up at his own time to commence an action against a defendant. The different statutes of limitation, which are essentially founded on the principle of equity and fair play, will not such a slumbering plaintiff. ***See Sulgrave Holdings Inc. v F.G.N (2012) 17 NWLR p. 309 (SC); Odyeki Alex & Anor v Gena Yokonani & 4 others Civil Appeal No. 9 of 2017.***

If an action succeeds on a plea of statute limitation, the court should not proceed to determine the merits of the case, irrespective of the evidence.

The defendant's defence to the plaintiff's action as being statute barred is accordingly sustained by this court and the plaintiffs/counterclaimants claim is dismissed.

The defendants raised another plea of res judicata as a preliminary objection or point of law.

I have declined to determine this point of law since the available evidence of the documentary evidence is not sufficient for this court to ably determine what the cases were about.

Each party shall bear its costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
31st March 2023