THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(FAMILY DIVISION)

M.A NO.529 OF 2022

[ARISING FROM HCCS NO.264 OF 2019]

BEGUMANA EMMANUEL :::::::::::::::: APPLICANT

VERSUS

1. **SARAH NANTEGE SEBULIBA**
2. **RAMATHAN SEBULIBA :::::::::::::::: RESPONDENTS**

[Administrators of the estate of the late ALAMANZANE SEBULIBA]

Before**:** Justice Ketrah Kitariisibwa Katunguka.

Ruling.

Introduction.

1. Begumana Emmanuel (herein called ***'the applicant'***) brings this application against Sarah Nantege Sebuliba and Ramathan Sebuliba (herein called ***'the respondents***); under sections 5, 6(2) and 15 of the Limitation Act Cap.80, Order 7 rule 11(d) and (e) and rule 19 of the Civil Procedure Rules SI-71-1; seeking orders that; HCCS No.264 of 2019 filed by the respondents (Administrators of the estate of the Late Alamanzane Sebuliba) is barred by the Limitation Act, Cap.80; and is frivolous and vexatious so it should be dismissed.

2. The grounds of the application are in the notice of motion and the affidavit in support deposed by Begumana Emmanuel the applicant; and briefly that: the respondents filed High Court Civil Suit No.264 of 2019 against the applicant jointly with Nakakawa Jane and Mugume Cedric Kabeho; claiming several remedies but primarily a declaration that the suit land comprised in Maule Kyadondo Block 122 Plot 5, 17 and 57 still forms part and parcel of the estate of the late Alamanzane Sebuliba; the late Alamanzane Sebuliba (herein called ***'the deceased'***) died intestate on the 5th day of October 1986; yet the plaint was filed in September 2019 for recovery of land by the respondents for the estate of the deceased who died on 5/10/1986, therefore it is time barred by the Limitation Act Cap.80, incompetent and an abuse of court process since the

interests of the estate of the deceased were long extinguished in HCCS No.37 of 2011;the applicant prays that the respondents' suit vide HCCS No.264 of 2019 be dismissed with costs.

The respondent though served on 17/10/2022 through their counsel (M/s Mugabi Godfrey Advocates and Solicitors) never filed an affidavit in reply.

3. The position of the law is that once one is served with court process/motion and chooses not to reply, one is deemed to have conceded to the claims against them; (see **Prof. Oloka Onyango & Ors vs Attorney General (Constitutional Petition No.6 of 2014 ;**Makerere University vs St. Mark Education Institute LTD & ors (1994) KALR 681; and Mufumba Fredrick versus Waako Lastone Revision Cause No. 006 of 2011; Sengendo versus Attorney General (1972) 1 EA 140 and Kanji Devji versus Damor Jinabhai & Co. (19340) 1 E. A.C.A. 87).

4. The application however, must pass probity because court orders should not be made without substantial proof of relevance, need or cause (see **Samwiri Massa vs Rose Achen (1978) HCB 297;)**

Representation:

Counsel Felix Ampeirwe of M/s Byarugaba & Co. Advocates represented the applicant.

5. When the matter came up for hearing on the 28th of February 2023; in the absence of the respondents and their counsel, counsel informed court that the service of pleadings and court summons was effected on counsel for the respondents; he prayed that the matter proceeds exparte under Order 9 rule 20(1)(a) of the Civil Procedure Rules; court being convinced that the respondent was served, ordered that the matter proceeded exparte.

Background

6. The late Alamanzane Sebuliba died intestate on 5/10/1986; his two sons Bulayimu Kayondo and Abdu Nsereko were granted letters of administration vide High Court Administration Cause No.34 of 1991 on 24/5/1991 to administer the deceased's estate; upon the death of the aforementioned administrators, the respondents herein were appointed as administrators to the estate of the late Alamanzane Sebuliba vide High Court Administration Cause No. 880 of 2013.

7. According to the respondents/plaintiffs' plaint in HCCS No.529 of 2019, the estate of the late Alamanzane Sebuliba comprised among others the suit land at Maule Kyadondo Block 122 plots 5,17 and 57; their case is that the 1st

defendant intermeddled in the estate of the deceased by registering herself and her sister the late Safina Nantumbwe on the certificates of title of the suit land; the 1st defendant transferred the land into the names of the 2nd defendant (the applicant herein) and 3rd defendant to the deprivation of all other beneficiaries of the estate including the plaintiffs; the plaintiffs contend that the suit land still forms part and parcel of the estate of the late Alamanzane Sebuliba and the 1st defendant's actions are null and void.

8. In his defence, the 2nd defendant/applicant herein asserts that they legally purchased their interest in the suit land from the 1st defendant who together with the late Safina Nantumbwe were the registered proprietors of the suit land; subsequently, the applicant filed this application claiming that since the suit is for recovery of land for the estate of the late Alamanzane Sebuliba who died in 1986, it is statute barred, incompetent and an abuse of court process; the interests of the estate of the late Alamanzane Sebuliba were extinguished in HCCS No.37 of 2011.

I shall first address the issue of raising a preliminary objection by filing this application.

9. **Order 6 Rule 28 of the Civil Procedure Rules,** provides that; *"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the Court at or after the hearing; except that by consent of the parties, or by order of the Court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."*

10. In **Attorney General versus Major General David Tinyefuza, Constitutional Appeal No. 1/1997** Justice J. N. Mulenga (JSC) while referring to Order 6 rule 28 of The Civil Procedure Rules held that;

"Clearly under these provisions, the Court has options. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after the hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a Court to be in error, which opts to hear a preliminary objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party, or that the decision was reached at un-judicially."

11. The applicant filed this fresh miscellaneous application raising a preliminary point of law arising from the main cause; points of law should be raised during or within the main matter; and it is at the discretion of court to dispose off a preliminary objection either before, at or after the hearing. (See; **In the**

Supreme Court of Uganda Telecom Ltd versus Zte Corporation CA No.03 of 2017). I find the current practice by advocates of filing separate applications grounded on points of law an extra cost to the litigants which also creates a multiplicity of suits leading to backlog which is number based and not subject matter based.

I shall proceed to determine the merits of the application.

Issues:

Counsel for the applicant filed written submissions but framed no issues; a look at the facts of the case shows that the issues for resolution are: -

1. ***Whether HCCS No.264 of 2019 is time barred?***
2. ***Whether the interests of the estate of the late Alamanzane Sebuliba were extinguished in HCCS No.37 of 2011?***

Consideration:

Issue No.1 ***Whether HCCS No.264 of 2019 is time barred?***

12. Counsel for the applicant submitted relying on sections 5, 6(2), 15 of the Limitation Act, Cap.80 to the effect that any person seeking to recover land in a suit must do so within a period of 12 years from the date when the cause of action arose; he cited Nile Breweries Limited Vs. Naava Agnes Zawedde & Nassuna Mary Margaret Misc. Application No.4o of 2021 (arising from Civil Suit No.144 of 2019) where court held that *"It is a settled position that in determining the period of limitation, court looks at pleadings only, and as such no evidence may be required...if the suit is barred by statute the party cannot enforce the rights through a court action."*

13. Counsel contends that since the main suit was filed on 23rd September 2019 yet the cause of action arose in October 1986 when the deceased died; it is statute barred; the respondents did not plead an exception to the limitation created by law and therefore cannot be presumed to be exempted; their right of action was long extinguished and no right of action for the respondents under the estate of the late Alamanzane Sebuliba exists in both law and equity.

Analysis.

14. Order 6 rule 6 of the Civil Procedure Rules states that; *"The defendant or plaintiff, as the case may be, shall raise by his or her pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or*

reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation act, release, payment, performance, or facts, showing illegality either by statute or common law"

15. Stephen Mubiru J in the case of **Yaya v. Obur and Others (Civil Appeal No. 81 of 2018) [2020] UGHC 165;** held that; *"A defendant wishing to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised. It is very clear that for one to say that a suit is statute barred is to raise a defence of the statute of limitation. By that rule, a defendant who intends to raise the defence of The Limitation Act or that the suit is statute barred (as in the instant case) must specifically plead that defence. A limitations defence is an affirmative defence and must be pleaded. Once it is not pleaded, the defendant will ordinarily not be granted the protection of that law since the Court cannot grant a defendant the benefit of the limitation law contrary to the rules of pleading and the principle of avoidance of surprise. This is because failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of The Civil Procedure Rules and the goal 7 of fair contest that underlies those Rules."*

16. The applicant contends that the HCCS No.264 of 2019 is time barred and that the estate of the late Alamanzane Sebuliba's interest in the suit land was legally extinguished vide HCCS No.37 of 2011; I have carefully examined the joint written statement of defence filed by the 2nd and 3 defendants; I find no pleading to the effect that HCCS No.264 of 2019 is statute barred by the law of limitation; I concur with the holding in **Yaya v. Obur and Others (*supra*);** and find that the point of law based on statutory limitation raised in this application is unhinged because it is not pleaded in the applicant's written statement of defence.

Issue 2. ***Whether the interests of the estate of the late Alamanzane Sebuliba were extinguished in HCCS No.37 of 2011?***

17. While considering this application, the fact that court has already pronounced itself on the suit estate came to attention of this court; In his affidavit, the applicant states that vide HCCS No.37 of 2011 (Ibulayim Kayondo Vs. Jane Nakakawa & 4 Others), the estate of the late Alamanzane Sebuliba's interest in the suit land was legally extinguished; to this, the applicant implies that HCCS No.264 of 2019 is res judicata.

18. The doctrine of res judicata is provided for under **Section 7 of the Civil Procedure Act Cap.71** which stipulates that; *"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."*

19. R*es judicata* will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties or parties under whom they or any of them claim as those in the current suit; **The Black's law Dictionary 10th Edition defines "*res judicata*"** *as* "An issue that has been definitely settled by judicial decision…the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"

20. The legal interest of the suit land in this case comprised in Kyadondo Block 122 plots 5,17 and 57 land at Maule has before now been determined in four different courts; the applicant adduced three high court judgements which are on court record; to wit; Nakawa HCCS No.37 of 2011 this was filed by Ibulayim Kayondo (Administrator) against Jane Nakakawa and 4 others; Faith Mwhondha J in HCCS NO.37 of 2011 found I quote; ***" That in 1987 the plaintiffs (Ibulayim Kayondo and another Vs. Safaina Nantumbwe and Jane Nakakawa vide Civil suit No.10/87), filed a suit at Kasangati Chief Magistrates' Court where they unsuccessfully disputed the title their late father gave as a gift to the defendants…Needless to point out that from the facts of the action apart from being res judicata, it is time barred."***

21. In relation to the present civil suit from which this application arises, the plaintiffs are suing as administrators of the estate of the late Alamanzane Sebuliba; the 1st defendant is the same as in this matter; the subject matter is in no doubt the same; in the context, court in HCCS No.37 of 2011 considered that the subject matter had been determined by the Chief Magistrates' Court and there was no appeal hence court came to the conclusion that it was res judicata.

22. Further, the 1st defendant in HCCS No. 264 of 2019 filed Nakawa High Court Miscellaneous Application No.93 of 2015 against the respondents herein; court found the matter to be res judicata and made orders amongst of which were; the Commissioner for land Registration to proceed with effecting the orders issued

to the applicant arising from Civil Suit No.37 of 2011; the same suit land came into contention in MA No.31 of 2017 UGHCLD between the applicant herein against Sebabi Dirisa a grandson to the deceased; the applicant sought the vacation of a caveat lodged by the respondent on Kyadondo Block 122 plots 5, 17 and 57; Bashaija K. Andrew stated that; *"it is in no doubt based on the evidence that the issues as to whether the children of the said late Alamanzane Sebuliba have any interest in the suit land have since been settled in HCCS NO.37 OF 2011, as being res judicata in addition to the doctrine of laches applying. Therefore, the respondent being a son to the son of the late Alamanzane Sebuliba has no reasonable cause to lodge a caveat on the land which his own father had no subsisting interest."*

23. The Court of Appeal **in *Ponsiano Semakula v. Susane Magala and others (1993) KALR 213*** explained the doctrine of *res-judicata* as follows; -

"The doctrine of res-judicata, embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: 'nemo debt bis vexari pro una et eada causa' (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res-judicata appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res-judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".

I n ***Makula International Ltd versus His Eminence Cardinal Nsubuga (1982) HCB 11****; it was held that, 'an Illegality ounce brought to the attention of Court overrides all questions of pleading including admissions'.*

24. As analysed above, there has been no appeal to this present day against any of the judgements cited; I agree that HCCS No. 264 of 2019 is *res judicata*; considering that the suit land was directly or substantially in issue in the previous suits as is in the current suit and legal interest of the suit land was raised and conclusively determined by courts of competent jurisdiction; in all the above suits, the learned judicial officers have unanimously agreed that the subject matter is res judicata and time barred.

25. The position of the law is that there must be finality and decisions of the court unless set aside or quashed, must be accepted as incontrovertibly correct; I find that HCCS NO.264 of 2019 is res judicata; the interests of the estate of the late Alamanzane Sebuliba were determined in HCCS No.37 of 2011, HCCS No.264 of 2019; therefore, hearing of HCCS No.264 of 2019 would be calling court to consider a matter that has been determined which is an illegality; while the defendant/applicant did not meet the requirements for having limitation as a defence he has shown that the suit is res judicata.

26. While the grounds of this application have not been found supported,the illegality brought to this court's attention through this application cannot be sanctioned by allowing to entertain a matter that has already been determined by court; in any case section 33 of the Judicature Act provides that where multiplicity of suits is envisaged court has power to make appropriate orders to avoid them.

This application does not succeed on the defence of limitation; but rather shows that HCCS No.264 of 2019 is res judicata.

27. High Court Civil Suit No.264 of 2019 is dismissed with costs to the defendants.

Ketrah Kitariisibwa Katunguka.
Judge
15/06/2023

Delivered by email to:ampeiremutungi@gmail.com