

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. CAUSE NO. 33 OF 2012**

R.H.K DDUNGU.....APPLICANT

VERSUS

**THE CO-OPERATIVE BANK LIMITED
(IN LIQUIDATION).....RESPONDENT**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application was brought by Chamber Summons under **Section 140** and **188** of the **Registration of Titles Act Cap 230**, **Section 33** of the **Judicature Act Cap 13**, **Section 98** of the **Civil Procedure Act Cap 71** and **Order 52 rule 7** of the **Civil Procedure Rules SI 71-1**. The applicant sought an order to vacate a caveat lodged on his property known as Kibuga Block 38 Plot 320 (hereinafter called the suit land) and costs. On 11/12/13 when the application came up for hearing, counsel for the respondent raised preliminary objections to the effect that;

1. The chamber summons had expired and accordingly the application ought to be dismissed.
2. The matter is statute barred under **Section 5** of the **Limitation Act**.

In respect to the 1st objection, Andrew Bwengye counsel for the respondent argued that chamber summons are summons and the instant applicant is a suit within the meaning of **Order 5 Rule 1 CPR**. That the respondent was served on 9/12/2013 which is about a year after issuance of the summons. He relied on the case of **Orient Bank Ltd Vs. AVI Enterprises HCCA 2/201** in which it was held and that failure to serve Chamber Summons issued by court within 21 days (which is couched in mandatory terms), warrants the dismissal of the matter. He thereby called for dismissal of this application.

With respect to the second objection, counsel argued that actions for land cannot be presented after expiration of 12 years from the date the claim accrued. That the cause of action arose in 1990 when the applicant actually deposited the title with the respondent and not when he made the search. He argued further that annexure B, C and D to the affidavit of the applicant show that any action to recoup his title was taken from May 2011. That He knew in 1990 that the bank had his title and took no action even when the respondent ceased operation in 1999. That time began to accrue in May 1990 when knowledge was imputed on him of the bank's possession of his certificate of title.

In reply to the 1st objection Salim Makeera counsel for the applicant submitted that when the application was filed on 8/5/2012, the court file was misplaced and they wrote several times to court to find it and even applied for a duplicate file. The application itself was delivered to them by the court for service in the last week of November 2013 and service upon the respondent was achieved after that within the statutory time allowed. He contended that this would be a case in which, **Section 96 and 98 CPA** would apply. He in addition argued that under **Order 5 Rule 32 CPR** the objections should have been presented by chamber summons.

With regard to the 2nd objection, counsel argued that this is not a suit for recovery of land but for removal of a caveat as an encumbrance affecting land. That recovery of land in law refers to land to which a party has been deprived ownership thereof in terms of both the legal title and physical possession, and none applies to the applicant. He argued in the alternative that the limitation in this case would begin to run from the date the applicant discovered the wrongful registration of a caveat on his title.

In rejoinder to the 2nd preliminary objection, counsel for the respondent contended that paragraph's 3, 7 and 8 of the applicant's affidavit clearly specifies that he pledged his title to the respondent so he actually knew that he was not in possession of his title legally, actually or constructively. That it is shown in paragraph 8 that his rights have been curtailed by the presence of the caveat, that the only effort he made to retrieve his property was in May 2011 and he cannot persuade this court that between 1990-2011 he had no knowledge of the whereabouts of his title.

RESOLUTION OF THE PRELIMINARY OBJECTIONS

Although applications under **Order 5** shall be by summons in chambers (see 0.5 Rule 32) counsel for the respondent raised points of law and these need not be by formal application. I will therefore proceed to consider the objections.

1. Whether the chamber summons had expired and accordingly the application ought to be dismissed

Order 5 rule 1 (1) (a) CPR provides that “*when a suit has been duly instituted a summons may be issued to the defendant ordering him or her to file a defence within a time to be specified in the summons.*” Under **sub rule 2** of the same order”.....*service of summons issued under sub rule (1) of this rule shall be effected within 21 days from the date of issue except that the time may be extended on application to the court, made within 15 days after the expiration of 21 days, showing sufficient reasons for the extension. (Emphasis mine).*

Order 5 rule 1(3)CPR stipulates that “*where summons have been instituted in this rule and service has not been effected within 21 days from the date of issue and there is no application for an extension of time under sub rule (2) of this rule or the application for extension has been dismissed, the suit shall be dismissed without notice.*”

In the instant case, the application was filed on 8/5/2012 and the record indicates that the summonses were issued for service on 16/9/2012. The respondent was served on 9/12/2013 clearly way beyond the 21 days stipulated by law. With failure to do so, the applicant should have applied for extension of time to effect service showing sufficient reasons as to why service was not effected within the statutory period. The reasons advanced by counsel for the applicant is that the court file got misplaced and they even applied for a duplicate file to be opened. That in fact, it is the court which released the summons to them for service during the first week of November 2013.

Order 5 rules 1 and 3 CPR appears to have been couched in mandatory terms and I am aware that this court has on several previous occasions chosen to treat it as much. See for example **Orient Bank Ltd (supra)**. With much respect, I wish to defer from those previous views. This is because, although that rule refers to the institution of suits, in my view, Order 5 refers specially to ordinary suits and cannot be said to apply to interlocutory or matters specifically instituted by way of chamber summons or motions on notice. On this point, reference can be made to Section 2(x) CPA which provides as follows:-

“Suit means all civil proceedings commenced in any manner prescribed”

Further, Section 2(q) defines the term ‘*prescribed by rules*’ while the term ‘*rules*’ is defined in section 2(t) of the same Act as ‘*rules and forms made by the rules committee to regulate the procedure of courts*’.

My sister Justice Monica Mugenyi in **Matco Stores Ltd & Ors Vrs Grace Muhwezi & Anor civil suits No.90 & 91 of 2001** while considering facts in which the bar of res judicator was raised, ably considered the case of **Mityana Ginners Ltd Vrs Public Health Officer, Kampala (1958) 1 EA 339 AT 341** (East Africa Court of Appeal) in which a meaning of the term ‘suit’ as defined in Section 2 of the CPA was considered. In that case, the appellants had lodged an ‘appeal’ against a notice or directive issued upon them by a public health officer in the trial court by way of Chamber Summons. She noted that the operative words in that ‘appeal’ were that:-

‘Let all parties concerned attend the Judge when the court will be moved on the hearing of an application That this Honourable court be pleased to set aside the notice....’

In **Mityana Ginners Ltd (supra)** judgment, Justice Briggs who also relied on the authority of **Mansion House Ltd Vs Wilkingson (1954) EACA 98** at 101 & 102 gave the definition of the term ‘suit’ within the precincts of what was then section 2 of the Civil Procedure Ordinance, which is identical to Section 2(x) and stated as follows:-

“Accordingly a ‘suit’ is any civil proceeding commenced in any manner prescribed by the rules and forms made by the rules committee to regulate the procedure of courts I consider that ‘suit’ must for the purposes of these proceedings, have its precise and statutorily defined meaning”.

In my view, for our current purposes, the applicable rules of procedure of this court are the Civil Procedure rules, S1 71-1, Order 4 rule 1(1) of the CPR explicitly provides that *“every suit shall be instituted by presenting a plaint to the court or such officer as it appoints for that purpose”*. Order 4 rule 1(2) further provides that every plaint must conform to the rules contained in order 6 and 7 CPR, where particularly under 0.7 particulars to be contained in plaint are given. By all accounts the form and contents of a plaint are quite dissimilar to what one would find in a chamber summons.

I therefore agree with the ruling of Mugenyi that, from the foregoing rule, the kind of suit envisaged by Section 2 of the CPA and indeed Order 5 rules 1, 2 and 3 CPR is a substantive suit as opposed to miscellaneous applications as is the case here. It is also evident that in **Mityana Ginners Ltd (supra)**, the honorable Judge drew a distinction between decrees and orders of courts in so far as they relate to the definition of a suit and held that:-

“It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred to above. If therefore, as I believe, the application to the Supreme Court was not a ‘suit’, it could not result in a decree, but only an order”.

Comparing the findings of the court in Mityana Ginners Ltd (supra) to the present facts, the chamber summons before me are proceeding that does not constitute a suit within the meaning of Order 4 Rule 1 CPR or Order 5 rule 1 CPR. The current application was presented under specific provisions of (inter alia) RTA and Judicature Statute as notice to the respondent to present to court reasons to prevent the removal of a caveat on the suit land for which the applicant is a proprietor. It is not a substantive claim and only seeks the remedy of an order and not a judgment or decree.

Further the wording of Order 5 rule (1) (a) CPR is instructive. It stipulates that after a suit is filed by the lodging of a plaint, a summons (the form of which is given in form 1, under Appendix A of the CPR is issued by the court to be served upon the defendant within a period of 21 days. The summons must include the days within which the defendant is expected to file the defence to the suit. This specific procedure clearly does not apply to chamber summons which in their form, call upon the respondent to attend court to hear counsel of the applicant on their application. Such summons do not specify a time within which the summons should be served or responded to by the respondent. The response by the respondent is ordinarily presented by an affidavit and the respondent may or not appear before the court to oppose the application. In my

view, had the legislator intended service of a motion or chamber summons to be made within 21 days of their issuance, then the rules would have specifically provided so.

Accordingly, the chamber summons cannot be said to have expired within the meaning of Order 5 Rule 1(3) CPR and the first objection is thus rejected.

2. Whether the matter is statute barred under Section 5 of the Limitation Act

The question for determination is whether the applicant's claim is one for recovery of land which under **Section 5** of the **Limitation Act** should be made before the expiration of 12 years. The applicant's claim against the respondent is to attend court to show cause why the caveat lodged by the respondent on the suit land should not be removed. In ordinary terms, the term recovery of land means getting back land or rights in land which can be through physical or legal re-possession. However, according to his affidavit in support of the application, the applicant is both in physical possession and the registered proprietor of the suit land and it cannot be reasonably said that by this action he seeks its recovery. In my estimation all he is seeking is to rid the suit land from an existing unwanted encumbrance.

According to section 139 RTA, caveats are lodged for purposes (usually) of protecting parrell or opposing interests in registered land. They appear in the Register as encumbrances but not as registered property rights on the certificate of title. The purpose of a caveat is to forbid the registration of any dealing with the land in question so as to preserve the interest protected under the caveat. A caveat can remain as an encumbrance on land for as long as it is not formally withdrawn or by an order of court.

Under Section 140(1) RTA, it is the duty of the Registrar to notify a registered proprietor of the existence of a caveat. Nothing was advanced in evidence to confirm that such notice was ever relayed by the Registrar. Even then, the proprietor has a choice whether or not to summon the caveator before the High Court to show cause why the caveat should not be removed. Such proceedings are not mandatory and therefore cannot be barred by statute. Therefore this objection fails.

In conclusion I dismiss both objections with costs to the applicant.

I so order.

EVA K. LUSWATA
JUDGE
16/6/14