**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**(LAND DIVISION)**

**MISCELANEOUS APPLICATION NO. 455 OF 2014**

***(Arising out of Civil Suit No. 505 of 2004)***

**KIBUGUMU PATRICK**
**ALIAS MUNAKUKAAMA :::::::::::::::::::::::: APPLICATION/PLAINTIFF**

***VERSUS***

**1. AISHA MULUNGI**
**2. BASAJJABALABA HASSAN :::::::::::::: RESPONDENT/DEFENDANTS**

***BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW***

***RULING:***

***KIBUGUMU PATRICK alias MUNAKUKAAMA*** *(hereinafter referred to as "the Applicant")* brought this application under ***Order 52 rr.1, 2, & 3 of the Civil Procedure Rules, S.I. 71 -1 (CPR); and Section 98 of the Civil Procedure Act (Cap.71) (CPA)*** for orders that;

1. ***The court be pleased to set aside the order for dismissal of Civil Suit No. 505 of 2004.***
2. ***Civil Suit No. 505 of 2004 be re-instated.***
3. ***Costs of this application be provided for in the main cause.***

The grounds of the application are amplified in the Applicant's supporting affidavit, but briefly are that;

***(a) That the Applicant has sufficient cause for his non-appearance when the suit was fixed and called on for hearing on the 29th day of October, 2013.***

***(b) That as the Plaintiff in Civil Suit No. 505 of 2004, the Applicant, is still interested in pursuing the claim up to its final determination.***

***(c) That the Applicant's case has got higher chances of success.***

***(d) That the Applicant has opted to lodge this application for setting aside the order for dismissal, because he is barred by the law of limitation in bringing a fresh suit; as it is now 11 years since 2003 when the cause of action arose, as the case is based on tort of trespass for which he seeks for general and special damages.***

***(e) That this being a land matter and focusing on compensation by way of special and general damages for the demolished structures/buildings, it shall be just and equitable that the application is granted, since the dictates of natural justice demand that the substance of all disputes be investigated and judgment be delivered on tier merit.***

***(f) That it is in the interest of justice that the matter be reinstated because it had been scheduled on the 17th day of October, 2005, so what is remaining was just presenting the Applicant's witness for testifying.***

***AISHA MULUNGI and BASAJJABALABA HASSAN*** *(hereinafter referred to as "the 1st and 2nd Respondents"* respectively*)* opposed the application and filed an affidavit in reply sworn by Aisha Mulungi the 1st Respondent. At the commencement of hearing of this application Counsel for the Respondents Mr. Caleb Alaka appearing jointly with Mr.Joseph Kyazze raised preliminary objections on points of law.

The first objection is that the application is bad in law as it seeks to reinstate a suit, vide ***H.C.C.S. No. 505 of 2004,*** which was dismissed on 29/10/2013 under provisions of ***Order 17 r.6 (1) CPR,*** and ***Section 17(2) of the Judicature Act (Cap.13).*** Counsel submitted that where a suit is dismissed under the said order, the remedy for the aggrieved party is provided for under ***sub-rule (2) of rule 6(supra)*** and the party may, subject to the law of limitation, bring a fresh suit, but

there is no provision for the reinstatement of the same suit that was dismissed. Counsel buttressed this proposition with the case of ***A.P Bhimji Ltd v. Michael Opkwo, H.C. Misc. Appl. No. 423 of 2011,*** where Mwangusya J. (as he then was) was considering provisions of ***Order 17 r.4 CPR*** in a situation where a suit is dismissed for the non appearance of either parties to the suit, and distinguished it from one where the suit is dismissed under ***Order 9 r.17CPR*** when neither party appears when the suit is called for hearing. The Learned Judge in that case observed that that whereas in suits dismissed under ***Order 9 r.17CPR*** a plaintiff may, subject to the law of limitation, bring fresh suit or apply to court to set aside the dismissal and to reinstate the suit under ***Order 9 r 18(supra),*** no similar provision exists for the reinstatement of suit dismissed under ***Order 17 r.4 CPR***. Counsel argued that the same principle applies where a suit is dismissed under ***Order 17 r6(1)(supra)*** and that no alternatives are provided except that under ***r.6(2)(supra)*** a plaintiff may, subject to the law of limitation, bring a fresh suit.

Counsel went on to submit that the Applicant in this case is aware of this provision of the law and states so in ground (b) of the application and in paragraph 24 and 25 of the affidavit in support of the application. Counsel argued that this application only seeks to circumvent the law in order to defeat the defence of limitation, which is the reason why the Applicant brought this application under ***Section 98 CPA*** by invoking the inherent power of the court. Mr. Caleb Alaka submitted that this is untenable because thee inherent power of court is exercised only where there is no specific remedy available in the circumstances, and that courts will be reluctant to exercise their inherent power where a specific remedy existed, but for some reasons, such as limitation, is no longer available. Counsel fortified his argument with ***Adomia v. Mutekanga [1970] 429 at 432.***

Counsel also observed that the Applicant admits that his suit is be time barred if he were to bring the application under ***Order17 r.6 (2) (supra),*** because it has been

more than eleven years since the cause of action in tort of trespass arose in 2003. Counsel argued that this too is unobtainable because a party cannot bring a suit to deprive a defendant of a statutory defence of limitation. Counsel backed this argument with the authority of ***Mohammad B. Kasasa v.Jaspher Buyonga Sirasi Bwogi, C.A CA No. 42 of 2008.***

Mr. Alaka went on to submit that the suit sought to be reinstated was, in addition to the above provisions, dismissed under ***Section 17(2) of the Judicature Act (supra)*** which makes no provision for reinstatement. Again relying on ***A.P Bhimji Ltd v. Michael Opkwo case (supra)*** Counsel submitted that when court exercises discretion under the said section and provisions of ***Order 17 r6(2) (supra)*** the decision becomes final and there is therefore a decree, and the only remedy is to appeal the decree. Counsel maintained that where the law of limitation of actions is concerned the merits of the case are immaterial. Counsel prayed that the application be dismissed with costs.

In reply Mr. Muchake Musa, Counsel for the Applicant, submitted that whereas the suit sought to be reinstated was dismissed under ***Order 17 r.6 (1) (supra),*** the Applicant has a remedy under ***r.6 sub-rule (2)(supra)*** but that this is not couched in mandatory terms, and it provides that, subject to the law of limitation, the plaintiff "may" bring a fresh suit. Counsel argued that the use of the phrase "may" means that the plaintiff can either file a fresh suit, if it still falls within the limitation period, or to apply for reinstatement of the dismissed suit, if the action would be time barred. Counsel vehemently argued that the use phrase "may" in ***r.6 sub-rule (2)(supra)*** means that there are other options available for plaintiff to pursue his rights by seeking for justice outside provisions of ***Order 17 r6(2) (supra).***

Mr. Muchake further submitted that having envisaged that filing a fresh suit would be barred under ***Section 3(1) (a) of the Limitation Act (Cap 80)*** the Plaintiff opted

for filing an application for reinstatement of the suit by invoking the inherent power of court under ***S.98 CPA (supra).*** Counsel insisted that the Applicant is not trying to circumvent the law to defeat the defence of limitation since he is not seeking to file a fresh suit; and that if that were to be the case, the Respondents' objections would be justified. That in this case the Applicant is merely trying to find ways of seeking for justice; which is his right to do so. Counsel also submitted that the existence of a specific procedure addressing a particular situation of a case does not restrict the inherent power of court.

***Issues.***

The issues, as I perceived them from the application and submissions of Counsel, are as follows;

1. ***Whether court can invoke its inherent power to allow reinstatement of a suit dismissed under Order 17 r 6(1) CPR, if to file a fresh suit by the plaintiff would be time barred.***
2. ***Whether an order of dismissal of a suit under Order 17 r.6 (1) CPR and Section 17(2) Judicature Act (Cap 13) constitutes a final decree.***
3. ***What are the remedies available to the parties?***

***Resolution:***

Since the issues are interwoven in nature I will resolve them simultaneously. This application is brought under ***Section 98 CPA*** as the enabling provision, which provides as follows;

> ***"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or <u>to prevent abuse of the process of the court</u>."[underlined for emphasis]***

The suit which the Applicant seeks to have reinstated by invoking the inherent power of court in the above cited section was dismissed under provision of ***Order 17 r. 6(1) CPR,*** which provides as follows:

> "***In any case, otherwise not provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed.***"

Under ***sub-rule (2) rule 6 (supra),*** it is provided that;

> ***"In such case the plaintiff may, subject to the law of limitation, bring a fresh suit."***

The phrase "may" as used in the ***sub-rule(2)(supra)*** is permissive, and it gives the plaintiff liberty to file a fresh suit where the original suit has been dismissed under ***sub-rule (1***) thereof; provided the fresh suit is brought within the time limited by law for filing suits. Where filing the fresh suit would be caught up by limitation, the provision does not provide for an alternative remedy for the plaintiff because then the suit is regarded as time barred.

The above situation is distinguishable from one under ***Order 9 r.17 CPR*** where a suit is dismissed for non appearance of the parties when the suit is called for hearing. It provides as follows;

> ***"Where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed."***

In the above latter scenario, the remedy for the affected plaintiff lies under ***Order 9 r.18 (supra)*** which permits the plaintiff, subject to the law of limitation, either to bring a fresh suit or to apply to court to set aside the dismissal and restore the suit after demonstrating sufficient cause for the non appearance to the satisfaction of the court. In either of the options, however, it is clear that strictly observing the law of limitation still applies with equal force. In the event that the filing of a fresh suit

or reinstating the suit is caught up by the law of limitation, the court would not grant any remedy because its hands are tied.

In the present case the Applicant concedes, in paragraph 24 and 25 of his affidavit on support of the application, and in ground (d) of the application, that he opted for the filing of this application for setting aside the order of dismissal and reinstating the suit rather than filing a fresh suit because he was aware that he is barred by law of limitation in bringing a fresh suit. I find this concession to be self – indictment by the Applicant and a bitter but true acknowledgment of the obvious fact that his application as a desperate attempt to resurrect a non-starter case.

In the first instance, the principle that underlies the law of limitation is basically one that *"once statute barred, always statute barred"*. See: ***Arnold v. General Electricity Generating Board [1988] A.C 288.*** In the present case it means that if the Plaintiff could not file a fresh suit because it would be statute barred, equally the defect could not be cured by an application for reinstatement. The essence of the principle is that once a suit is statute barred, any subsequent developments cannot revive it. See: ***Nicholson v. England [1926] 2KB 93.***

Secondly, where an action is barred by law, the court has no residual or inherent jurisdiction to entertain such a matter. See: ***Makula International Ltd v. His Eminence Cardinal Nsubuga & Ors [1982] HCB 11; Al Haji Nasser Ntenge Sebagala v. Attorney General, Constitutional Petition No. 01 of 1997.*** Logically, it follows that an application brought under ***Section 98 CPA*** as the enabling law invoking the inherent power of court would be in vain as the court is seized with no such power where the matter is barred by law.

The third point to note is that since the suit sought to be reinstated was dismissed under ***O.17 r.6 (1) (supra)*** there exists a specific remedy under ***sub-rule (2***) thereof**.** It follows that ***Section 98 CPA,*** in which the Applicant is essentially asking the court to invoke its inherent power, does not apply. It is trite law that the

court cannot invoke its inherent power where a specific provision of the law exists that addresses the particular situation or provides a remedy.

It needs to be emphasized that the inherent power of court is exercised, *inter alia*, to meet the ends of justice. However, it cannot be exercised where to do so would have the effect of defeating the purpose and effect of any given statute. In this case, the Applicant unequivocally concedes, in his affidavit in support of the application and grounds of the application, that his suit is time barred, but nonetheless goes on to state that he seeks judicial intervention just because court is vested with inherent power. With due respect, this proposition is rather untenable. Court cannot grant a remedy by overriding the established law and principles of limitation of actions using its inherent power.

The established law is that a suit which is time barred by statute must be rejected because in such a suit the court is barred from granting a relief or remedy. See: ***Mathias Lwanga Kaganda v. Uganda Electricity Board H.C.C.S No. 124 of 2003***; ***Sayikwo Murome v. Kuko & A' nor [1985] HCB 68 at page 69; Vincent Rule Opio v. Attorney General, [1990-1991] KALR 68; and Banco Arabe Espanol v. Attorney General, Bank of Uganda H.C.C.S No. 527 of 1997; Onesiforo Bamuwayira & 2 Or's v. Attorney General (1973) HCB 87***.

Mr. Muchake argued that it is the Plaintiff's right to seek for justice by bringing the present application for reinstatement of the suit. The correct position is that even if the party has substantive rights, if his or her suit is barred by statute, he or she cannot enforce them through a court action. As the Court of Appeal held in the case of ***Mohammad B. Kasasa v Jaspher Buyonga Sirasi Bwogi,(supra)*** quoting Lord Green M.R. ***Hilton v.Satton Steam Laundry [1946] IKB 61 at page 81,*** statutes of limitations are by their nature strict and inflexible enactments. Their overriding purpose is interest *republicae ut fins litum*, which means that litigation shall automatically be stifled after a fixed length of time irrespective of the merits

of the particular case. Statutes of limitation are 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 insist on his strict rights.

Apart from the above, the suit the Applicant seeks to be reinstated was also dismissed under provisions of ***Section 17(2) of the Judicature Act (supra)*** which provides as follows;

> ***"(2) With regard to its own procedures and those of the magistrates courts, the High Court shall exercise its inherent powers <u>to prevent abuse of the process of the court</u> by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.***" [underlined for emphasis].

The clear import of the provision, in my view, is that where a suit is dismissed for inordinate delay that is beyond the legally prescribed period (under ***Order 17 r 6(1) (supra)*** it is two years of no steps being taken by the parties on the case) or for being an abuse of court process, the order dismissing the suit constitutes a final decree even though the matter may not have been heard on its merits. This is buttressed by the authority of ***A.H Zaidi v. F.H. Humeidan [1960] EA 92; Tariol Singh Sactgu v. Roadmaster Cycles (U) Ltd., C.A.C.A. No 46 0f 2000*** where the courts were considering a dismissal of a suit under ***Order 17 r.4 (supra)*** and held that a decision made under this rule was a decision on merit which gave rise to a decree.

It is further my view that ***Section 17(2) Judicature Act (Supra)*** was intended by the Legislature to operate as a statutory tool in the hands of court to prevent abuse of its process by curtailing delays in trials and to put an end to such trials. Though rarely applied, when applied it is not a tool that is used in vain. The court will have addressed its mind fully to the overall essence of the suit in the court system and satisfied itself that the suit is pretenceless or absolutely groundless, and hence

merits no further judicial attention. In that case no amount of subsequent action would revive the suit, and an order on those grounds is a final decree that is only appealable as of right. See: ***Ejalu v. Uganda Railways Corporation (1994) 1 KALR 51 (SC)***.

I hasten to add that the stated effect of the limitation law on an actions is only that the remedy is barred, but the plaintiff's substantive rights are not necessarily extinguished. It is quite certain, though, that the plaintiff would, in any case, be precluded from seeking judicial remedy to enforce his or her rights which are in all respects still recognized by the law. The plaintiff would still be free to enforce his or her rights by pursuing any other lawful means, but not through a judicial process. In my view, this is why the wording of ***Order 17 r.6 (2) (supra)*** is permissive in nature in that the plaintiff "may", subject to the law of limitation, file a fresh suit. A plaintiff has a choice either to file a fresh suit, if his or her action is still within the time limited by law, or to pursue other non judicial lawful means to enforce his or her rights where the suit is caught up by the law of limitation. I therefore find that this application is incompetent and it is dismissed with costs.

***BASHAIJA K. ANDREW***

***JUDGE***

***19/09/14***