

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

CIVIL SUIT NO. 565 OF 2012

NABISERE GERADINE MIRUNDI ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

- 1. HARRY FRED MUTEBI SSERUGGA**
- 2. JOHN MUHWEZI ::::::::::::::::::::::::::::::::::::::: :DEFENDANTS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

*NABISERE GERADINE MIRUNDI (hereinafter referred to as the “plaintiff”) filed this suit in the capacity as Administrator of the Estate of the Late Samalie Bugutanya Nakibuuka Namukasa against **HARRY FRED MUTEBI SSERUGGA and JOHN MUHWEZI (hereinafter referred to as the 1st and 2nd “defendants”)** seeking for declarations and orders that;*

- a. **The plaintiff is rightful owner of the land situate in Kyadondo Block 174, Plot 86 At Kabanyoro as the Administrator of the Estate of the Late Samalie Bugutanya Nakibuuka Namukasa.***
- b. **The defendants were fraudulently registered as proprietors of the suit land.***
- c. **The Special Certificate of title in the names of John Muhwezi be cancelled.***
- d. **The transaction between the 1st and 2nd defendant is fraudulent and therefore null and void.***
- e. **General damages.***

f. A permanent injunction be issued retraining the defendants from threatening trespass on the suit property.

g. Costs of the suit.

Submissions.

At the commencement of hearing the case, Mr. Wameli Anthony, learned Counsel for the defendants, raised a preliminary objection on a point of law that the suit is time barred and should be dismissed with costs. Mr. Wameli submitted that according to the averremets in the plaint, the alleged fraudulent transfer of the land to the 1st defendant was effected in 1986, and that this is time the when cause of action arose. Further, that the plaintiff derives interest in the suit land as the Administrator of the Estate of late Samalie Bugutanya Nakibuuka Namukasa who was all along aware of the alleged fraudulent transfer from a one Paul Kaaya to the 1st defendant in 1986. That since then the 1st defendant remained the registered proprietor of the suit land until 2011 when he transferred the same to the 2nd defendant.

Counsel further submitted that the plaintiff filed this suit in 2012 after obtaining Letters of Administration in 2011 for the Estate of late Samalie Bugutanya Nakibuuka Namuka who died in 1997. That the period between 1986 when the cause of action arose and 2012 when the plaintiff filed the suit to recover the suit land is more than twelve years stipulated under ***Section 5 of the Limitation Act (Cap.80)*** hence the suit is time barred, and should be dismissed with costs.

In reply Ms. Sauda Nsereeko, Counsel for the plaintiff, submitted that according to the pleadings the in plaint, the late Samalie Bugutanya Nakibuuka Namukasa left for Europe in 1986 and when she returned in 1992, she found the 1st defendant had fraudulently transferred into his names the suit premises. She asked the 1st defendant to leave the suit property but that the 1st defendant refused to do so. As a result she instituted a case against him in the Resistance Council Courts (as they

were known at the time) which ruled in her favour, and with help from police forcefully evicted the 1st defendant from the suit premises in 1992. Ms. Nsereko submitted that after the eviction, the 1st defendant attempted to appeal against the RC Court's orders in the Chief Magistrate's Court at Mengo vide **Civil Appeal No. 16 of 1992**, but never followed through with his appeal. Counsel argued that this action by the plaintiff's predecessor in title Samalie Bugutanya amounted to challenging the 1st defendant's ownership of the suit land.

Ms. Nsereko further submitted that after the eviction of the 1st defendant, the late Samalie Bugutanya Nakibuuka Namukasa put a caretaker, her son one Mugerwa Geoffrey, in the suit premises who has since 1992 been in physical possession and that as such, the plaintiff as Administrator of late Samalie Bugutanya's estate is taken have been in adverse possession of the suit land since then unchallenged by the 1st defendant the registered proprietor, and that she is entitled to legal title as a result. Counsel relied for this proposition on the case of **Rosemary Nabukenya (Administrator of Estate of Late Maria Luuze Nalongo Namuyonga) v. Gladys Mukula & 4 Others, H.C.C.S No. 046 of 2011**.

Ms. Sauda Nsereko argued that late Samalie Bugutanya Nakibuuka Namukasa died in 1997, and that between 1992 when 1st defendant was evicted and 1997 when Samalie Bugutanya Nakibuuka died is a period less than twelve years in which she could have pursued the matter. Counsel argued that the plaintiff obtained Letters of Administration on 19/09/2011 when she legally became the owner of the suit land and filed the suit in 2012. Counsel maintained that even if the 1st defendant is still in possession of a certificate of title which is conclusive evidence of ownership of the suit land under **Section 59 of the Registration of Titles Act**, this principle is subject to adverse possession and other equities existing in the suit land. For this proposition Counsel again relied on the case of **Rosemary Nabukenya (supra)**.

Ms. Sauda Nsereko maintained that the facts about adverse possession can be inferred from the pleadings in the plaint, and that all issues including adverse possession and ownership by title can only be resolved if the case is heard on its merits.

Counsel conceded that that the RC courts which decided the case in 1992 and evicted the 1st defendant had no jurisdiction to entertain issues of ownership of titled land, but argued that this fact notwithstanding, ownership can be by having title or adverse possession for twelve years uninterrupted by defendants, which the plaintiff has had since 1992, and that the right of action against the defendants continues from that date since the defendants have never challenged the plaintiff's claim to the suit land.

In rejoinder, Mr. Wameli Anthony submitted that the issue of adverse possession was never pleaded by the plaintiff as a ground of exemption or disability from limitation, but was merely stated as a fact which is denied in the defence and counterclaim. That adverse possession is not a ground of disability as required under ***Order 7 r.6 Civil Procedure Rules***. Mr. Wameli maintained that court is precluded from hearing the merits of this case since it is time barred.

Issues.

From the facts in the parties' pleadings and submissions of Counsel for the parties, the issues for determination are:

- 1. Whether the suit is time barred?***
- 2. Whether court can hear the merits of the case in the event that a suit is barred by statute?***
- 3. What are the remedies available to the parties?***

Resolution of the Issues:

Issue No.1: Whether the suit is time barred?

The plaintiffs' action is for the recovery of the suit land comprised in ***Kyadondo Block 174 Plot 86 at Kabanyoro***. The 1st defendant is said to have fraudulently transferred the same into his names in 1986. The late Samalie Bugutanya Nakibuuka Namukasa from who the plaintiff derives title as the Administrator of the Estate is also said to have been the rightful owner of the suit land. It is an undisputed fact that the late Samalie Bugutanya Nakibuuka Namukasa during her lifetime was aware of the alleged fraudulent transfer of her land by the 1st defendant in 1986. As a matter of fact she challenged the transfer and ownership by the 1st defendant in the RC Courts which ruled in her favour, and in 1992 with the help of Police forcefully evicted the 1st defendant from the suit premises. It is also an acknowledged fact that the 1st defendant remained the registered proprietor and in possession of the certificate of title to the suit land. The RC Court's orders and the 1992 eviction did not cancel the 1st defendant's title, and that he later in 2011 he transferred the same to the 2nd defendant.

Limitation of actions for the recovery of land is governed by ***Section 5 of the Limitation Act (supra)*** which provides as follows;

“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.”

In this case, the plaintiff as Administrator of the Estate claims interest in the suit land through the late Samalie Bugutanya Nakibuuka Namukasa to whom the right of action accrued in 1986 when the 1st defendant got registered on the title to the suit land allegedly through fraud. She challenged the 1st defendant before the RC Courts 1992, and the 1st defendant was forcefully evicted from the suit premises. Since the RC Courts' decision never affected the 1st defendant certificate of title,

he still remained the registered proprietor of the suit land until in 2011 when he transferred the same to the 2nd defendant.

Section 15 (supra) provides that;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Therefore, in 2012 when the plaintiff instituted this suit to recover the suit land, the period of twelve years stipulated under *Section 5 (supra)* within which to recover land had long expired from the time the cause of action accrued to Samalie Bugutanya through whom the plaintiff claims interest as Administrator of the estate.

Ms.Sauda Nsereko raised the issue of adverse possession by the plaintiff. She argued that the plaintiff has been in adverse possession unchallenged by the registered owner since 1992 when the 1st defendant was forcefully evicted, and the late Samalie Bugutanya Nakibuuka Namukasa put her son Mugerwa Geoffrey in the suit premises as caretaker. That as such the plaintiff has been in adverse possession of the suit premises unchallenged for over twelve years and is entitled to legal title from the registered proprietor under the principle of adverse possession.

I find this argument does not hold in light of facts of this case. Firstly, the RC Court’s orders which were the basis of the purported adverse possession by the plaintiff were and are null and void. As Ms. Nsereko rightly conceded in her submission, the RC Courts had no jurisdiction to entertain the matter regarding ownership of registered land. It is the established law, as was held in *Assanand & Sons (U) Ltd v. East African Records Ltd [1959] EA 360*, that if a court has no

jurisdiction over the subject matter of litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable. They are void and have no effect either as estoppel or otherwise, and may not only be set aside any time by the court in which they are rendered, but he declared void in even; court in which they may be presented.

Applying the principle to facts of this case, the RC Court's judgments and orders of the eviction of the 1st defendant from the suit premises were of no legal consequence, and the late Samalie Bugutanya Nakibuuka Namukasa did not challenge the 1st defendant's ownership of the suit land in a court of competent jurisdiction. Since she became aware of the 1st defendant's alleged fraudulent transfer in of the suit land and 1992 and did not competently challenge the same, the plaintiff who obtained Letters of Administration in 2011 and lodged a suit in 2012 is barred by law of limitation in bringing this action to recover the land since she claims interest in the suit land through late Samalie Bugutanya Nakibuuka Namukasa, and provision of **Section 15 (supra)** apply with equal force.

Even if the RC Courts had the jurisdiction, the judgment and orders remained unenforced for over twelve years from the date it was issued in 1992 and the 1st defendant's title remained unaffected. Therefore, n the authority of ***Kabwengure v. Kanjabi [1977] HCB 89***, the plaintiff could not later in 2012 rely on the same to argue that the 1st defendant's ownership of the suit premises was effectively challenged by late Samalie Bugutanya Nakibuuka Namukasa in 1992. **Section 35(1) of the Civil Procedure Act(Cap.71)** further provides that;

“ Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed; or

(b) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.”

Secondly, the submissions of Ms. Nsereko as regards the issue of adverse possession do not obtain on facts of this case. It is trite law that for a party to claim ownership by adverse possession as against the registered owner, the adverse possessor must have peacefully entered the land and had quiet possession unchallenged by the registered owner. See: ***Nambalu Kintu v. Kamira [1975]HCB221;Karnaraka Board of Wakf v. Government of India & O’rs [(2004)] 10 SCC 779.***

In this case, the late Samalie Bugutanya Nakibuuka Namukasa through whom the plaintiff claims interest in the suit land forcefully evicted the 1st defendant using Police on the orders of RC Courts; albeit null and void. This invariably runs contrary to the prerequisite conditions of adverse possession stated in the above cited authority.

The other point to note is that adverse possession is only stated as a fact that can be inferred from the pleadings of the plaint. Even then, it is denied by the defendants in their defence and counterclaim. Adverse possession was never pleaded as a ground of disability or exemption from the limitation period. It is a requirement under ***Oder 7 r.6 CPR*** that;

“Where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which the exemption from that law is claimed.”

Clearly where no grounds of exemption from limitation are pleaded, a party cannot rely upon them in his or her case. *Issue No.1* is answered in the affirmative.

Issue No.2: Whether court can hear the merits of the case in the even the merits of the case in even that issue?

It is now established law 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: ***Vincent Rule Opio v. Attorney General, [1990-1991] KALR 68; 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.***

Even in a situation where a party has substantive rights, if the suit is barred by statute, the party cannot enforce them through a court action. As was held by the Court of Appeal in the case of ***Mohammad B. Kasasa v. Jasher Buyonga Sirasi Bwogi, C.A CA No. 42 of 2008;*** 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. *Issue No2* is answered in the negative.

Issue No. 3: What are the remedies available to the parties?

The net effect is that the suit is time barred, and it is dismissed with costs. The court will only proceed to hear and determine the counterclaim.



**BASHAIJA K. ANDREW
JUDGE
26/09/14**