

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 0073 OF 2011**

NALUYIMA MABLE PLAINTIFF

VERSUS

**1. REG. BOARD OF TRUSTEES OF
SEVENTH DAY ADV. CHURCH**

2. GEOFFREY MUKIIBI..... DEFENDANTS

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

When this suit came up for hearing on 19/3/14, counsel for the 2nd defendant raised preliminary objections to the effect that:

1. The suit is time barred.
2. The plaintiff has no *locus standi* to bring the suit.
3. The late Godfrey Kyansimbi's will is not a proper law.

All counsel argued the preliminary objections orally.

It was argued for the 2nd defendant that is S.5 Limitation Act bars recovery of land after 12 years and S.20 of the same Act bars a plaintiff from claiming against the personal estate of a deceased person after the lapse of 12 years. Counsel relied on the case of **Henry. Wabui & Anor Vs Rogers Hans Kyoga & 2 Ors HCCS.102 of 2009 at page 2.** Counsel argued that, the will of Abisaji Batesanaliwo (hereinafter referred to as the deceased) is dated 12/12/80 and according to paragraph (6) of the amended plaint, it is from that will that the plaintiff derives her claim was filed in 2011 which is a period of 31 years since the purported interest arose. Counsel for the 1st defendant supported that submission and added that since the plaintiff is deriving her interest from the deceased, then her claim rose from the point of death which puts the case out of time.

On the second objection, counsel for the 2nd defendant argued that the plaintiff has no *locus standi* to bring this suit because Geoffrey Kyansimbi's estate (the plaintiff's father) already has an administrator who is the 2nd defendant. According to paragraph 5 (c) of the amended plaint, the deceased Kyansimbi confirmed the plaintiff's interest in his will. That S.264 Succession Act

bars a suit brought by any person where the estate has an administrator unless the letters of administration have been revoked. Lastly it was contended for 2nd defendant that that the late Kyansimbi's will is not a will in law because it is not attested by anyone. Counsel then prayed for the suit to be dismissed with costs under 0.7 R. 11 CPR.

In reply to the objection on limitation, counsel for the plaintiff submitted that the time is counted from the time the cause of action accrued. That in this case, the cause of action is against the 1st defendant who obtained legal ownership of the land in 2006 having bought the same in 2002 from the 2nd defendant as administrator of Kyansimbi's estate. That evidence of that transaction is to be found in Annexure B (agreement of sale dated July 2002) between the defendants. Payment for the land was completed over several years and title obtained in 2006. Therefore that the suit was filed in 2011 clearly within time. Counsel further argued that it is a question of evidence (as shown in paragraph 5 (i) of the amended plaint) as to when the plaintiff got to learn about the loss of the land. It was also contended that the plaintiff is not only claiming from the deceased's will. Even then, after her death in 1980, there was no adverse claim to this land that the plaintiff would challenge and even then she was only five years then, which time the land was possessed by Kyansimbi her father, who died in 1998.

On locus standi, counsel for plaintiff submitted that **S.264 Succession Act** is inapplicable because this is not a suit by the estate but a suit by a beneficiary against an owner of land that the plaintiff claims is hers and against the 2nd defendant who is the administrator of the estate of the late Kyansimbi. That S.264 only applies if the injury complained about is against the estate of a deceased person and to hold otherwise would suggest that a beneficiary cannot sue a cheating administrator which would be absurd. On this point, counsel relied on the authority of **Israel Kabwa Vs Martin B. Musinga SCCA 52/95**. With regard to late Kyansimbi's will, counsel argued that it is not the only document on which the claim in the claim is grounded and even then, testing whether the will is a proper will, can only be done when that document is adduced in evidence.

Resolution of the preliminary objections:-

1. The suit is time barred

The plaintiff in paragraph 4 of the plaint avers that the cause of action is for recovery of land situate at **LRV 3108 Folio 9 Plot 1438 Block 12 Mengo (hereinafter referred to as the suit land)** which the 2nd defendant fraudulently without consent from the plaintiff and without any claim of right stealthily sold off to the 1st defendant.

Section 5 of the Limitation Act Cap 80 provides that “*No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or her...*” Further Section 20 provides that:-

“Subject to Section 19(1) (on trusts), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued “

According to paragraphs 5(a) to (f) of the plaint, the suit land was owned by the deceased who upon her death in 1982, bequeathed it to the plaintiff as her legal heir but left it under the charge and care of her son the late Godfrey Kyansimbi (the plaintiff’s and 2nd defendant’s father) to keep in trust for the plaintiff until she become of age. The bequest was also confirmed by the late Kyansimbi in his will of 1988. That after Kyansimbi died in 1998, the 2nd defendant as Kyansimbi’s legal heir applied and acquired letters of administration which he used to sell the suit land to the 1st defendant in 2002. The 2nd defendant then obtained a leave from the Buganda Land Board in 2006.

The 2nd defendant cited the case of **Hajati Ziribagwa and Anor Vrs. Yakobo Ntate HCCS 102/09** which referred to the decision in which Byamigisha J (as she then was) held that “*...since this was an action for recovery of land, the cause of action must have arisen at the date the defendant acquired the land...*” By inference, a cause of action relating to land should accrue on the date that the plaintiff claims it was wrongly appropriated. This seems to be supported by Section 11 of the Limitation Act which states that the right of action in land will not accrue unless there is adverse possession. The facts as related in the plaint are that at the time of the deceased’s demise, the plaintiff was still minor. It was for that reason that the suit land was entrusted to the late Kyansimbi. The latter kept the land until his death and by inference; the 2nd

defendant took over control over the land, when he became administrator of Kyansimbis estate. But I hasten to add that whether the land become part of the late Kyansimbi's estate will be a matter that is still subject to proof by evidence. That notwithstanding, the plaintiff had no reason to sue the defendants because there was no adverse claim to the suit land by then. In my understanding of the pleadings, the transaction complained of is that between the 1st and 2nd defendant when the 2nd defendant transferred the suit land to the 1st defendant. Therefore the cause of action in the instant case accrued in 2002 when the suit land was sold to the 1st defendant by the 2nd defendant. The suit was filed on 3rd March 2011 which is nine (9) after the point at which the cause of action could accrue against the defendants. Also it will still be a matter that needs to be proved when the plaintiff first came to know about the misappropriation of her land. Thus, the suit is not barred by the law of limitation.

2. The plaintiff has no locus standi to bring the suit

It appears that according to **Section 264 of the Succession Act Cap 162**, where letters of administration have been granted, no other person other than the one to whom the letters have been granted shall have the power to sue or otherwise act as representative of a deceased person. However as rightly put by counsel for the plaintiff, that section would apply if the injury complained of is by or against the estate of a deceased person. It would not apply where a beneficiary seeks to protect their interest in an estate for which a grant has or has not been made as to hold otherwise would suggest that beneficiaries cannot sue erring administrators of estate in which they have an interest. I do agree with that observation. I am fortified in this opinion by the decision in **Israel Kabwa Vrs. Martin Banoba Musiga SCCA No. 52 of 1995 in which** Justice Tsekoko held that an heir's interest to the estate does not depend on the grant of letters of administration but on his being an heir.

In the instant case, the plaintiff is claiming recovery of the suit land as a beneficiary to the estate of her late grandmother Abisage Bateesa who left it in charge of the plaintiff's late father Kyansimbi to keep in trust for the plaintiff until she would become of age. Firstly if we are to go by the facts in the plaint, the suit land never belonged to Kyansimbi and therefore did not form part of his estate. And father, going by the **Israel Kabwa** (supra) authority, the plaintiff is entitled as a beneficiary to challenge the actions of both defendants for dealing in the suit land contrary to the wishes of the deceased. I therefore agree with counsel for the plaintiff that

Section 264 of the Succession Act is inapplicable in the instant case and the plaintiff has locus standi to institute this suit.

Legality of the will

Whether the deceased's will was properly attested is a question of fact which can only be confirmed or challenged after evidence is adduced. The defence will have the chance to challenge its cogency at the right time. In my opinion, it is premature to contest such evidence at this preliminary stage.

I accordingly find no merit in the preliminary objections and they are thus dismissed with costs to the plaintiff.

I so order.

EVA K. LUSWATA
JUDGE
19/4/14