

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

MISC. APPLICATION NO.0433 OF 2017

ISRAEL DITHAN DDAMULIRA: :::APPLICANT

V E R S U S

MUGABI ROGERS: :::RESPONDENT

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant moved this Honourable Court by Chamber Summons that he (Applicant) be granted leave to amend the original plaint/pleadings so as to join a one Kezimbira Investments Ltd as a party. By the affidavit in reply by Mugabi Rogers, the Respondent opposed the application. The gist is that the omission was not a mistake, but the Applicant is actually a shareholder and director in the said company sought to be added and did consent to the sale to the Respondent (*paragraph 6 thereof*).

The Respondents argue that Civil Suit No. 170/2015 is frivolous and cannot be sustained. He also argues that there are falsehoods in the application aimed at wasting Court's time.

In rejoinder by the affidavit of Israel Dithan Ddamulira, the Applicant denies the above.

I have read and internalised the submissions by Counsel and I do find as follows:

1. Preliminary objections
 - (a) Limitation

The Respondent's Counsel referred to **Section 5 of the Limitation Act** which is to the effect 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 or, if it first accrued to some person through whom he or she claims to that person'.

Counsel referred to the affidavit in reply of Mugabi Rogers *paragraphs 6, 7 and 8* to argue that the Applicant was a shareholder and Director of Kezimbira Investment Ltd. as seen from Annexure 'A' and signed off the sale of the suit land to the Respondent as per Annexure A2. He also helped in acquiring the land as per *paragraph 7*; and having it registered in the name of the company in 2000 as per the Applicant's own annexure SDT.

From the above facts, counsel referred to the principles in **Gasu Transport Services (Bus) Ltd. versus Obene (1996)-1994; EA 88**, where Court held *inter alia* that:

'a proposed amendment should not be allowed where it is expressly or implied prohibited by any law.'

He referred for emphasis on the Law of Limitation as an example of such prohibition, and added that in this case, the proposed amendments offends **Section 5 of the Limitation Act**; for reasons he postulates in his submissions.

Counsel argues that the Applicant as a director of the said company was all the time aware of its activities and the alleged fraud was in his knowledge as a participant if at all it did exist. Counsel argues that by virtue of **Section 5 of the Limitation Act**, the Applicant is barred from adding Kezimbira Ltd, which is registered on the certificate of title by 2000; yet the suit is filed in 2015, after the statutory period of limitation of 12 (*twelve*) years. Counsel points out that the applicant has not offered any explanation why the suit was not brought in time. He argues that the Applicant's case is not sustainable and as against the Respondent or against Kezimbira Investments Ltd, and the application out to be rejected on that ground.

The Applicant Counsel in responding to this point both in the affidavit in rejoinder and submissions in rejoinder argues that this matter should only be raised after the proposed

amendment to add Kezimbira Investments Ltd has been determined and argues, that its prematurely brought up.

I have followed the said arguments. There is evidence from the Respondent in his affidavit in reply to show that the Applicant is a director in the company and he seeks to be added as a party. That means that he has all along since 2000 known the facts pertaining to the said alleged fraud, but did not take action. In the case of *Makula International versus His Eminence Cardinal Nsubuga (1982) HCB.11*, it was held that;

‘an illegality once brought to the attention of Court, supersedes all matters of pleadings’. An illegality should not await amendment of pleading. Why post pone it?

The Applicant has not raised any sufficient answer to wash away all the allegations contained in *paragraphs 5,6,7,8,9,10,11,12 and 13* of the affidavit in reply of Mugabi on the question of limitation.

The affidavit in rejoinder by Dithan Damulira only mentions in passing that the contents of paragraphs 3,4 and 5 are answered in the plaint (*see paragraph 3*), but the same plaint is the subject of amendment.

In paragraph 4 of the affidavit in rejoinder, he only states;

‘the Respondent is free to challenge and bring out the defence of limitation when Kezimbira investment is already a party to the suit’

That averment does not answer the fact that an illegality has been pointed out to which if no answer is given, then it’s truth is not denied.

I do find that by the evidence laid before this Court by the Respondents in this application, it has been shown that the proposed amendment is caught up and is prohibited by the Law of Limitation.

This is because the suit ought to be amended was brought after the statutory limitation period of 12 years. It is also illegal and has been proved that for the Applicant – shown as a director in the said company to come to Court to plead that he was ignorant of the fact that the addition of the company as a party was necessary at the time of fling the plaint, is unbelievable. This ground of objection is accordingly sustained.

Having found as such, I do not need to divulge into the other grounds on the strength of the decision in *Makula International* (*supra*). However, I also find that the Applicant faulted the *Gasu Transport Services (Bus) Ltd. versus Obene*; rules which provide that such a proposed amendment should not be malafide.

This application by virtue of the grounds raised by the Respondents has been shown to contain falsehoods. It has also been shown that the Applicant has deliberately avoided to disclose his role in the said Kezimbira Investment Ltd, yet the pleadings provided by the Respondent show that the Applicant was a director who participated in the transactions he complains of. (*See the affidavit of Mugabi in reply especially paragraph 6*).

I did not find sufficient replies from the Applicant to those allegations. I do again find that this ground of objection on the strength of arguments by the Respondents is sustained.

For reasons stated above, the preliminary objections raised have disposed of this application.

I find no merit in the same. It is dismissed with costs.

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Henry I. Kawesa

JUDGE

23/2/2018

23/02/2018:

Sebanja Lubega for the Applicant

Applicant present.

Mr. Nyero Peter for the Respondent

Respondent absent.

Sebanja: Matter is for Ruling.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

23/2/2018