

The particulars of fraud as pleaded by the plaintiffs are that the 1st defendant unlawfully registered the suit land in his name and that he acquired the same without purchasing the land. Further, that the signature of the late Mary Nabankema appearing on the transfer form had been forged.

The 1st defendant filed a defence denying the allegations of fraud. He contended that he lawfully acquired the suit land for valuable consideration and has been the owner since the early 1970s.

That the suit is time barred since the 1st defendant has had legal and physical possession of the land with the plaintiffs' knowledge and their predecessor for over 30 years during which time, the plaintiffs took no action.

Furthermore, that the particulars of general and special damages as well as mesne profits have no basis. He accordingly prayed for the dismissal of the suit against him, with costs.

The 2nd defendant never filed a defence to the suit despite having been served with summons to do so.

The parties filed a joint Scheduling Memorandum wherein the issues for determination were identified as follows:

1. ***Whether the suit is barred by limitation.***
2. ***Whether the 1st defendant acquired the suit land fraudulently.***
3. ***What remedies are available to the successful party***

The plaintiff adduced evidence of four witnesses to wit; Darlington Kampama as **PW1**, the 2nd plaintiff, Naluwoza Margret as **PW2**, the 1st Plaintiff, Mukooza Michael Semazzi who testified as **PW3** and Ezati Samuel a handwriting expert as **PW4**.

The 1st defendant on his part adduced evidence of one Abraham Kironde Kabanda, his son, who testified as **DW1**.

Representation:

The plaintiffs were represented by **M/s Nakagga & Co. Advocates** while the 1st defendant was represented by **M/s Sebalu and Lule Advocates**. This court directed both counsel to file written submissions in support of their respective cases by 10th May 202. However, only the counsel for the plaintiff filed submissions, which I have taken into consideration in deciding this matter.

Resolution of issues.

Issue No.3: Whether the suit is barred by limitation.

It is not in dispute that the plaintiffs filed this suit as administrators of the estate of their late mother, Mary Nabankema who, from 1955 to 1974 was the registered proprietor of the land comprised in **Block 486 Plot 14 at Mazzi**. From the certificate of title, the transfer form and the land office search report, all admitted documents, exhibited in evidence by the plaintiffs, the 1st defendant was registered as proprietor of the suit land on the 9th of April, 1974.

It is also not a fact in contention that the late Mary Nabankema died on 31st March, 2014 at the age of 70 years old and that in 2012, two years prior to her death had testified in favour of her brother who was seeking to recover his land from the 1st defendant.

The suit, **Civil Suit No. 0009 of 2012: (Darlington Kampama Senkumba vs. Ibulaimu Kironde Kabanda and Anor)**, (the status of which is yet to be established) concerned land comprised in **Block 486 plot 9**, which according to the evidence given in this court, was originally part of the estate of the father of Mary Nabankema, the plaintiffs' mother and her brother, Darlington Kampama, who was the plaintiff in that suit and also a witness in the present suit.

The law:

He who asserts must prove. This proposition is supported by **section 101 (1) of Evidence Act, Cap. 6**, to the extent that whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts do exist. (**George William Kakoma v Attorney General [2010] HCB 1 at page 78**).

The burden of proof lies therefore with the plaintiff who often bears that duty to furnish evidence, whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiffs contend, on a balance of probabilities. (**Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004**).

Several cases were cited by each sides to demonstrate the responsibility cast upon each party that makes an assertion requiring proof.

The law rests the evidential burden upon the party who asserts the affirmative of the issue in dispute. Evidential burden means the obligation to show that there is sufficient evidence to properly raise an issue at trial and to show the existence or nonexistence of a fact in issue. This position was emphasized in one of the cases cited by counsel for the 1st defendant: **John Bwiza vs. Patrick Yowasi Kadama, Civil Appeal 35 of 2011 (CA)**.

The plaintiff in this case therefore had to lead evidence in support of his assertion that the 1st defendant as the registered proprietor of the suit land had acquired the suit land fraudulently. The 1st defendant on the other hand had to satisfy this court that the suit before this court was incompetent, since it was statute barred, and ought to be therefore rejected under **order 7 rule 11(d) of the CPR**.

On the issue of limitation, counsel for the 1st defendant submitted that the suit had been instituted after the expiration of twelve years, some years after the alleged acts of fraud had been committed. He cited the authority in **Mohammed B Kasasa vs. Jasper Buyonga Sirasa Bwogi, Civil Appeal 42 of 2008**, where it was held that court cannot grant a relief or remedy in any suit barred by the statute of limitation.

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. (**See: Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321; Rawal v. Rawal [1990] KLR 275, and Iga v. Makerere University [1972] EA 65**).

Thus it is also the settled position that in determining the period of limitation, court looks at the pleadings only, and as such no evidence may be required. (**See: Polyfibre (U) Ltd v. Matovu Paul & 3 others (supra); Madhivani International S.A v. Attorney General (supra)**).



Statutes of limitations are by their very nature strict and inflexible enactments and not concerned with merits. Their overriding purpose is *interest republicae ut finds litum*, which means that litigation is automatically stifled after a fixed length of time, irrespective of the merits of the particular case.

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. (**Lord Green MR in *Hilton vs. Satton Steam Laundry (1946)1KB 61***).

As the general rule, as stipulated in **section 5 of the Limitation Act**, no action can be brought by any person to recover 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.

Section 25 of the Limitation Act which the plaintiffs' counsel relied on and which provides an exception to the general rule under **section 5** is to the effect that in actions founded on fraud, the period of limitation does not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered the fraud.

Time does not commence to run as against the plaintiff until he or she becomes aware or could have with reasonable care known about the fraud. This is the position as postulated in the cases of ***Mukasa Sendaula vs. Christine Mukalazi [1992 – 1993] HCB 179; Semakula vs. Serunjogi HCCS No. 187 of 2012***.

In addition, it is a mandatory requirement under **O.7 r 6 of the Civil Procedure Rules** that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff must show the grounds upon which exemption from that law is claimed.

The mandatory nature of the provisions was affirmed in ***Hammann Ltd. vs. Ssali & Another, High Court Miscellaneous Application No.449 of 2013*** wherein court held that the plaintiff must show when he or she became aware of the alleged fraud; and that the failure to comply with the mandatory provisions would render the suit time barred.

In the instant suit, the plaintiffs allege that they discovered that the 1st defendant had been registered on the certificate of title when they went to the land office to be registered on the same as the administrators of the deceased. To this end, the plaintiffs attached a search request form as well as a search statement dated 16th October, 2017 marked **Annexure 'B1' & 'B2'** respectively.

In **paragraph 6** of the plaint, the plaintiffs aver that the defendants acted fraudulently since he had not purchased the land; got himself fraudulently registered on the land without any claim of right/interest; without the consent of the administrators; and upon forging the late Mary Nabankema's signature, contentions which the defendant totally rejected.

The suggestion being made by the plaintiffs as deduced from the above facts was that the period of limitation started to run on 16th October, 2017 when they discovered the alleged fraud and filed this suit, not the year 1974 when the 1st defendant got himself registered on the certificate of title.

A cause of action is disclosed where a plaintiff's right exists; there is violation of that right; and the defendant is liable for that violation. (Refer also to: ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514***,

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at 519; *Mulindwa Birimumaso vs Government Central Purchasing Corporation C.A.C.A. No. 3 of 2002* relying on the Supreme Court decision in : *Ismail Serugo vs Kampala City Council & Anor. - Supreme Court Constitutional Appeal No. 2 of 1998*).

5 **Section 6 of the Limitation Act (supra)** of the same Act stipulates that the right of action is deemed to have accrued on the date of the dispossession. The period therefore begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. (**F. X Miramago v. Attorney General [1979] HCB 24**). Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff.

10 The direct import of **section 5 and 6** is, first, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued; which is the date of dispossession.

15 In relation to this suit, the catch word mainly lies in **section 5** where it is stated clearly that no action is to be brought for the recovery of 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. (emphasis mine)*

The right of action in this case did not first accrue to the plaintiffs but to their deceased mother as the predecessor in title, and through whom they both claim. The right of action accrued to her as early as 1974 when the 1st defendant became the registered proprietor of the land.

20 Without delving into the validity or otherwise of the transfer of the suit property to the 1st defendant in 1974 there is no disputing the fact that the said transfer directly affected the right of ownership and possession of the suit land by the deceased registered proprietor.

25 The transfer form was signed and kept as public document, available for public viewing. There is nothing on record to show that a search was made by her or her children during her life time to prove that she ever took any step or ever challenged the entry of the names of the 1st defendant onto the certificate of title or into the register.

The cause of action therefore accrued to the deceased, who however did not raise any complaint over the years to question the validity of the 1st defendant's transfer and possession on the disputed land. As such therefore, the suit property had long ceased to be part of their mother's property/estate.

30 It would therefore seem inconceivable that the plaintiffs who never took action while their deceased mother was still alive, never obtained the relevant details concerning this land and never took trouble to establish the whereabouts of the certificate of title, had to wait till her demise and that of their uncle Bbira, whom they believed had custody of the title, before questioning the validity of the manner of acquisition, transfer and possession by the 1st defendant, transactions which occurred during the lifetime of their mother.

35 The learned counsel's argument was that the 1st defendant had been in legal and physical possession of the land, a fact known to the plaintiffs and their predecessor for more than 30 years and that no action has been taken to challenge the possession.


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The presumption therefore as perceived by this court was that there was acquiescence by the deceased registered owner of the suit land to the 1st defendant's possession and continued stay on that land.

At common law, acquiescence of a degree that amounts to passive encouragement, may by way of a proprietary estoppel, deprive an owner of land in favour of an occupier of land in possession under a mistaken belief in his or her own inconsistent legal right, when it is unconscionable for the owner to reassert his or her title (*see Willmott v. Barber (1880) 15 Ch D 96 and Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] QB 133*).

This requires proof in the first place that:

- a. The occupier made a mistake as to his legal rights.
- b. The occupier must have expended some money or must have done some act (not necessarily upon the owner's land) on the faith of his or her mistaken belief.
- c. The owner of the legal right, must know of the existence of his or her own right which is inconsistent with the right claimed by the occupier.
- d. The owner the legal right, must know of the occupier's mistaken belief of his or her rights.
- e. The owner of the legal right, must have encouraged the occupier in his or her expenditure of money or in the other acts which he or she has done, either directly or by abstaining from asserting his or her legal right.

The principle requires an approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he or she has allowed or encouraged another to assume to his or her detriment (*see Willmott v. Barber (1880) 15 Ch D 96*).

PW1, Mr. Darlington Kampama Senkumba, a brother to the late Mary Nabankema testified that their late father left land measuring about 207 acres which was divided among the 12 surviving children and that the late Nabankema got **plot 14** at Mazzi, measuring 10 acres.

That the said land was under the care of their elder brother, Christopher Bira, who is also the customary heir. That to his knowledge, the late Nabankema did not sell her land to the 1st defendant or any other person for that matter.

That the 1st defendant has on numerous occasions been involved in grabbing land at Mazzi especially from **PW1's** relatives. He referred to the fraudulent transfer of his land comprised in **Busiro Block 486, plot 9**, through forgery of his signature but that the same was recovered through court process. (*Ref: Darlington Kampama Senkumba vs Ibulaimu Kabanda Kironde & Anor Civil Suit No. 0009 of 2012*), a position which, according to the counsel for the 1st defendant, had been altered by this court through revision.

In cross-examination, **PW2**, Margaret Naluwooza (the 2nd plaintiff) told court that her mother was not staying on the suit land; that she did not know when the 1st defendant got registered on the suit land; that she went to the land office to get registered on **plot 14**, and found that the defendant had already

been registered on the title for that land; that she did not have the certificate of title of the suit land; and that it is their uncle, Christopher Bbira since deceased, an elder brother to their mother who had kept the titles even when their mother was still alive; and that their mother used to tell them (the plaintiffs) that she had land in Mazzi, a fact which their uncles had confirmed after her death,

5 The 1st plaintiff on his part, testifying as **PW3** confirmed his sister's evidence that the family neither stayed nor utilised the suit land at the time. Further, in cross examination that his late mother Nabankema had testified against the 1st defendant in **Civil Suit No. 0009 of 2012 Darlington Senkumba v Ibulaimu Kabanda**.

10 **PW3** went on to state that when the plaintiffs went to the land office, they only knew the block number and plot number but they did not have the certificate of title, had never seen the same and that they had no other document.

15 That the 1st defendant was known to be a notorious land grabber, in the habit of transferring people's land into his names. That the late Nabankema testified in **Civil Suit No.0009 of 2012** in Wakiso Grade I Magistrate Court in which the deceased confirmed to court that she got 10 acres of land out of the estate of her late father.

20 It is the view of this court however that if the genuine legal owner who from the evidence availed to court was fully equipped with the knowledge of the controversy and the risk of deprivation surrounding the disputed land, merely stands by and watches quietly for years, without taking any action to find out any details on the land for the purpose of reclaiming or repossessing the land; takes no interest in knowing the whereabouts of the title for her land; allows another to transfer it into his names, to occupy it and/or make developments on it, then an estoppel will operate so as to prevent the actual owner from insisting upon his/her strict legal rights.

25 In those circumstances the plaintiffs as administrators of the estate would not have any protectable right or *locus standi* to reclaim such property which they believed genuinely belonged to the estate, when in actual fact had long ceased to be part of that estate.

The doctrine is applicable where the true owner by his or her words or even by conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act.

30 I could not agree more therefore that the cause of action arose in 1974 when the land was transferred in the names of the 1st defendant and thereafter as deduced from the evidence of **DWI** enjoyed quiet possession of the suit land, with acquiescence from the deceased Nabankema; and as an admitted fact from the evidence of the plaintiffs, she never held the certificate of title or physical possession of the land for all the period the plaintiffs were adults, and during her lifetime.

35 The time starts counting against the previous owner so that the plaintiffs are affected by such inaction, indolence, delay or acquiescence. Having testified in her brother's case against the 1st defendant claimed to be known as a land grabber, she would have been remained on alert regarding the safety of her own land. She could have, with reasonable diligence have discovered the purported fraud.

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Given the above findings it would be reasonable to conclude that 12 years after 1974, neither the deceased nor her children had any right of action against the 1st defendant. The suit is therefore time barred and therefore incompetently before this court.

I accordingly dismiss it, with costs to the 1st defendant.

5 I therefore so order.

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Alexandra
Alexandra Nkonge Rugadya

Judge

10 **8th September, 2021**

Delivered by email

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8/9/2021.