

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**  
**CIVIL SUIT NO. 1213 OF 2021**

5 **JAMES KAKOOZA ::: PLAINTIFF**

**VERSUS**

**NALWEYISO GERTRUDE ::: DEFENDANT**

**BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA**


**RULING:**

10 The plaintiff on 20<sup>th</sup> December, 2021 instituted a suit against the defendant for trespass to land comprised in **LRV Plot 329 Block 268 Naziba Lubowa in Wakiso District measuring approximately 0.089 hectares.**

15 The defendant on 13<sup>th</sup> January, 2012 filed her written statement of defence in which under paragraph 3 she notified the plaintiff that before the hearing of the case she would raise preliminary objections capable of substantially disposing of the main suit to wit:-

20 **1. That the plaintiff's plaint discloses no cause of action against the defendant.**

**2. That the suit is barred by limitation.**

  
29/07/2022

25 3. That the summons accompanying the plaint extracted on the 21<sup>st</sup> December, 2021 was served on Kalema Joshua a minor and hence there was no effective service.

1. Whether the plaint discloses a cause of action.

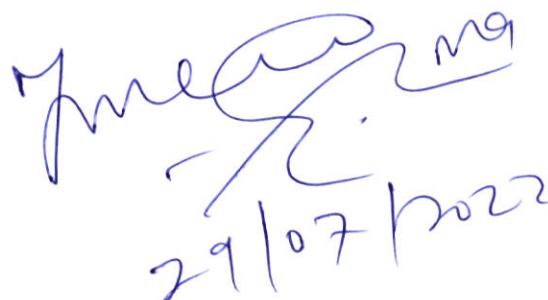
30 The defendant submitted that **Order 6 rule 30(1) of the CPR** provides that:-

35 *"The court may, upon application order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in any such case or in the case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or Judgment entered accordingly as may be just"*

The defendant also cited **Order 7 rule 11 of the CPR** which provides that *"The plaint shall be rejected in the following cases:-*

40 (a) *Where it does not disclose a cause of action.* The defendant cited the case of ***Kapeka Coffee Works Ltd Vs NPART – C.A.C.A No. 3 of 2000*** where it was held that in determining whether a plaint discloses a cause of action the court must look only at the plaint and its annexures and nowhere else.

45 The defendant also cited the case of ***Tororo Cement Co. Ltd versus Frokina International Limited – S.C.C.A No. 2 of 2002*** where it was held that in order to prove that there is a cause of action, the plaint must


  
29/07/2022



show that the plaintiff enjoyed a right; that the right has been violated; and  
50 that the defendant is liable.

The defendant submitted that under Paragraph 4(a) of the plaint, the  
plaintiff alleges to have bought the suit land which is approximately 0.089  
hectares put that on the perusal of the sale agreement attached, it does not  
55 show the size of the land purchased by the plaintiff. That the plaintiff did not  
attach any copy of the duplicate certificate of title which was a basis for the  
said purchase. That the certificate of title as indicated on Pages 4 -1 0 of the  
plaintiff's trial bundle is not in the names of the plaintiff and is still in the  
names of Birungi Simpson.

60 The defendant contended that the plaintiff has no interest and claim in the  
suit land and hence could not institute this suit against the defendant.  
The defendant further contended that the agreement attached on the plaint  
as executed on 24<sup>th</sup> April, 2006 which the plaintiff alleges to have used as a  
65 purchase document but the title that was filed in court is in the names of  
Birungi Simpson which were entered on 12<sup>th</sup> July, 2006. That there was no  
way the plaintiff could have the suit land comprised in LRV Plot 329 Block  
268 Naziba, Lubowa on 24<sup>th</sup> April, 2006 yet the title is a creature of 12<sup>th</sup> July,  
2006. That this proves to this court that the plaintiff's suit is just an intended  
70 ploy to dispossess the defendant of her land on which she has lived for over  
25 years.

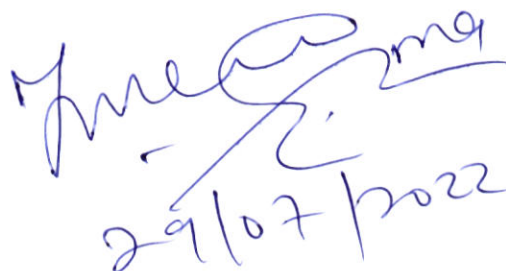
  
29/07/2022

That under paragraph 4(b) of the plaint, the plaintiff alleges that he took possession of the suit land shortly after the purchase of the suit land from  
75 Birungi Simpson and has been in possession to date but that there is no iota of evidence attached and/or annexed to prove this assertion. That the reading of the whole plaint shows that the plaintiff failed to demonstrate to this court his exclusive possession and control of the suit land.

The defendant contended that it was trite law that for someone to institute  
80 a suit for trespass, he or she should be in possession of the land. The defendant cited the case of ***E.M.N Lutaya versus Sterling Civil Engineering Co. Ltd – S.C.C.A No. 11 of 2002*** to buttress her submissions. That the plaintiff's claim that the defendant is a trespasser on the suit land is therefore baseless and without merit because the plaintiff  
85 has no locus to bring this action against the defendant.

**Plaintiff's reply to the above preliminary objection.**

The plaintiff submitted that his case discloses a cause of action against the defendant. That the plaintiff's cause of action can be got from his plaint and  
90 annexures thereto. The plaintiff reproduced paragraphs three to ten of his plaint and contended that it was clear that the plaint meets all the test for disclosure of a cause of action. The plaintiff maintained that his action is for trespass to land. The plaintiff contended that he enjoyed a right to the suit property and that right was violated by the defendant who interfered with  
95 the plaintiff's use of the suit land by stopping the plaintiff's contractor from executing construction works on the suit land. That on the 14<sup>th</sup> December, 2021 the defendant without the consent/permission of the plaintiff built a

Handwritten signature and date: 29/07/2022



perimeter wall on the plaintiff's suit land and hence the defendant trespassed and/or interfered with the plaintiff's quiet enjoyment of the suit land and developments thereof.

100

The plaintiff went ahead to demonstrate the particulars of trespass committed by the defendant on his land. The plaintiff also cited many authorities to buttress his submissions.

105

**Decision of court on preliminary objection No. 1 – Whether the plaintiff discloses a cause of action against the defendant.**

It was held in the case of *Mukisa Biscuit Manufacturing Co. Limited versus West End Distributors Ltd [1969] E.A 697* that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point of law may dispose of the suit.

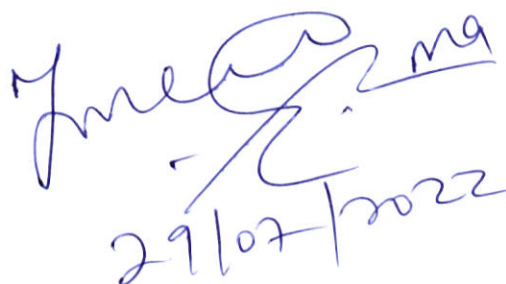
110

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. The gist of the defendant's submission on the said preliminary objection is that the plaintiff has not been able to demonstrate in his pleadings that he has sufficient evidence to prove his cause of action in trespass.

115

It is not a requirement of the law that all evidence must be adduced in pleadings for one to ascertain whether the plaintiff has a cause of action. **Order 6 rule 1 of the Civil Procedure Rules** provides that "(i) Every

120


Handwritten signature and date: 29/07/2022

***pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be".***

The material facts which the plaintiff relies on are contained in paragraphs 4 to 8 of his plaint where he claims that the defendant has trespassed on his land comprised in **LRV Plot 329 Block 268 Naziba Lubowa Wakiso District**. He lists the particulars of trespass which he attributes to the defendant and claims that the defendant constructed a perimeter wall on the suit land. The details of the evidence are yet to be adduced in court. This preliminary point of law does not raise a pure point of law but raises facts that are yet to be proved and hence cannot be disposed of at this stage. The preliminary point of law in that regard is therefore overruled.

**2. The plaintiff has no locus to bring this suit against the defendant hence the suit being an abuse of court process.**

The defendant submitted that the plaintiff by his own plaint has failed to prove that he is or has been in possession of the suit land which is a major element one must prove before instituting a claim in trespass. The defendant contended that the plaintiff is not the registered proprietor of the suit land as per the certificate of title in his trial bundle and that the certificate of title to the suit land is still in the names of Simpson Birungi. The defendant contended that the plaintiff therefore has no right to institute an action against the defendant.

  
29/07/2022



**Reply to plaintiff's to preliminary objection No. 2 – No locus standi to bring suit**

150 The plaintiff submitted that he bought the suit land from Simpson Birungi on the 24<sup>th</sup> April, 2006 and upon full payment of the consideration of Seventy Five Million (75,000,000/=) Uganda Shillings on the 6<sup>th</sup> July, 2006. That the said Simpson Birungi handed over to him the relevant documentation for the suit land and possession of the suit land which he has retained to date.

155 **Decision of court on the above preliminary objection**

From the pleadings, the plaintiff claims he bought the suit land from Simon Birungi and is in the process of transferring the title into his names. He therefore claims that he has a proprietary /equitable interest in the suit land that gives him the locus standi to institute this case. This is a fact that  
160 requires him to adduce evidence to that effect and hence cannot be disposed of at this stage.

The preliminary objection in that regard is therefore overruled.

**3. The suit is barred by time**

165 The defendant submitted that under **Order 7 rule 11(a) of the Civil Procedure Rules**, a plaint shall be rejected where the suit is barred by limitation of time.

170 The defendant submitted that the gist of the plaintiff's claim is an action for recovery of land. The defendant contended that basing on the pleadings of the plaintiff and prayers, it was clear that the gist of the suit is for recovery

*James M. M. M.*  
*29/07/2022*

of 0.012 hectares of the suit land and which is a claim for title and ownership as opposed to continuous trespass and therefore **Section 5 of the Limitation Act** applies to it.

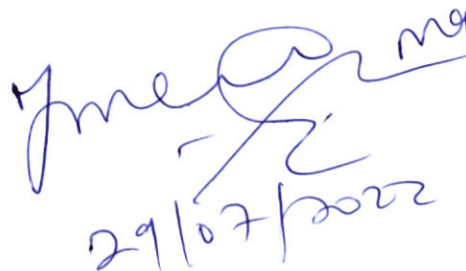
175 The defendant submitted that this court should find that the suit is barred by limitation as it was instituted outside the statutory limitation provided under **Section 5 of the Limitation Act**. The defendant further contended that the plaintiff cannot attempt to rely on the principle of constructive possession with a legal title to show that there was an alleged continuous  
180 trespass. That the plaintiff has no physical possession of the suit land and he only lays claim on the suit land because he alleges he has a title to it.

The defendant further contended that the plaintiff is an out of possession claimant reasserting his title or ownership and seeking possession of the land  
185 through the defendant's premises who has been on the suit land for over 25 years. The defendant cited many cases to buttress her submissions.

### **Reply to the preliminary objection by the plaintiff.**

The plaintiff submitted that the suit is not barred by time/limitation as  
190 claimed by the defendant for the following reasons:-

- (i) That the defendant attempts to re-characterize the plaintiff's claim in the suit as an action for "**recovery of land**" and yet the plaintiff's pleadings are clear that his action is for "**trespass to land**".
- 195 (ii) That the plaintiff's claim in the suit is trespass to land (i.e. entry unto the suit land) followed by occupation or exploitation (i.e. construction

  
29/07/2022



of a wall fence) on the suit land. That this is a continuous tort which is not barred by time/limitation.

200 (iii) That the said trespass happened on 14<sup>th</sup> December, 2021 and the instant suit was filed on 20<sup>th</sup> December, 2021 and therefore cannot be barred by time/ limitation which is set at twelve years.

205 The plaintiff further submitted that according to the contract of sale of land, the full purchase price for the suit land was paid on 6<sup>th</sup> July, 2006 and that it was on that date that the plaintiff pleads to have taken possession of the suit land and remained thereon to date.

210 The plaintiff contended that he was not seeking recovery of the suit land from the defendant. The plaintiff states that he was challenging the defendant's unlawful entry onto the plaintiff's land and/or interference with the plaintiff's quiet enjoyment of his land.

215 **Decision of court on preliminary objection – Suit barred by time/limitation**

According to the plaint, the plaintiffs claim against the defendant is for a declaration that the defendant is in trespass (See Para 3 of the plaint).

220 The plaintiff claims that on the 14<sup>th</sup> December, 2021, the defendant began to rebuild the perimeter wall on the suit land without the consent/permission of the plaintiff (See Para. 4. g of the plaint).

*Handwritten signature*  
29/07/2022

It is therefore clear that the plaintiff's cause of action is in trespass to land and not an action for recovery of land. Basing on the pleadings therefore, the suit is not barred by **Section 5 of the Limitation Act Cap. 80** as the defendant submitted. The preliminary objection in that regard is also overruled.

225  
230 **4. That the summons accompanying the plaint extracted on the 21<sup>st</sup> day of December, 2021 was served on Kelema Joshua, a minor and that there was no effective service.**

Counsel for the defendant submitted that **Order 5 rule 10 of the Civil Procedure Rules** provides that "*wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service in which service on the agent shall be sufficient*".

235  
240 Counsel for the defendant also cited **Order 5 rule 13 of the Civil Procedure Rules** which is to the effect that service of summons must be personal but where it is not possible to serve the defendant service can be done on his agent or adult member of his family.

245 The defendant submitted that in the instant case the summons were served on the minor and this is considered as ineffective service as there was no personal service of summons. That this service is bad and cannot even be cured by **Article 126(2) (e) of the Constitution** and hence the plaintiff case should be dismissed.

  
29/07/2022



**Reply by plaintiff to the above preliminary objection – No effective service.**

250 The plaintiff submitted that the said preliminary objection was neither pleaded nor did it arise by implication out of the pleadings. The plaintiff contended that there was nothing on the court record to show that service of the summons was effected on the minor. That the submission to that effect was from the bar and was not proved. The plaintiff contended that

255 he served the defendant by leaving the summons at the house in which the defendant ordinarily resides and which was in accordance with **Order 5 rule 15 of the Civil Procedure rules.** The plaintiff submitted that the desired result of serving summons is to make a defendant in the suit aware of a pending suit against him/her so as to give him/her an opportunity to respond

260 to the suit. That therefore the summons will be effective where the defendant will be aware of the suit in time to file a defence within the time prescribed for filing a defence. Counsel for the plaintiff cited many authorities to buttress his submissions.

265 **Decision of court on preliminary objection**

There was no evidence adduced to show that the plaint was served on a minor as alleged by the defendant, therefore the allegation to that effect was a submission from the bar.

270 It is also my considered view that the desired result of serving summons is to make a defendant in the suit aware of a pending suit against him or her

*Handwritten signature and date:*  
29/07/2022

so as to give him or her an opportunity to respond to the suit within the required time. Once the desired effect is achieved, the defendant is estopped from claiming that the service was not effective.

275

It was held in the case of ***Geoffrey Gatete and another versus William Kyobe – S.C.C.A No. 7 of 2005*** that effective service of summons means service of summons that produces the desired or intended result.

280

The service in this case produced the desired effect or intended result by enabling the defendant to be aware of the suit that had been instituted against her and which enabled her to reply in the required timeframe.

I therefore find this preliminary objection to that effect superfluous and will be overruled.

285

In the conclusion, all the preliminary objections raised by the defendant are overruled with costs and for the reasons I have already adduced.



290

**HON. JUSTICE JOHN EUDES KEITIRIMA**

**JUDGE**

**29/07/2022**