

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
HCCS. NO. 3065 OF 2016

JUSTINE NAKIRYA

PLAINTIFF

V

TAMALE KIGGUNDU

DEFENDANT

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

R U L I N G

[ON TWO (2) PRELIMINARY OBJECTIONS]

Representation:

Mr. Kenneth Kajeke for the Plaintiff.

Mr. Kabanda Sam for the Defendant.

Introduction:

- [1] The Plaintiff; Ms. Nakirya brought this suit against the Defendant, for alleged trespass. She contends that she owns the suit property comprised in **Busiro, Block 266 Plot 166 at Seguku**, and complains that without her consent, the Defendant who occupies the neighboring plot No. 147, constructed rental houses on the suit property. That despite

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her requests and demands, the defendant and his family members have refused to stop the alleged encroachment.

[2] Ms. Nakiryra seeks *inter alia*; for a declaration that the defendant and his family members are trespassers on the suit property, and for an order of vacant possession, and for a permanent injunction against them.

[3] In answer, it is pleaded that; the late Kiggundu Tamale obtained a certificate of title to Plot 147 and built a house thereon in 1985. That in 1986 Ms. Nakiryra approached the deceased claiming that his boys' quarters were constructed in her land. That the deceased paid Ms. Nakiryra compensation and by the time he died in 2002, the matter had been settled. That Ms. Nakiryra attacked the widow of the deceased, and the matters were again settled by the Local Council. That when the widow died in 2009, Ms. Nakiryra rose up again. That the suit is an abuse of court process.

[4] At the commencement of the hearing of this suit¹; Mr. Kabanda Sam; learned Counsel for the Defendant, raised two preliminary objections by way of written submissions. In answer, in like manner, Mr. Kenneth Kajeke; learned Counsel for the Plaintiff, filed a reply, and to which reply, Mr. Kabanda filed a rejoinder, hence this Ruling.

Submissions of Counsel on the Preliminary Objections:

[5] For the 1st preliminary objection, Mr. Kabanda submitted that Ms. Nakiryra's suit does not disclose a cause of action. He argued that the defendant that was sued, is deceased and non-existent. That the heir to the deceased defendant is Lincoln

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¹ Ms. Nakkiryra (PW1) had hardly started her testimony on June 10, 2019 before my predecessor, than the case was adjourned. Upon resumption of the case before me in June 2022, these preliminary objections were raised.

Kiggundu Tamale, who was only two (2) years old by 1985, the time of the construction of the alleged premises. That Ms. Nakiryia ought to have sued the Administrator of the estate of the late Tamale Kiggundu, and that having not done so, the plaint is incurably defective, and an abuse of court process.

[6] For his 2nd objection, learned Counsel; Mr. Kabanda argued that Ms. Nakiryia's suit is time barred. That her claim arose thirty (30) years ago, yet she filed a suit in 2014. That Ms. Nakiryia should have addressed her suit between 1986 and 2002, the time the late Kiggundu Tamale passed.

For his propositions, Mr. Kabanda relied *inter alia* on:

1. **Order 7 Rule 11 of the CPR²**
2. **Gawubira Mankupias v Katwiita Stephen³**

[7] In reply to the 1st objection, learned Counsel Mr. Kajeke argued for Ms. Nakiryia, *inter alia*, that the suit discloses a cause of action against the Defendant and his family members.

[8] For the 2nd objection, learned Counsel; Mr. Kajeke argued that Ms. Nakiryia's claim is not time barred by the law of limitation.

For his propositions, Mr. Kajeke relied; *inter alia*, on **Abram Kitumba v Uganda Telecommunications Corporation⁴**

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² Cap 71

³ HC C/A No. 130 of 2008 (at Jinja H/C Circuit)

⁴ [1994] 11 KALR at page 126- 137

Decision of Court on the 1st Preliminary Objection:

[9] The question for my determination is; **whether the Plaintiff's suit discloses a cause of action?**

[10] Generally, in determining whether or not a plaint discloses a cause of action, a court is required to look at the plaint only. Order 6 Rule 1 (1) and Order 7 Rules 1 (e) & (g) of the Civil Procedure Rules provide, in sum, that **a plaint shall contain a brief statement of material facts constituting the cause of action and when it arose, and the relief that the Plaintiff claims.** (Boldening added for emphasis.)

[11] **'A cause of action'** in a plaint is said to be disclosed if three (3) elements are pleaded namely;

- i) That the Plaintiff enjoyed a right,
- ii) That the right has been violated, and
- iii) That the Defendant is liable.

See Ismail Serugo vs. Kampala City Council⁵ and Tororo Cement Co. Ltd v Frokina International Ltd⁶.

[12] Guided by the above, I dutifully perused the Plaint to establish whether or not the said three elements were pleaded. However, clearly, it was not possible for me to tell from the face of the plaint, whether or not the defendant is deceased and non-existent.

There is nothing in the plaint to show that.

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⁵ SC Constitutional Appeal No. 2 / 1998

⁶ SCCA No. 2 / 2001

[13] Resultantly, I employed the exception to the above rule as was pointed out by **Mulenga, JSC., (RIP) in Baku Raphael Obudra & Obiga Kania & the Attorney General**⁷.

In that case, the learned Justice of the Supreme Court pointed out;

'...that upon an application to strike out a plaint for not disclosing a cause of action, the court ought to restrict its ruling on the defect of the plaint and not to decide on the merits of the case. The exception is where the court is satisfied that the cause of action disclosed is clearly not maintainable in law'

(Underlining added)

[14] **On the strength of the Baku Raphael Case (supra), I looked at other documents before me, and I was satisfied, from the admission made by the Plaintiff's Counsel; Mr. Kajeke, at page 4 of his submissions, that the defendant is indeed deceased.**

Mr. Kajeke stated, I quote;

'Clearly by 27/April/2014 Tony Kiggundu Tamale and his wife had died...

...We pray the Honourable Court to be (*sic*) pleased to order the parties to amend the pleadings and the late Kiggundu Tamale Tonny be substituted with Lincoln Kiggundu Tamale as his legal representative for the purpose of proceeding with the suit. This will enable the parties avoid a multiplicity of suits...'

[15] **It is well settled that suing a non-existent party is fatal as the suit is a nullity *abinitio*. Such a fatal mistake cannot be cured by way of an amendment through the substitution with the right party, as there is nothing to amend. The suit 'is not only bad, but is incurably bad. You cannot put something on nothing and expect it to stay there; it will collapse'. (As per Lord Denning in Macfoy v United Africa Company Ltd)⁸.**

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⁷ SC Constitutional Appeal No. 1 of 2003

⁸ [1961] 3 All ER 1169 at page 1172

Refer also to Paul Nyamarere v UEB (in Liquidation)⁹ and Mulangira Ssimbwa v the Board of Trustees of Miracle Centre and Anor¹⁰, where the above principle was applied.

[16] For the reason given, the 1st preliminary objection is upheld. The defendant is deceased and non – existent, and the present suit is not maintainable in law. No cause of action is disclosed in the plaint.

[17] Having held as I have for the 1st preliminary objection, it is not necessary to address the 2nd preliminary objection. To do so will not change the fate of this case.

[18] In the final result, the Plaint is accordingly, hereby rejected under the provisions of Order 7 Rule 11 (a) and (d) of the CPR. I make no order as to costs. The same principle is applied, to wit; that a non-existent, deceased person cannot be paid costs.

I so order,



P. BASAZA - WASSWA

JUDGE

August 22, 2022

This Judgment has been delivered via email to the parties and uploaded on the ECCMIS system.

⁹ [2008] HCB 126

¹⁰ HCMA No. 655 of 2005