

SEBOWA ABUDALA SELEIMAN ::: APPLICANT
VERSUS
NALULE GLADYS ::: RESPONDENT
(Administrator of the Estate of the Late Nalule Christine)

RULING

1. ***Sebowa Abudala Seleiman*** herein after referred to as the applicant brought this application against ***Nalule Gladys(Administrator of the estate of the Late Nalule Christine)*** herein after referred to as the respondent by way of a Miscellaneous application under provisions of Section 33 of the Judicature Act Cap.13,Section 98 of the Civil Procedure Act Cap.71,Sections 5 & 25 of the Limitation Act Cap.80,Order 7 rules 11(a),(d)&(e),Order 6 Rules 29 & 30,Order 26 rules 1,2(1)& 3,Order 52 rules 1 & 3 of the Civil Procedure Rules SI-71-1 seeking for orders that;

- i) Civil suit No.321 OF 2022 be struck out for being barred by limitation.
- ii) Civil suit No.321 of 2022 be struck out for want of locus standi to bring the suit.
- iii) The plaint vides civil suit No.321 of 2022 be struck out for it does not disclose any cause of action against the applicant/2nd defendant.

- iv) Civil suit be struck out on the basis of the plaintiff's failure and or refusal to comply with directives of court.
- v) In the alternative without prejudice to the foregoing, the respondent/plaintiff be ordered to deposit security for costs.
- vi) Costs of the application be provided for.

Background;

2. The applicant is the registered proprietor of land comprised in Kyaddondo Block 169 Plot 32 at Kabubu, Wakiso District having purchased the same from Nalule Kulistina who executed transfer documents in favor of the applicant and she surrendered vacant possession to that effect. The applicant has been enjoying quiet possession and utilization as the registered proprietor uninterrupted from 1984 until recently in 2022 when the respondent filed civil suit No.321 of 2022. The application is premised on preliminary points of law for the disposal of Civil Suit No.321 of 2022.

Applicant's evidence;

3. The application is supported by an affidavit deposed by **Mr. Sebowa Abudala Suleiman** which sets out the grounds of the application including the following;
 - i) That upon purchase of land comprised in Kyadondo Block 169 Plot 32 at Kabubu Wakiso district from Nalule Kulistina she executed transfer instruments in her

favor and on the 18th of July 1984 the applicant's name was registered on the certificate of title as the registered proprietor.

- ii) That the applicant has been enjoying quiet possession of the suit property where he has utilized the same from 1984 until 2022 when the respondent filed Civil Suit No.321 of 2022 with unsubstantiated claim over the suit land.
- iii) That the late Nalule Kulistina died in 2002 approximately eighteen years after the sale and purchase of the suit land.
- iv) That for the past eighteen years before the death of the Late Nalule Kulistina, the applicant lived in harmony with the late whereby at no point in time did she ever dispute and or challenge ownership of the suit property.
- v) That the cause of action arose on the 18th day of July 1984 when the applicant was entered on the title as the registered proprietor and that the late Nalule kulistina's right of action including that of her lawful successors in title had ceased six years before the demise of the late in 2002.
- vi) That the respondent's/plaintiff's pleadings vide Civil Suit No.321 of 2022 never pleaded for any exceptional circumstances for concealment of any fraud in respect of land comprised in Kyadondo Block 169 Plot 32 at Kabubu Wakiso district.
- vii) That the suit property does not form part of the Estate of the Late Nalule Kulistina which is being administered by the respondent.

- viii) That the person whom the applicant purchased land from was Nalule Kulistina not Nalule Christine under whom the respondent/plaintiff brought Civil Suit No.321 of 2022 as an administrator of her estate.
- ix) That the parties in Civil Suit No.321 were directed by this honorable court to file witness statements and trial bundles by the 16th of January 2023 which the respondent/plaintiff never complied with.
- x) That in the alternative without prejudice to the foregoing, the respondent should furnish security for costs and a sum of UGX.250.000.000 would be sufficient.
- xi) That there are no known properties forming the Estate of the Late Nalule Christine from which I will recover costs in the likely event where court determines Civil Suit No.321 of 2022 in my favor.
- xii) That the plaint should be rejected for being time barred by the law on limitation and for failure to disclose any cause of action.

Respondent's evidence;

4. The application is responded to by an affidavit in reply sworn by *Mrs. Nalule Gladys* the Administrator of the Estate of the Late Nalule Christine the respondent in which she states the following among others;

- i) That Civil Suit No.321 of 2023 has merit and that the respondent/plaintiff has locus standi to bring the said suit in court.
- ii) That there are triable issues in Civil Suit No.321 of 2023 which include how the applicant got registered on the certificate of title to the suit land as the registered proprietor.
- iii) That the respondent is the administrator of the estate of the Late Nalule Christine alias Kulistina.
- iv) That Civil Suit No.321 of 2022 is not time barred and that the exceptions to the limitation period for the cause of action on which the said suit is premised were pleaded in the plaint.
- v) That the suit property forms part of the Estate of the Late Nalule Kulistina and that civil Suit No.321 of 2023 seeks declarators orders about the same.
- vi) That the respondent together with the family of the Late Nalule Kulistina are in possession of part of the suit land with burial grounds there on.

- vii) That this honorable court issued a temporary injunction order vide Miscellaneous Application No.632 of 2022 restraining the applicant herein from interfering with the possession of the suit land.
- viii) That there are no justifiable and proven grounds/reasons adduced on why the respondent/plaintiff in Civil Suit No.321 of 2022 should pay security for costs.

Representation;

5. The applicant was represented by **Mr.Luyimbazi Nalukoola** of M/s Nalukoola Advocates & Solicitors whereas the respondent was represented by **Mr.Serunjogi Brian** of M/s Serunjogi & Partners Advocates. Both parties filed their affidavits and submissions which I have considered in the determination of this application.

Issues for determination;

- i) Whether or not the application holds merit to warrant the dismissal of Civil Suit No.321 of 2022 under Order 6 rule 29 of the civil procedure rules?

Resolution of the issues;

6. *Whether the application holds merit to warrant the dismissal of Civil Suit No.321 of 2022 under Order 6 rule 29?*

7. In arguing this issue, the applicant raised five averments that warrant the dismissal of Civil Suit No.321 of 2022 which include that; Civil Suit No.321 of 2022 brought by the respondent/plaintiff is time barred under the law of limitation, the respondent/plaintiff does not have locus standi to institute Civil Suit No.321 of 2022, the plaint vide Civil Suit No.321 of 2022 does not disclose any cause of action, failure by the respondent/plaintiff to comply with directives issued by court in Civil Suit No.321 of 2022 and in the alternative seeking orders of court for the plaintiff to deposit security for costs since Civil Suit No.321 of 2022 is frivolous and vexatious.
8. Before dwelling into the resolution of the issue, this honorable court will first elaborate on the law on dismissal of suits based on preliminary objections premised on points of law as stated under Order 6 rule 29 of the Civil Procedure Rules.
9. The law to take into consideration regarding an application for dismissal of a suit based on a point of law is Order 6 Rule 29 of the Civil Procedure Rules which states that; *if, in the opinion of court, the decision of the point of law substantially disposes off the whole suit or of any distinct cause of action, ground of defence, set off, counterclaim or reply there in, the court may thereupon dismiss the suit or make such other order in the suit as may be just.*
10. It is a settled principle of law that in considering applications under Order 6 rule 29 the court only considers the pleadings alone and any annexures thereto not any subsequent affidavits or evidence. A point of law is urged on the assumption that all facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained. (*See; Libyan Arab Bank Vs Intrepco ltd (1985) H.C.B 73.*)

- 11.** Situations where preliminary points of law are raised, they should be capable of disposing off the matter preliminarily without court having to resort to ascertaining the facts from elsewhere, apart from looking at the pleadings alone this is because a good case is always one where the parties are given the opportunity of being heard and not driven away from the court unless it is extremely necessary to do so on the facts which are very clear.
- 12.** Anything that purports to be a preliminary objection premised on point of law must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. Where a point of law raises issues of evidence which require proof, it is to be overruled. (*See; Yaya Farajalla Vs Obur Ronald & 3 Others, CA No.0081 of 2018 and Robert A.lusweswe Vs G.W Kasule & anor (1987) HCB 82 before Justice Ouma*)
- 13.** Upon elaborating on the law regarding dismissal of suits under Order 6 rule 29 of the civil procedure rules, this honorable court will now proceed to resolve all the five averments as raised by the parties in their submissions.
- a) Whether Civil Suit No.321 of 2023 brought by the respondent/plaintiff is barred by the law of limitation?**
- 14.** The Limitation Act Cap.80 under Section 5 provides that; *no action shall be brought by any person to recover any 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.* This fixed limitation period is applicable to all suits in which the claim is for possession of land based on title or ownership.
- 15.** However, the same Limitation Act provides for a waiver to provisions of Section 5 of the same Act, which waiver is stated under Section 25 of the same Act which provides that; **(a) where in**

the case of any action for which a period of limitation is prescribed by this Act, either (b)'
The action is based upon the fraud of the Defendant or his or her agent or any person
through whom he or she claims.....,the period of limitation shall not begin to run until
the plaintiff has discovered the fraud. This means in cases of fraud; the limitation period starts to run when the plaintiff discovers the fraud.

16. In situations where the suit is brought after the expiration of the limitation period, then the litigant puts himself in the position of showing the grounds upon which he or she could claim exemption failure of which, the suit is time barred therefore court cannot grant the remedy or relief sought and it must reject the claim.(See; *Iga Vs Makerere University 1972 E.A 65*).
17. Further the Civil Procedure Rules under Order 7 rule 6 provides that; *where the suit is instituted after the expiration of the period prescribed by the Law on limitation, the plaintiff shall show the grounds upon which exemption from that law is claimed.*
18. There are two major purposes that underlie the statutes of limitation and these include; protecting the defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits and requiring plaintiffs to diligently pursue their claims. Once the time period limited by the limitation act expires the plaintiff's right of action will be extinguished and becomes unenforceable against the defendant.
19. In the instant application, the applicant states in his affidavit in support of the application under Paragraphs 3,4,9 & 10 that he purchased the suit land in 1984 and he was registered on the certificate of title to the suit land as the registered proprietor in 1984 and that is when the cause of action is deemed to have accrued yet the respondent/plaintiff filed Civil Suit No.321 of 2022 in this honorable court on the 7th of April 2022 that is 38 years after when the cause of action arose.

- 20.** The respondent in her affidavit in reply refers to the contents in the plaint vide Civil Suit No. 321 of 2022 where the particulars of fraud are disclosed against the applicant/2nd defendant and that she was prevented by sufficient cause from bringing the said action during the limitation period. The respondent further alleges in her plaint vide Civil Suit No.321 of 2022 that her and the family of the Late Nalule Chritine have been in possession of the suit land and they only got to know about the fraud in the year 2022 due to that effect the respondent lodged a caveat over the said land and instituted Civil Suit No.321 of 2022 as well.
- 21.** The issues of when the respondent got to know about the fraud and how he was prevented by sufficient reasons from instituting the suit during the limitation period as prescribed by the Limitation Act is one which is to require further evidence to ascertain since the pleadings alone do not satisfactorily address the same. Further the respondent pleads fraud, particularizes the same and the date when she got to know of the fraud. The applicant cannot conclusively tell this honorable court that Civil Suit No.321 of 2023 is time barred before court pronouncing itself about the same. I am of the view that these issues are to be well settled upon both parties adducing evidence and court making a finding about the same.
- 22.** Therefore, the said issue is resolved in the negative by this honorable court.

b) Whether Civil Suit No.321 brought by the respondent/plaintiff against the Applicant/2nd defendant should be struck out for lack of locus standi by the respondent/plaintiff?

- 23.** Locus standi is a point of law that literally means a place of standing, right to appear or heard in court. To say that a person has no locus standi means that the person has no right to appear or be heard in specified proceedings. In determining such a point, court is perfectly entitled to

look at the pleadings and the attachments only. (*See; Mukisa Biscuits Vs West End Distributors (1969) EA 696.*)

24. The applicant in his affidavit in support states how the respondent/plaintiff filed Civil Suit No.321 of 2022 as an Administrator of the Estate of the Late Nalule Christine upon being granted letters of administration by the high court of Uganda family division. Further the applicant states that the late Nalule Christine never left behind any property and that the former registered proprietor to the suit land was Nalule Kulistina not Nalule Christine who at the time of her death had transferred the said certificate of title to the suit land into the names of the applicant/2nd defendant.
25. The respondent in her affidavit in reply under paragraphs 3,6 & 8 states that the names Nalule Christine and Nalule Kulistina all referred to one and the same person being the person whom she got the letters of administration for, she also states that the applicant/2nd defendant has at all times during the proceedings of Civil Suit No.321 of 2022 indicated that he is dealing with the Administrator of the Late Nalule Christine who is the former registered proprietor to the suit land. This speaks to the fact that Nalule Christine and Nalule kulistina referred to one person.
26. This is one of the issues that falls under the doctrine of Idem Sonans, the same doctrine states that a person's identity is presumed known despite the misspelling of his or her name if the misspelt name sounds the same when pronounced. This applies to names of a person used in pleadings so as to avoid liability, this principle is one of fact and may be determined by court when the issue is free from doubt.
27. Under the rule of Idem Sonans, absolute accuracy in spelling names is not required in legal documents. If a name in the document ,though different from the correct spelling of it conveys

to the ears when pronounced a sound practically identical with the sound of the correct name as commonly pronounced, it may be sufficient designation of the individual person referred to. *(See; Civil Procedure and Practice in Uganda by Justice Musa Ssekaana and Salima Namusobya Ssekaana at Page 18)*

28. The principle of Idem Sonans is that though a person's names have been inaccurately written the identity of such persons will be presumed from the similarity of the sounds between the correct pronunciation and the pronunciation as written. *(See; Orr Vs Byers, by the Court of Appeal of California 1988)*
29. Referring to the pleadings of both parties Nalule Christine and Nalule Kulistina as referred to speak to the same person despite the difference in the spellings of the names. And it can be inferred from the onset that the applicant/2nd defendant was referring to the same person.
30. In conclusion, the respondent/plaintiff has locus to bring Civil Suit No.321 of 2022 therefore the issue is resolved in the negative.

c) Whether the plaint vide Civil Suit No.321 of 2023 discloses any cause of action against the applicant/ 2nd defendant?

31. A cause of action connotes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. *(See; Gladys Nduku Nthuki Vs. Letshego Kenya & Anor, Kenya High Court Civil Suit No. 007 of 2021)*
32. In **Tororo Cement Co. Ltd Vs Frokina International Ltd SCCA No. 2 of 2001 at page 10** the Supreme Court guided that the plaintiff must plead facts in the plaint which if proved would entitle him to judgment in respect of the claim in the plaint. That the plaintiff must prove that

he or she enjoyed a right which is protected by statute, common law or equity, that that right was violated and that the defendant is responsible for such violation to entitle him to the reliefs sought. (*See; Auto Garage & Anor Vs. Motokov, 1971 E.A 514*).

33. In ascertaining whether a plaint discloses a cause of action or not, court should limit its self to the plaint and the annexures thereto and nothing more or nothing less. (*See Kebirungi Vs. Road Trainers Ltd & 2 others, 2008 HCB 72*)

34. In **Yaya Towers Limited Vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** court expressed itself thus; *“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”*

35. In the instant application, the applicant in his affidavit in support of the application under Paragraph 2(b), 14 & 20 discloses that the plaint filed by the respondent in Civil Suit No. 321 of 2022 does not disclose any cause of action against him and he prays for the same to be struck out since he did not take part in the fraud.

36. The respondent in his affidavit in reply refers to the plaint under paragraph 4 where the respondent in 15 paragraphs stated the details of how the cause of action arose and she further particularizes fraud as the cause of action.

37. Drawing reference to the plaint on the face of it, it can be inferred that indeed there is a cause of action disclosed by the pleadings of the respondent/plaintiff that is subject to the rules of evidence, this court cannot bar the respondent/plaintiff from being heard in civil suit no. 321 of 2022 over the same cause of action.

38. Therefore, the plaint vide Civil Suit No. 321 of 2022 discloses a cause of action against the applicant/2nd defendant the same is resolved in the negative.

d) Whether civil suit No.321 of 2022 should be struck out for failure by the respondent to comply with court's directions?

- 39.** The applicant in his affidavit in support of the application under paragraphs 15 & 16, avers that the respondent did not comply with directions to file her witness statement and trial bundles by 16th January 2023.
- 40.** The respondent in her affidavit in reply states that as per court record all the respondent's/plaintiff's documents were filed which include trial bundles and witness statements and that the applicant's ground for dismissal failure to comply with directives of court lacks merit and the same doesn't hold water.
- 41.** I will draw reference to **Article 126(2)e of the 1995 Constitution of Uganda as amended** which provides for the substantive hearing of the matter on its merits without undue regard to technicalities should come into play. It would be unfair to deny the respondent's/plaintiff's case to be heard yet the steps of pre-trial have been complied with.
- 42.** In conclusion Civil suit No.321 of 2022 cannot be dismissed on ground of failure to comply with court directives of filing of trial bundles and witness statements by the respondent/plaintiff, therefore this issue is resolved in the negative.

e) Whether in the alternative the respondent/plaintiff should deposit security for costs?

- 43.** The law on security for costs is provided for under Order 26 Rule 1 of the Civil Procedure Rules and it is to the effect that court may if it deems fit order for payment of security for costs that are to be incurred by the defendant.
- 44.** The primary considerations as stated in the case of **Galukande Vs Kibirige, Misc.App. No.261 of 2018** which include; whether the applicant/defendant is being put to undue expenses of

defending the frivolous and vexatious suit, that the applicant/defendant has a good defense to the suit, It is only after the consideration of the above factors that issues, like inability come in.

45. The applicant in his affidavit in support discloses that the respondent's Civil Suit No.321 of 2022 is frivolous and vexatious and that he is being put to undue expenses to defend the said suit. He further states that the Late Nalule Christine never left behind any property and the suit land does not form part of the estate of the late Nalule Christine.

46. The respondent in his reply avers how the plaint vide Civil Suit No.332 of 2022 is not frivolous and vexatious as alleged since the same raises' triable issues for determination by court.

47. The question as to whether Civil Suit no.321 of 2022 is frivolous or vexatious is subject that is subject to determination of court regarding the same suit, this is because the pleadings of the respondent/plaintiff raises triable and contested issues. Further the applicant states that the suit property did not form part of the estate of the late Christine and that the late did not leave behind any property entitling the applicant/2nd defendant to security for costs.

48. In conclusion, I am of the view that such an aspect is subject to findings of court, why would the applicant/defendant rush to make the finding that the Late Nalule Christine never left behind any properties with the uncertainties regarding ownership and proprietorship of the suit land, therefore the issue is resolved in the negative.

Determination of court;

49. This honorable court will proceed to determine all the issues concurrently raised by the applicant vis-à-vis the principle of law stated in Order 6 rules 29 of the Civil Procedure rules, court will only consider the pleadings of the parties and the law regarding the claims.

- 50.** For a suit to be dismissed under Order 6 rule 29 of the civil procedure rules, court only refer to pleadings of the parties and the law regarding the same, however where the points of dismissal are premised on contested facts where parties are to adduce evidence to prove the same, then a suit will not be dismissed under Order 6 rule 29 of the civil procedure rules but rather proceed with the hearing of the suit.
- 51.** The grounds raised by the applicant in this application are aspects which are contested by both parties in their pleadings and subject the principles of evidence.
- 52.** This honorable court dismissing Civil Suit No.321 of 2022 under Order 6 rule 29 of the civil procedure rules would not only have closed the doors of justice to the respondent/plaintiff to the said suit but also leave litigants in a state of confusion.
- 53.** This honorable court is of a finding that the orders sought by the applicant cannot be granted but the same can be achieved in the determination of the Civil Suit No.321 of 2022.
- 54.** Accordingly, it is the finding of this court that the application lacks merit, the same is dismissed and the point of law is hereby overruled. Costs of the application to be in the main cause.

I SO ORDER.



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NALUZZE AISHA BATALA

JUDGE

23rd /10/2023