


of title have been placed before this court for adjudication. That a competent court has already pronounced itself on the said issues and the judgment has never been appealed. That the instant suit is a disguised appeal with the effect of altering or confirming the decision of the Chief Magistrates Court.

3. The Respondents opposed the application through an Affidavit deposed to by the 4th Respondent, with written authority from the 1st, 2nd and 3rd Respondents. She averred that they are Administrators of the late Abraham Pellew Nkalubo Waligo whose estate comprises the suit land and are in possession of the original duplicate certificate of Title to that effect. That the Applicant has never been in possession of the suit land but the Respondents. That the Respondents learnt of the fraudulent acts and illegalities committed by the Applicant and his co-fraudsters in early October 2014 on information from the occupants of the suit land and upon inspecting the Register at Wakiso Mailo office. That the Applicant was aware of his predecessors' fraud and the Respondents' interest in the suit land but transacted on the same to defeat the latter's interest thereon.
4. Further, that only parties to a criminal case can appeal against it but Criminal Case No. 1389 of 2016 was instituted by the Director of Public Prosecution and the Respondents were not parties to it. That they have never instituted any suit against the Applicant or any of the parties to the head suit in respect of the suit land. That the burden and standard of proof and remedies sought in criminal cases is different from civil cases and the remedies sought in the head suit, could not be obtained in the said criminal case. Finally, that Section 38 of the Evidence Act cap 6 or any other law does not bar the head suit or this application.
5. In rejoinder, the Applicant averred that he has been in possession of the suit land since 2014; and that he never participated in any fraud while acquiring the suit land or been aware of any fraud. That the Respondents need not be parties to the criminal matter for this suit to be barred by law, and the burden of proof in both criminal and civil matters is on the party alleging presence of the alleged facts. That had the Applicant been convicted by the lower court, the Respondents would have gotten the remedies sought in this suit under Count 5 of fraudulent procurement of title contrary to Section 190 of the Registration of Titles Act. Subsequently, that the title and name of the Applicant would have been cancelled by the


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lower court and the Respondents would apply to this Court for consequential orders to that effect.

6. During hearing of the application, the Applicant was represented by M/s Oketcha Baranyanga & Co. Advocates while the Respondents were jointly represented by M/s Nexus Solicitors & Advocates and Najjuma, Nakalule & Co. Advocates. Counsel for the parties filed written submissions which I have considered.
7. The following issues were raised by the Applicants' Counsel for determination by this court; -
 - i. Whether Civil Suit No. 159 of 2022 is an abuse of Court process and barred by law due to the existence of the judgment in Criminal Case No. 1389 of 2016 in the Chief Magistrates Court of Makindye at Makindye?
 - ii. Whether Civil Suit No. 159 of 2022 is time barred?
8. In his submissions in reply, Counsel for the Respondents raised a preliminary objection about the validity of the affidavit in support of the application and rejoinder. He argued that the affidavits sworn by a one Alex Kafeero, an Advocate in Okecho Baranyanga & Co. Advocates who are the legal representatives of the applicant offends Regulation 9 of the Advocates (Professional Conduct) Regulations S.I 267-2.
9. That Regulation 9 (supra) provides bars an Advocate from appearing in a matter which he or she has reason to believe that he or she will be required as a witness; except on a formal or non-contentious matter. Counsel argued that the said advocate is named as the 1st witness on the Applicant's summary of evidence which is attached on the application.
10. Counsel further cited the case of **Henry Kaziro Lwandasa Versus Kyas Global Trading Co. Ltd. Misc. Appln No. 865 of 2014**, where Madrama J. (as he then was) held that "*the regulation bars an advocate who may be required to appear as a witness to give oral or affidavit evidence in any contentious case or matter from appearing before any court or tribunal hearing the matter. The regulation is permissive on one part and mandatory on another part*". He prayed that the affidavits in issue be expunged from the court record for violation of the legal provisions stated above.
11. In reply, Counsel for the Applicant contended that the said Regulation has been misinterpreted. That the Regulation bars an Advocate in his individual


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capacity to appear or be on record in court or tribunal in a matter he has reason to believe that he will be required to testify as a witness. That in the instant matter, a different advocate (*Seninde Saad*) appears or is on record in court and another advocate (Alex Kafeero) swore the affidavit in support of the application though both Advocates are from the same law firm. That the impugned affidavits are properly sworn.

12. I have considered Regulation 9 of the **Advocates (Professional Conduct) Regulations SI 267-2**, which I shall not reproduce. I have also appreciated the decision of court in **Henry Kaziro Lwandasa vs. Kyas Global Trading Co. Ltd (supra)**, but I find it distinguishable from the facts of the instant case.

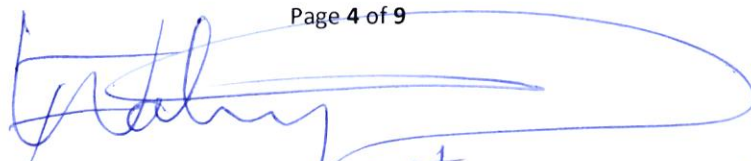
13. In addition, I note that in **Uganda Development Bank vs. Kasirye Byaruhanga & Co. Advocates, SCCA No. 35/1994**, the Supreme Court guided that an Advocate who finds him/herself in such a situation, like in this case, has to choose whether to act as a witness or as Counsel. Furthermore, in **MA No. 036 of 2023: The Most Reverend Dr. Steven Samuel Kazimba Mugalu Vs Mazzi Joyce & 5 Ors**, Dr. Justice Flavien Zeija properly observed that *"where an advocate does not appear in personal conduct of a matter, he/she can depose an affidavit on matters within his knowledge on behalf of his client, a best example is an advocate supporting an application raising a point of law"*.

14. In view of the above authorities and observation, I agree with the Applicant's Counsel that the aforesaid Regulation only affects an individual Advocate and not the entire law firm. In this case, the impugned affidavits were deposed to by Alex Kafeero. However, the said deponent is not the one in personal conduct of the application, as per the record. Consequently, I find that the deponent is not barred from deposing to the impugned affidavits. Accordingly, the preliminary objection is hereby overruled. The Application shall proceed on its merits.

Issue No.1

Whether Civil Suit No. 159 of 2022 is an abuse of Court process and barred by law due to the existence of the judgment in Criminal Case No. 1389 of 2016 in the Chief Magistrates Court of Makindye at Makindye?

15. Counsel for the Applicant submitted that the suit is barred by **Section 5 of the Civil Procedure Act, and Sections 38 and 41 of the Evidence Act** due to the presence of a binding judgment of the Chief Magistrates Court Makindye in Criminal Case No. 1389 of 2016 that has never been appealed.



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16. That the instant suit is about the same subject matter with similar issues for determination that is, forgery of a judicial document and fraudulent procurement of title of the suit land by the Applicant. That the remedies sought in the suit are provided for under Section 190 of the Registration of Titles Act from which one of the counts in the charge sheet was coined.
17. That there would be no need of this suit against the Applicant had he been found liable for forgery and fraud in the lower court.
18. Counsel relied on the case of **Core Woods Ltd Vs Senyoga Mohammed Mutenda & 7 Ors HCCS No. 67 of 2010** where Justice Bashaija stated that:
I therefore concur with submissions of the various Counsel for the defendants that the present suit is barred by law under Section 5 of the CPA. The Plaintiff is estopped from seeking to enforce the terms of an invalid sale agreement by Section 114 of the Evidence Act. The Judgment in the criminal Court is without doubt a relevant fact in issue in the instant case. There was no appeal against it, it stands and operates as a bar to this suit as a subsequent proceeding in court.
19. Counsel also submitted that the 1st and 4th Respondents initiated and testified as PW1 and PW2 respectively in Criminal Case No. 1389/2016. That the judgement was delivered to the effect that the Applicant neither forged nor uttered the decrees and never participated in the fraudulent acquisition of a certificate of title in Block 272 Plot 35. That the Respondents have never appealed the said judgement to date.
20. Counsel submitted further that the Chief Magistrates Court at Makindye already faced the same issues which are to be resolved in the head suit. He added that from the Plaint, the Respondents want this court to determine similar issues as it was in Criminal Case No. 1389/2016. He added that this court cannot entertain the same issues against the same opponent if it is not an appeal. That the suit amounts to an abuse of court process as was established in the Nigerian case of **R-Benkay Nigeria Ltd Vs Cadbury Nigerian PLC SC 29 of 2006** which outlined circumstances which give rise to abuse of court process, that is;
- a. Instituting multiplicity of actions on same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties where there exists a right to begin the action.


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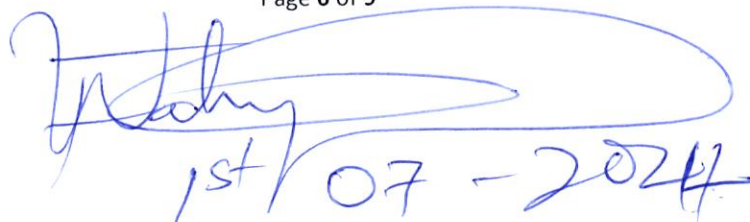
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and the respondents' notice.
- d. Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court.
- e. Where there is no law supporting a court process or where it is premised on frivolity and recklessness.
- f. Where a party has adopted the system of forum shopping in the enforcement of a conceived right.
- g. Where two actions are commenced, the 2nd asking for a relief which may have been obtained in the first. In that case, the 2nd action is prima facie, vexatious and an abuse of court process.

21. In reply, the Respondents' counsel submitted that the determination of a criminal case or civil case on the same fact/transaction is not a bar for commencement or continuing either of them since the burden and standard of proof, and remedies are different. He relied on **Joseph Zagyenda vs Uganda HCR-00-CR-CM 003 of 2011** where the trial judge relied on the case of **Esso Standard (U) LTD Vs Nabudere HCCS No. 594 of 1990** and reiterated that:

...why should plaintiff's legal rights be pegged on the speed with which the police carry on their inquiries when the plaintiff is the person that was hurt most, and more especially, when the judgment in the civil suit has no weight to be attached to by the court sitting in a criminal trial? The judgment in civil suit cannot influence the judgment in the criminal case as the prosecution in the criminal trial must pursue its case, against the accused beyond reasonable doubt.... while in civil case the proof by a plaintiff is on preponderance of probabilities.....

22. The same Court held further that, "there is a clear distinction between civil and criminal actions. The civil proceedings determine the civil litigants' civil claims or liabilities and the standard of proof is on balance of probabilities."

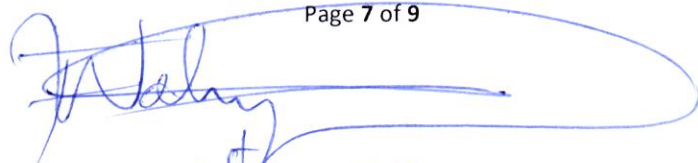
23. Counsel submitted further that, the facts in the case of **Core Woods Limited Vs Senyonga Mohammed Mulenda (supra)** are distinguishable from those in the present case since court did not pronounce itself on whether every decision in a criminal case bars a subsequent civil suit on the same facts.


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He added that a complainant in a criminal case is free to seek remedies from the civil court in the event that the remedies sought were not obtained in the criminal court.

Resolution

24. This application was brought under **Section 5 of the Civil Procedure Act** which provides that “any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognisance is either expressly or impliedly barred”. Under **Section 2 (b)** of the same **Act**, a ‘court’ means, ‘any court exercising civil jurisdiction’.
25. What is deducible from the above provisions is that for a party to rely on a judgement to bar subsequent suits, the judgement must have come from a competent court exercising civil jurisdiction. This is not the same concerning the facts before me now.
26. Further, the judgment of the lower court in a criminal trial indicates that judicial documents were indeed forged. However, the evidence before court was insufficient to attribute the forgery to Applicant (See. Page 3 of the judgment). To this extent, it is recalled that the standard of proof in criminal matters is beyond reasonable doubt, as rightly expressed by the Respondents’ Counsel. That is unlike the standard of proof at which the Respondents’ will be required to prove their case in HCCS No. 208/2022; the standard of proof in that case will be on a balance of probability applied in ordinary civil cases but not beyond reasonable doubt as it was required in Criminal Case No. 1389/2016 (See. **Kampala Bottlers Limited v. Damanico (U) Limited, S. C. Civil appeal No. 22 of 1992**).
27. Besides the distinction in the standard of proof, civil and criminal trial differ in the purpose, as the aim at punishing offenders while the former aim at offering remedies to parties whose rights are affected. There is nothing that bars either of them from taking course concurrently or consecutively in order to achieve their intended purposes. For instance, in **Bumbakali Vs Muhairwe & Ors, HCCS No. 36 of 1999**) Justice Flavian Zeija pointed out that, “evidence of a conviction in a criminal matter can be used in a civil matter”. Similarly, in **Joseph Zagyenda Vs Uganda (supra)**, it was pointed out that, judicial efficiency will best be promoted by the expeditious disposal of both the criminal and civil proceedings.


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28. I agree with the Respondents' Counsel that the facts in the case of **Core Woods Limited Vs Senyonga Mohammed Mulenda (supra)**, are distinguishable from those before me. In that case, the court dealt with a situation where parties to an agreement of sale of land had been restored to their original positions under a criminal case, and the subject matter for the suit had already been transferred to third parties as a result of that. Justice Bashaija rightly observed that:

...the orders sought if granted would soon run into difficulties. The plaintiff was refunded back its money that the 1st Defendant had fraudulently obtained. Therefore, a declaration that the plaintiff is the legal owner of the suit land for which the plaintiff has not paid any consideration would be premised on erroneous grounds since each party was restored to their former position...the judgement in the criminal court is without doubt a relevant fact in issue in the instant case.

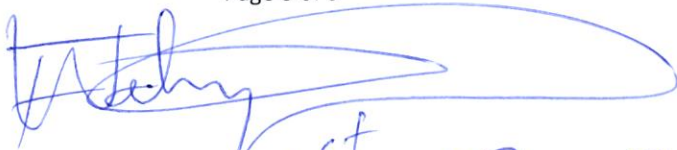
29. In that case, the court's reasoning that the judgment in the criminal case was a bar to subsequent suits was based on the fact that there was no binding agreement and the suit land was no longer available for adjudication. Therefore, the suit was moot.

30. In view of the above observations, I find that whereas the prosecution of the Applicant in a criminal trial and the resulting judgement may be piece of evidence in a civil trial, it is not a bar to the institution of a civil suit. Accordingly, the first issue is found in the negative.

31. Issue 2. Whether Civil Suit No. 159/ suit No. 208 of 2022 is time barred?

Counsel for the Applicant submitted that the late Abraham P. N. Waligo died in 2000; and that the Respondents as beneficiaries ought to have taken charge of the suit land since then. That the first transfer was executed in 2008 and thus the time to commence the suit but, the Respondents have waited for 14 years to file the suit. Consequently, that is beyond the 12-years period provided for under Section 5 of the Limitations Act hence making the suit time barred.

32. In reply, Counsel for the Respondents based his submissions on **Patrick Lyamulenye Vs Stephen Kwiringira & 3 Ors HCCS No. 118 of 2019**, and **Section 25 (a) of the Limitation Act**, which provides that, "*...the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it*". He


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argued that a cause of action for the Respondents, as Administrators, began to run from the time they were granted Letters of Administration in respect of the estate thus, 16/12/2020 and that a suit premised on an illegality as a cause of action is not limited.

33. Section 5 of the Limitations Act bars actions for recovery of land by any person brought after expiry of 12 years from the date on which the right to action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person. The exception to that is under Section 25(a) of the Limitation Act, as rightly submitted by the Respondents' Counsel.

34. According to the amended plaint, it is alleged, under paragraph 7 (h) and (n), that the late Abraham Pellew died in March 2000, and that the 1st and 2nd Defendants, in connivance with other defendants, forged and back dated a decree of the Chief Magistrates Court and the High Court; and in 2008, fraudulently created a special certificate of title of land comprised in Kyadondo Block 272 plot 35 at Mutungo. That subsequently, the 1st and 2nd Defendants got registered on a certificate of title using the forged decree.

35. The above statement implies that the cause of action arose when the suit land was transferred to the 1st and 2nd Defendants, which is ideally more than 12 years. However, the plaintiffs raised an exception under paragraphs (l), (m) and (dd) of the plaint, by pleading that they discovered the fraudulent acts or illegalities in early October 2014.

36. From the above, I find that the exception under **Section 25(a) of the Limitation Act** about postponement of the limitation period in cases of fraud applies in this case. Accordingly, the cause of action arose in 2014 after the alleged discovery of the fraud. In conclusion, the Respondents' suit is not time barred. This answers the second issue in the negative.

37. In the result, the application is dismissed with costs.

Signed, dated and delivered at Kampala this.....^{1st} day of ^{July}.....2024


Nabakooza Flavia. K
Judge