

98 of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 and 2 of the Civil Procedure Rules, Statutory Instrument 71-1 against the two (2) respondent jointly or /and severally.

1.2 This application is seeking the following orders; that:

(a) This honourable Court be pleased to review, vary or set aside the ruling made in Originating summons NO. 5 of 2008.

(b) Originating summons No. 5 of 2008 be heard and determined on its merits.

(c) The costs of this application be provided for.

1.3 This application is based on the grounds which are well set out in the affidavit of Mrs Dorothy Nandugga, Kabugo, which is in support of this application, and the supplementary affidavit that was sworn by the application, Mayanja Bosco, sworn on 12th September, 2011, but briefly they are that:

1. The ruling made during the hearing of the preliminary objection on a point of law in O.S No. 5 of 2008 was erroneous and offends the principles of natural justice.

2. There is no justification for the honourable Judge's Order to the police in O.s No. 5 of 2008 to investigate fraud and prosecute the perpetrators thereof before she could foreclose the mortgage yet this honourable Court has jurisdiction to preside over matters of fraud.

3. It is in the interest of justice that this application is heard and disposed of.

1.4 The respondents are represented by Sebalu & Lule Advocates. The respondents through the two affidavits sworn by the 2nd respondent on 16th February, 2012 (affidavit in reply) and 6th September, 2012 (supplementary affidavit) vehemently oppose this application. The affidavits evidence by the 2nd respondent raises triable issues. That is, the respondents deny in total

all the applicants' allegations in this application and in his affidavits evidence in support of this application.

1.5 Scheduling conference of this application.

1.5.1 On 7th /09/2012 when this case came up for scheduling conference by consent of the parties, this miscellaneous application No. 527 of 2010 was withdrawn with the following orders:-

(a) The Originating Summons NO5 of 2008 shall be heard and determined interparties by this Court.

(b) Each party shall bear its own costs.

1.5.2 On 10th September, 2012, the Originating Summons no 5 of 2008 came up for scheduling conference. On that date Mr. Nicholas Elimu together with Mr. Mafabi Micheal from Sebalu &Lule Advocates for respondents and Ms Dorothy Nandugga Kabugo, Counsel for the plaintiff discussed the entire application by the Originating Summons.

In her address to court, after the said application, Ms Dorothy Nandugga Kabugo submitted to Court:-

“We have had a discussion and after careful examination of the facts on record, we have agreed that before this application is withdrawn we shall filed written submissions on the preliminary objection relating to limitation of time. The ruling shall guide us on the issue of costs”.

In reply, Mr. Nicholas Elimu for the defendants stated:-

“Basically we made a proposal in respect of costs. We intimated to the plaintiff and his Counsel that they pay Shs 10,000,000/= (ten million) as costs. The plaintiff thinks that it is not applicable.”

The Counsel for the defendants then raised the following preliminary objections.

(a) Whether this suit is barred by limitation.

(b) Whether the suit is properly before this Court by way of Originating Summons.

2.0 Originating summons no. 5 of 2008 between the parties.

2.1 Before dealing with the above raised preliminary objections it is important to know what Originating Summons no. 5 of 2008 is all about. This application was brought against the defendants by way of originating summons under Section 8 and 9 of the Mortgage Act, Cap.229 and Section 25 (a) of the Limitation Act, Cap. 80 and Order 37 rule 4 of the Civil Procedure Rules. This application is seeking for the determination of the following questions:-

- 1) Whether the defendant/mortgagor, having failed, in spite of repeated demands, to pay to the plaintiff/mortgagee the sums advanced, should be foreclosed of his right to redeem the mortgaged property.**
- 2) Whether the plaintiff/mortgaged should be permitted to sell the mortgaged property upon foreclosure in accordance with the law.**
- 3) Whether the plaintiff/Mortgage should be granted costs of this suit.**

3.0 Summary of the facts that lead to a dispute;

The plaintiff filed this originating summons claiming an interest as equitable mortgagee in respect of land comprised in Kyadondo Block 257 plot 41, Land at Munyonyo, the suit land. The plaintiff's claim is that on the 8th January, 1983, he advanced a sum of Ugshs.550, 000/= as a friendly loan to the 1st defendant under a loan agreement. That the 1st defendant deposited her certificate of title as security for the loan, pursuant to which the plaintiff became an equitable mortgagee of the property. The plaintiff further claims that the loan was repayable in a period of six (6) months failure upon which the 1st defendant would pay interest of 6 % for the next six (6) months. The plaintiff claims that despite several demands to the 1st

defendant to refund the monies, the 1st defendant failed to pay hence this suit in which the plaintiff seeks to have the following questions answered by Court;

- (a) Whether the defendant/mortgagor, having failed, in spite of repeated demands to pay to the plaintiff/mortgagee the sums advanced, should be foreclosed of her right to redeem the mortgaged property.**
- (b) Whether the plaintiff/mortgaged should be permitted to sell the mortgaged property upon foreclosure in accordance with the law.**
- (c) Whether the plaintiff/Mortgage should be granted costs of this suit.**

The plaintiff also makes several allegations of fraud against the defendant which he alleges precluded him from enjoying his interest in the land an exercising his rights as an equitable mortgagee.

The defendants deny the allegations of the plaintiff. The 1st defendant does not know the plaintiff and has never obtained any money from the plaintiff or signed any agreement with the plaintiff.

4. Resolutions of the preliminary objections raised by the defendant by Court

4.0 Issue 1: Whether the defendant/mortgagor, having failed, in spite of repeated demands to pay to the plaintiff/mortgagee the sums advanced, should be foreclosed of her right to redeem the mortgaged property.

Counsel for the defendants submitted that the plaintiff's suit based on the facts of the case is barred by limitation. He referred to a number of authorities to support his arguments. Counsel for the plaintiff does not agree. She submitted that it is the defendants' case that this suit is barred by limitation. The plaintiff's case is based on a loan agreement dated 8th January, 1983 attached as annexure "A" to the Originating Summons pursuant to which the 1st defendant deposited her title for the suit property as security for the said loan. It is the plaintiff's case that the said loan advanced to the 1st defendant was to be refunded within a a period of six (6) months failing which interest would be payable for the next six (6) months. Despite several demands to the 1st defendant, she did not pay the money and has not done so to date. The plaintiff

therefore comes to this Court seeking the remedy of foreclosure as an equitable mortgagee of the suit property.

It is undoubtedly discernable from the plaintiff's pleadings that his cause of action against the 1st defendant arose at the point of the 1st defendant's default on payments of the loan on or about the 8th July, 1983. It is at this point that the plaintiff was entitled to pursue his rights under the loan agreement to recover or foreclose on the mortgage.

Section 18 (1 of the Limitation Act provides;

“ No action shall be brought to recover any principal sum of money secure by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued.” (Emphasis added)

Counsel for the defendants' submitted that the plaintiff's right to receive money accrued to him under the alleged equitable mortgage was on the 8th July, 1983. The plaintiff chose to pursue his right to recover the said money in the year 2008, 25 years after his right to receive money accrued.

He also submitted that this suit is barred by limitation and the same would be out rightly rejected. The plaintiff does not in his pleadings even show any legal grounds of exemption why he did not pursue his right at the time it accrued to him.

“If a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint and no grounds of exemption are shown in the plaint, the plaint must be rejected”.

In support of this statement of law we rely on the case of **Uganda Railways Corporation vs Ekwaru D.O and 5104 others Court of Appeal Civil Application NO. 185 of 2007.**

This Court is enjoined to only look at the plaint, in this case the originating summons, to decide the question whether this suit is time barred in light of the facts alleged. See

the case of **D.P. Sachania & another vs Hirji Pitamber [1958] E.A 503** to illustrate this point.

Counsel for the plaintiff correctly admits in their submission that actions for recovery of land or recovery of any principal sum of money secured by a mortgage or charge must be brought within 12 years. Counsel for the plaintiff in their submissions specifically also agree that the plaintiff's cause of action, if any accrued to the plaintiff in 1983.

The plaintiff has pleaded political instability that did not enable to him to file this suit within the prescribed statutory time. It is our submission that a political instability is not a ground to support a claim of disability to bring an action in this regard.

The definitive scope of what amounts to a disability was provided by the Court of Appeal in the case of **Departed Asians Property Custodian Board vs Dr. J.M Masambu, CACA No. 04 of 2004** significant amendment to the law, the Court of Appeal ruled that the only categories of disabilities accepted in law are infancy and unsoundness of mind.

The word “**disability**” is defined by the Black's law Dictionary as “inability to perform some function; an objectively measurable condition of impairment, physical or mental.” Uganda's Limitation Act, Cap.80, in its interpretation section, states that a person **shall** be deemed to be under a disability while he/she is an infant or of unsound mind. (emphasis is added). In affirming this application, Twinomujuni JA in the Masambu case cited above pointed out that a previous amendment in the Limitation Act that saw provisions of Section 8 (2) transferred to the interpretation Section of the Act had the effect of severely limiting the scope of what amounts to a disability. A key feature which the Court of Appeal took note of is the use of the words “**shall be deemed**” which denotes mandatory compliance.

In fact, in effecting the amendments to the Limitation Act, earlier decisions like **Sowali Kadim vs Attorney General [1971] HCB** and **Fred Mungecha vs Attorney General [1981] HCB 34**, which had attempted to widen categories of disability were explicitly overruled by the legislature. It is their submission that the only categories of disability permissible in law are infancy and unsoundness of mind and the plaintiff does not fall within any of these categories.

The plaintiff has belaboured to go so much into detail regarding incidents of alleged fraud against the defendants which enable the plaintiff to enjoy the benefit of S. 25 9b) of the Limitation Act. He submitted that there is no evidence whatsoever to prove that the defendants are guilty of any concealment by fraud. To say the least, the plaintiff's allegations are false, baseless and unsupported by evidence as required by law.

In the premises, I hold that this suit by way of originating summons is time barred. The originating summons therefore offends order 7 rule 11 of the Civil Procedure Rules, S.I. 71-1.

2 Issue two: Whether the plaintiff/mortgaged should be permitted to sell the mortgaged property upon foreclosure in accordance with the law.

Counsel for the defendants in his submissions argued that this suit was brought wrongly before this Court by way of originating summons. He argued that since the plaintiff was basing his claims on fraud he would have brought to Court his claims by way of a plaint. Counsel for the plaintiff did not agree. She argued in her submissions that according to **William v Morgan [1906] 1 CH.804** foreclosure cannot be sought before the contractual obligation repay has been broken.

The procedure for making the application to court to foreclose a mortgaged property is by Originating Summons under O.XXXVIII R.4 Civil Procedure Rules SI 71-1. This rule provides that:

“ any mortgage or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before a judge in chambers, for such relief of the nature or kind following as may be by the summons specified and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee”.

Rule 8 of the same order provides for the practice upon application of summons and states that:

- (1) An originating summons shall be in Form 13 of Appendix B to these rules, and shall specify the relief sought.
- (2) The person entitled to apply shall present it ex-parte to a judge sitting in chambers with an affidavit setting forth concisely the facts upon which the right to the relief sought by the summons is founded, and the judge, if satisfied that the facts as alleged are sufficient and the case is a proper one to be dealt with on an originating summons and give such directions for service upon person or classes of person and upon other matters as may then appear necessary.

In the instant case, instead of hearing the ex-parte arguments of Counsel for the plaintiff justifying presentation of the suit by Originating Summons as required by the law, the Judge issued the summons to both parties and on the 1st appearance, the defendants raised the preliminary objection on limitation of time, which recorded and even invited witnesses to adduce evidence thereon. This was in spite of the plaintiff's objection to the procedure adopted which Court stated would be dealt with as soon as a ruling on the preliminary objection is made.

It is counsel for the plaintiff's submissions therefore that bringing this suit by Originating Summons is the correct procedure and at we are at the stage of the suit where this honourable Court should apply the provisions of Rule 10 to the effect that

on the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he or she may deem necessary and may give such direction as he or she may think just for the trial of any issues arising upon the summons, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

The plaintiff has deponed to facts/acts of fraud allegedly perpetrated by the defendants in paragraphs 11 and 13 of his affidavit in support to the originating summons.

A pleading of fraud is governed by Order 6 rule 3 of the CPR which requires that where a party pleading relies on fraud, the particulars with dates shall be stated in the pleadings. It is also trite law that fraud must be specifically pleaded and proved by way of evidence.

The principle of law is that in all cases where Fraud is alleged, it must be actual fraud and it must be proved strictly, the burden being heavier than on balance of probabilities generally applied in Civil matters. Needless to say, that fraud must be attributable to the transferee. These principles are enunciated in the classic case of **Kampala Bottlers Ltd vs Damanico (U) Ltd SCCA No. 22 of 1992.**

That an allegation of fraud cannot beyond any stretch of imagination be brought to this Hon, Court by way of evidence of an affidavit. In the judgment of the Hon. Justice Platt JSC (as he then was) in the Kampala Bottlers case at page 4 thereof, he states thus; “Fraud is a very serious allegations to make, and it is: as always, wise to abide by the civil Procedure Rules Order VI Rule 2 (now 3)”. That the suit in its current form is improperly before Court. Suits in which fraud is alleged must be brought by ordinary plaint owing to the burden of proof imposed by law on an allegation of fraud.

Counsel for the defendants submitted that he agrees with the plaintiff that the correct procedure for foreclosure may be by way of originating summons. The operative word under order XXXVII r.4 of the CPR is “**may**”. A literal meaning of the word is to the effect that the plaintiff has another option besides bringing the suit by way of originating summons given the circumstances of each case.

That a number of facts which the plaintiff seeks to rely on in support of his claim are contested by the defendants. The allegation of the 1st defendant having obtained a loan from the plaintiff is contested. As they have indicated earlier, the 1st defendant does not know and has affidavit in reply. The defendants have shown in paragraph 6 of the affidavit in reply that the 1st defendant was not in Uganda at the time the alleged loan was obtained. The defendants also contest the allegations of fraud raised by the plaintiff.

The essence of the procedure of originating summons is to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question. For this proposition of law, we rely on the case of **Kulsumbai Gulamhussein Jaffer Ramji & anor vs Abdul Jaffer Mohammed Rahim & others [1957] E.A 699**.

That the questions raised in the instant case are neither simple nor clear cut, nor can they be determined by originating summons. The relief sought cannot properly be disposed of in a summary manner as the plaintiff would wish.

Accordingly, therefore, I hold that this suit was wrongly brought to Court by way of Originating summons. At the time of scheduling, after the parties discussed the law and the facts, the plaintiff’s Counsel ought to have withdrawn this suit.

5. Conclusion

5.0 The two preliminary objections are upheld in favour of the two defendants.

5.1 In the result and for the reason given hereinabove in this ruling, the suit against the defendants in originating summons no.5 of 2008 is dismissed with costs to the defendants.

Dated at Kampala this 7th day of May, 2013.

sgd

MURANGIRA JOSEPH

JUDGE