

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 226 OF 2005

ROSEMARY KABATAIZIBWA LWEMAMU.....PLAINTIFF

VERSUS

<ol style="list-style-type: none"> 1. FRANCIS SEMBUYA 2. RUTH BWOGI 3. HENRY MUBIRU 	}	<p>..... DEFENDANTS</p>
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BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON PRELIMINARY OBJECTION

When this matter was called for hearing, Counsel David Matovu for the 3rd defendant raised a preliminary objection (PO) that the suit is time barred as against the 3rd defendant. He referred to annexure **H** of the plaint which shows that the 3rd defendant got registered on the title for Kyadondo Block 248 Plot 342 on 28th May 1989. He submitted that this is the date the cause of action arose against him. He submitted that the plaintiff filed the suit in 2005 after sixteen years and no disability was pleaded. He contended that the period of sixteen years is clearly evidence of a suit which has been time barred. He prayed that the plaint be rejected with costs. He relied on section 5 of the Limitation Act and cited **Hajati Ziribagwa & Another V Yakobo Ntate HCCS No. 117/1991 [1994] II KALR 61** to support his position.

Counsel Daniel Rutiba for the plaintiff opposed the objection, arguing that it was misconceived. He submitted that the amended plaint clearly shows in paragraph 4(b) that the cause of action arose after July 1998 when the 1st defendant started appearing on the plaintiff's land with materials and started erecting a residential house. He also submitted that under paragraph 4(c) & (d) the plaintiff's action to stop the 1st defendant's actions including reporting the matter to the IGG and the latter's investigation up to 2002 was clearly pointed out in annexures **D** and **J** of the amended plaint. Thirdly, Counsel submitted that the date the 3rd defendant got registered is irrelevant in light of paragraph 4(b) & (c) of the amended plaint. He

argued that any evidence contradicting the plaintiff's evidence that she discovered the change in ownership between July 1998 when the 1st defendant first appeared on the land and 31st July 2002 when the Commissioner Land Registration wrote to the IGG can only be a matter of evidence and thus a matter for trial by court rather than a matter of law.

The plaintiff's Counsel further submitted that even if it was a matter of law, it would be covered by section 25 of the Limitation Act which postpones the limitation period in cases of fraud of the defendant to until the plaintiff discovers the fraud. He argued that since fraud was pleaded in the amended plaint as well as the original plaint, section 5 of the Limitation Act would be rendered inapplicable in the circumstances and/or is cured by section 25 of the same Act, since fraud had been pleaded against all the defendants. He contended that the case of **Hajati Ziribagwa & Another V Yakobo Ntate** cited by the 3rd defendant's Counsel was distinguishable from the instant case because, unlike in the instant case, it was apparent from the plaint in the cited case that the suit was time barred.

Counsel lastly submitted that the 3rd defendant has no *locus standi* to raise a PO as he had not complied with Order 8 rule 19 of the Civil Procedure Rules, in that he did not serve the plaintiff with a copy of the defence within the legally required time. He argued that the 3rd defendant's delivering a photocopy of the defence which had not been endorsed by the court registrar did not amount to filing of the same under Order 8 rule 19 of the CPR. He cited **Fazal Haq V Wasawa Singh s/o Jwala Singh Civil Appeal No. 28/1939 [1940] KLR Vol 19 page 23** to support his argument. He prayed that the objection be overruled with costs to the 3rd defendant and the matter proceeds to full hearing.

Section 5 of the Limitation Act provides as follows:-

“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the action accrued to him or her, or if it first accrued to some person through whom he or she claims, to that person.”

The plaintiff's claim against the defendants is for a declaration that she is the rightful owner of all that land comprised in Kyadondo Block 248 plot 342 and that the certificates of title comprising plots 651, 657 and 658 deduced from Kyadondo Block 248 Plot 342 be cancelled by reason of fraudulent transfer and sub division. It is alleged in paragraph 4 of the amended plaint that the defendant started appearing on the suit land around July 1998. It is pleaded that eventually the plaintiff commenced investigations into the alleged sale of her land with the Ministry of Lands and the IGG which revealed the land had been sub divided into three plots. The plaintiff pleaded fraud against the defendants. She contends in paragraph 5 of the amended plaint that the acts of the defendants in depriving her of her land are fraudulent.

Section 25 of the Limitation Act provides that where the action, among other things, is based on the fraud of the defendant or his or her agent or of any person through whom he/she claims or his/her agent, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it.

According to the amended plaint, the alleged cause of action against the defendants was discovered between July 1998 when the 1st defendant first appeared on the land and 31st July 2002 when the Commissioner Land Registration wrote to the IGG. This action was filed in this court on 9th September 2005 and the amended plaint was filed on 7th July 2009. The 3rd defendant who raised this objection only appears in the amended plaint filed on 7th July 2009.

In this case where fraud has been pleaded against the 3rd defendant, time should not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it, as provided in section 25 of the Limitation Act. Thus, if one was to count the time from the earliest date of July 1998 pleaded by the plaintiff to be the date when the 1st defendant was first seen by the plaintiff on the land, the plaintiff's cause of action against the 3rd defendant would be within time, considering that the twelve years would expire in July 2010. If the 3rd defendant has any evidence contradicting the plaintiff's pleading as to when the fraud was discovered, it would be a matter of evidence and consequently a matter for trial by court rather than a matter of law.

On the face of the plaint, this suit falls within the twelve years limitation period. I agree with the plaintiff's Counsel that the date of 28th May 1989 when the defendant got registered on the land is irrelevant where fraud has been pleaded against him, since time began to run from the time the fraud was discovered.

This case is distinguishable from **Hajati Ziribagwa & Another V Yakobo Ntate** cited by the 3rd defendant's Counsel. In that case unlike in the instant case, it was apparent from the plaint that the suit was time barred. The customary tenant in that case sought a remedy of cancellation of title for which he did not show disability having filed the suit twelve years after registration of the defendant.

On Counsel's submission that the 3rd defendant has no *locus standi* to raise a PO, Order 8 rule 19 of the CPR provides as follows:-

*“Subject to rule 8 of this Order a defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence **by delivering the defence or other pleading to the court for placing upon the record and delivering a duplicate of the defence or other pleading at the address for service of the opposite party.**”* (emphasis mine)

It was held in **Fazal Haq V Wasawa Singh s/o Jwala Singh**, cited above, that filing a defence is completed by two acts which are mandatory under Order 8 rule 19 of the Civil Procedure Rules, namely a delivery to court for placing upon the record, and delivering a duplicate to the other party. This was a decision of a court in Kenya, but the provisions of the rules relied on are equivalent to Order 8 rule 19 of the Uganda Civil Procedure Rules.

There is a written statement of defence by the 3rd defendant on the court record bearing a stamp of this court indicating that it was received on 14th October 2009. There is no affidavit of service on the court record to indicate how the plaintiff was served by the 3rd defendant. However, the submissions of the plaintiff's Counsel is that on 04/10/2011 the 3rd defendant's Counsel delivered a faint copy of the 3rd defendant's written statement of defence to the plaintiff's Counsel. It is more than two years since the copy was delivered. The record shows that since then, all Counsel have been appearing the several times the matter has been called, in addition to signing and filing a joint scheduling memorandum.

The plaintiff's Counsel's correctly argues that the manner in which the 3rd defendant's Counsel filed or served the written statement of defence did not amount to filing of the same under Order 8 rule 19 of the CPR. However, in the circumstances of this case, this could be regarded as a mere technicality that should not deny the 3rd defendant *locus* in this matter where he, through his Counsel, participated in the scheduling and made subsequent court appearances without objection from the plaintiff or his Counsel. In the spirit of Article 126(2)(e) of the Constitution, which requires substantive justice to be administered without undue regard to technicalities, this can be cured by the 3rd defendant filing and serving his defence as required under the rules. The document has been on the court record since October 2009. The plaintiff's Counsel has submitted that he got possession of the same in October 2011, and the same was relied on with other pleadings on record to prepare and file the joint scheduling memorandum.

In the premises, for the reasons given and authorities cited, the PO is overruled with costs to the plaintiff to be borne by the 3rd defendant. The matter should proceed to full hearing.

Dated at Kampala this 23rd day of May 2013.

Percy Night Tuhaise

JUDGE.