

plaintiff as owner thereof, a permanent injunction, general damages and costs of the suit.

The plaintiff claims that the late Alegizane (Alexander) Mudembuga, K. Ndugwa was the registered owner of the land comprised in Kibuga Block 8, plot 234 Mengo and by Will dated 1957, he bequeathed the said land to the late Lawulensio Mukiibi. Letters of Administration to the estate of the late Alegizane Mudembuga K. Ndugwa were allegedly granted to Alekizande Katende Ndugwa who died before transferring the said land to the late Lawulensio Mukiibi. The administrator of the estate of the late Alekizande Katende Ndugwa allegedly signed transfer forms in favour of the late Luwulensio Mukiibi who died before registering the said transfer. The plaintiff as administrator of the estate of the late Lawulensio Mukiibi attended the registry to effect the transfer into his name and found that the land was registered in the defendant's name.

3. Issues framed by parties to this suit.

From the above raised preliminary objections raised by Counsel for the defendant, the following issues were framed by the parties:-

3.1 Whether the plaint discloses a cause of action against the defendant.

3.2 Whether this suit is time barred.

4. Resolution of the preliminary objections by court.

4.1 Issue no.1: Whether the suit discloses a cause of action.

A cause of action is disclosed when it is shown that the plaintiff had right, and that right was violated, resulting into damages and the defendant is liable.

The decision in **Tororo Cement Co.Ltd vs Frokina International Ltd; Civil Appeal No. 21 of 2001** laid down the three essential elements to support of a cause of action:

- (1)The plaintiff enjoyed a right.
- (2)The right has been violated.
- (3)The defendant is liable.

In the instant case the plaintiff alleges that the land in question belonged to his late father Lawulensio Mukiibi as per translated Will in paragraph 5 of the plaint.

Under Section 180 and 192 of the Succession Act Cap. 162, the administrator or the executor of a deceased person is his legal representative and is entitled to all rights including suing on behalf of the deceased. Moreso, under Section 25 of the Succession Cap. 162 an administrator is a trustee who holds property on behalf of all beneficiaries.

Counsel for the defendant submitted that the plaintiff has no right/locus in his own capacity to bring a suit to recover what belongs to the estate where there is an appointed administrator and has instead brought present suit in his own right not as an administrator of the estate of the late Lawulensio Mukiibi.

Counsel for the defendant concluded by submitting that, therefore the plaintiff has no right or locus to sue in his own capacity. That it is their submissions that the plaint is incurably defective and should thus be struck of the record and the entire suit be dismissed with costs for failure to disclose of a cause of action.

Counsel for the plaintiff does not agree. He submitted that the plaint discloses a cause of action against the defendant. He prayed that the 1st preliminary objection be dismissed.

In **Cooke vs Gull LR 8E.P 116 and in Read vs Brown 22 QBD P.31**, a cause of action was defined as every fact which is material to be proved to

enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment. A perusal of the plaint shows that the plaintiff has pleaded all relevant facts to show that he has a cause of action against the defendant.

In paragraph 4 of the plaint, the plaintiff pleaded that the suit land belonged to the late Aligizane Muddembuga K. Ndugwa who by his will dated 14th December, 1957 bequeathed the same to the late Lawulensio Mukiibi the father of the plaintiff. This means that Lawulensio Mukiibi became the equitable owner of the suit land. Before he could be registered as the proprietor thereof he passed on. The plaintiff then acquired Letters of administration to his estate on 7th July, 2004. See annexure 'B' to the plaint.

Section 180 of the Succession Act provided that the administrator of a deceased person is his or her legal representative for all purposes and all the property of the deceased person rest in his or her as such. In **Maureen Tumusiime vs Macario and another [2006] I HCB 127** Court held that according to Section 180 of the Succession Act, ownership of the property of the deceased vests into the one being appointed administrator or executor through grant of Letters of Administration or probate.

Counsel for the plaintiff submitted that by obtaining letters of administration the plaintiff acquired the right and capacity to institute the instant suit against the defendant whom he said, fraudulently acquired the property of the estate of the late Lawulensio Mukiibi. In **Bulugeri vs Ntambi [2009] I HCB 61** Court held that grant of letters of administration enable the plaintiff to defend or commence action in respect of disputed property like in the instant suit.

In **Elly B Mugabi vs Nyanza Textile Industries Ltd [1992-93] HCB 227** Court held that a cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions. By the defendant allegedly fraudulently causing his registration as the proprietor of the suit land, his

actions adversely affected the plaintiff's interest in the suit land as administrator and beneficiary as well.

It is my finding that there are triable issues between the plaintiff and the defendant in this instant suit.

In **Kebirungi vs Road Trainers Ltd & 2 others [2008] HCB 72** Court held that the question whether a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it. From the perusal of the plaint on record together with the annexures, it is clear that the plaint discloses a cause of action against the defendant. This preliminary objection therefore ought to be over ruled.

In the premises, the 1st preliminary objection has no merit. it is accordingly overruled.

4.2 Issue no.2: whether the suit is statutory barred under the limitation Act, Cap 80.

Under Order 7 rule 11 (d) Civil Procedure Rules, a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Under Section 5 of the Limitation Act 80, it's provided that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the cause action arose. In the case of **Deported Asian Property Custodian Board vs Dr. J.M Masambis Court of Appeal, Civil Appeal NO. 04 of 2004:-**

Court held that the action against the appellant was time barred under the Limitation Act Cap.80. Court further emphasized “ **that this Court and the supreme Court have held in many cases that enforcement of provision of a statute is mandatory.....**”. Therefore the suit was dismissed for being statutory barred under Order 7 rule 11 (d) CPR.

Counsel for the defendant submitted that in regard to the above position of the law and authorities, the instant suit is statutory barred and that the plaintiff has no locus and prayed that same be dismissed with costs.

Counsel for the plaintiff submitted that the plaintiff's cause of action is partly based on fraud. The particulars of fraud are set forth in paragraph 7 of the plaint. Section 25 of the Limitation Act provides for the postponement of the limitation period in cases of fraud and categorically states that the period of limitation shall not begin to run until the plaintiff has discovered the fraud. The plaintiff in his plaint averred in paragraph 8 that he was not aware that his late father was the beneficiary of the suit land until 2007 when his late grandfather Bisatu Yokana Mayanja gave him a copy of the Will of the late Aligizane Ndugwa. That thus the cause of action arose in 2007 when the plaintiff discovered the fraud. That the plaintiff did not sit on his rights for 23 years as alleged because that he obtained letters of administration to the estate of the late father in 2004. That he is, therefore, within time to file the instant suit. In **David Mukasa Sendaula & anor vs Christine Nakalanzi [1992-930 HCB 179**, Court held that cause of action arose when the plaintiff discovered the alleged fraud.

In the plaint, fraud has been imputed on the transferee who happens to be the defendant in this case as per the authority of **Kampala Bottlers Ltd vs Daminico (U) Ltd, Civil Appeal No. 22 of 1982**. The rest is a matter of evidence that can only be resolved during or after a full trial.

Accordingly, therefore, the 2nd preliminary objection, too, has no merit. It is found in the negative.

5. Conclusion

In the result and for the reasons given hereinabove in this ruling, the two preliminary objections raised by the defendant's Counsel are dismissed with costs to the plaintiff.

Dated at Kampala this 27th day of May, 2013.

sgd

Murangira Joseph

Judge