

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 449 OF 2013
(Arising from Civil Suit No. 756 of 2006)

1. **HAMMERMANN LTD**.....: **APPLICANTS/**
2. **DOTT SERVICES LTD.**.....: **3RD & 4TH DEFENDANTS**

VERSUS

1. **HAM SSAALI**: **RESPONDENTS/**
2. **GEORGE KASEDDE MUKASA**: **PLAINTIFFS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

This application is brought under **Order 7 rr.11 (a) (e) and 19** of the **Civil Procedure Rules (CPR)** for orders that:-

- (a) The Respondents'/Plaintiffs' plaint in H.C.C.S No. 756 of 2006 be rejected with costs to the 3rd and 4th Defendants/Applicants.***
- (b) The Respondents/ Plaintiffs pay costs of this application.***

The grounds of the application are set out in the Chamber Summons and supported by the respective affidavits of Mr. Venu Gopal Rao, the Managing Director of M/s. Hammermann Ltd., and Mr. Maheswara Reddy, the Managing Director of M/s. Dott Services Ltd. Briefly they are that:-

- 1. H.C.C.S No. 756 of 2006 is time barred; and in the alternative.***
- 2. The Plaint does not disclose a cause of action against the 3rd and 4th Defendants/Applicants.***
- 3. The suit is frivolous and vexatious.***

Submissions.

Mr. Peter Walubiri, Counsel for the Applicants, submitted that **Section 5** of the **Limitation Act (Cap 80)** is to the effect that no action for recovery of land shall be brought after the expiration of twelve years. That according to paragraph 13 of the plaint, the Plaintiffs lost land through alleged fraud in 1978, and in 1984 respectively. The Plaintiffs had twelve years to recover the land, and that the period expired in 1996 ten years before filing the suit.

Counsel pointed out that the Plaintiffs do not plead in their plaint any disability or exemption from limitation as required under **Order 7 r.6 CPR** showing why they or their predecessor in title could not file the suit within the limitation period. Counsel relied on the case of ***Polyfibre (U) Ltd v. Matovu Paul & 3 O'rs, H.C.C.S No. 412*** where Tuhaise J., citing ***Madhivani International S.A v. Attorney General, C.A Civ. Appeal No. 48 of 2004*** held that in considering whether a suit is barred by any law court looks at the pleadings only, and no evidence is required. That from the plain facts averred in the plaint the instant suit is time barred and must be dismissed.

Regarding cause of action, Mr. Walubiri submitted that paragraph 13 of the plaint sets out particulars of fraud for each of the Defendants, but that none is set out for the 4th Defendant, who is the 2nd Applicant herein, and that the alleged particulars of fraud set out are only in respect of the 3rd Defendant. Further, that in paragraph 3 of the plaint the Plaintiffs aver that the 2nd, 3rd and 4th Defendants are companies duly incorporated under the **Companies' Act**, but in same breath contradict this averments in the alleged particulars of fraud by stating that the 2nd Defendant fraudulently did not disclose that its shareholders were foreigners, and that the 3rd Defendant presented itself as an incorporated company whereas not. Counsel submitted that these particulars of fraud do not hold at all.

Counsel also pointed out yet another contradiction in paragraph 11 of the plaint where the Plaintiffs aver that the 3rd Defendant did not acquire *mailo* interest but lease, but at the same time state that the *mailo* interest was acquired by 1st Defendant. Counsel submitted that given the misrepresentation, the alleged holding of *mailo* interest in perpetuity without consent of Minister which is set out in particulars of fraud for the 3rd Defendant does not arise.

Counsel further noted that the plaint does not disclose a cause of action against the 4th Defendant, and that the narrative in paragraph 11 of the plaint does not mention it at all. That there is nothing in the particulars of fraud that mentions the 4th Defendant at all. Counsel cited *Auto garage & O'rs v. Motokov (No.3) [1971] E.A 514* that provisions of *Order 7 r.11CPR* are mandatory, and that if a plaint discloses no cause of action it must be rejected. That since the plaint is frivolous and vexatious; besides being contradictory and embarrassing, as it raises no triable issues as against the Applicants should be stuck off.

Counsel also submitted that in the affidavit in reply of Ham Ssaali, he does not deny any of the depositions in the affidavits in support of the application, but only admits that there are contradictions, mistakes and misrepresentations in the plaint. He claims that his former lawyers made the mistakes and that they can be cured by amendment to the pleadings. Mr. Walubiri argued that the limitation period cannot be cured by amendment nor would a plaint which has no cause of action be amended. Counsel also faulted the proposition by Counsel for the Respondents that the limitation period does not run against a cause of action founded on fraud, and submitted that whatever the cause of action limitation applies.

Regarding alleged mistakes of the plaintiffs' former lawyers, Mr. Walubiri strongly maintained that a litigant is bound by pleadings drawn by his or her counsel, and that if pleadings contravene the law; such a mistake as would be cured. That if the lawyers were negligent the Plaintiffs have the option to sue them

for negligence. Counsel prayed that the application be allowed with costs and the main suit be dismissed with costs

In reply Mr. Mutyaba B. Counsel for the Respondents submitted the Plaintiffs have a cause of action against the Defendants/Applicants, which is averred in paragraph 11, and 12 of the plaint. That the cause of action arose in 1999, and hence the suit was brought within time. Further, that even if the suit was filed out of time, **Section 2 Limitation Act (supra)** allows court to extend the limitation period in cases where the cause of action is founded on fraud. That **Section 6 (2) (supra)** exempts suits from limitation where there is a beneficial claim as in this case, and that the Respondents being administrators of the estate to which the suit land belongs are by implication beneficiaries.

Specifically regarding cause of action, Mr. Mutyaba submitted that it is disclosed in paragraph 11 and 12 of the plaint which show that the 3rd Defendant purportedly leased part of the suit land to the 4th Defendant, which is currently operating a quarry on the suit land. While conceding that there are some mistakes, contradictions and misrepresentations in the plaint, Counsel contended that they do not go to the root of the matter, and can be cured by amendment under **Order 6 r.19 CPR**. That these were occasioned by the Respondents' former lawyers and ought not to be visited on the innocent litigants. To fortify this proposition, Counsel cited **Motorcare (U) Ltd v. Attorney General, H.C.C.S No. 638 of 2005; Julius Rwabirumi v. Hope Bahimbisomwe, Civ. App. No. 14 of 2002**, and prayed the objection by overruled.

In rejoinder, Mr. Walubiri submitted that if the 3rd Defendant got lease in 1999 from 2nd Defendant who got registered in 1984, to impeach the lease the Plaintiffs needed to plead and show that the lessee was privy to the 1984 alleged fraud or was aware and took advantage of it. That it must be shown on face of the pleadings that the 3rd Defendant is not to be a *bona fide* lessee. Counsel supported this

proposition with the case of *Henry N.K Wabui & Another v. Rogers Hanns Kiyonga & 2 Others, H.C.C.S No. 102 of 2009* per Murangira J.

Regarding paragraph 11 and 12 of the plaint, Mr. Walubiri maintained that they do not show any wrongdoing by the 3rd and 4th Defendants; because creating a lease *per se* is not actionable. Further, that the said paragraphs do not comply with **Order 6 r.3 CPR** because they do not set out particulars or dates as required under the provision, and that the only particulars of fraud set out are erroneous.

Furthermore, that **Section 2 Limitation Act** should be read subject to **Part III** of the Act, which under **Section 25 (supra)** specifically provides for actions founded on fraud. Regarding the application by Mr. Mutyaba for amendment under **Order 6 r.19 CPR**, Mr. Walubiri submitted that court cannot on its own initiate amendment to pleadings, but that it only allows a party to amend. That for an amendment sought thirteen years after the cause of action arose, it would require a formal application; and that there is no proper application before court for amendment. Counsel reiterated his earlier prayers.

Issues.

- 1. Whether the plaint in H.C. C.S No. 756 of 2006 is time barred.**
- 2. Whether the plaint discloses a cause of action.**

Applicable Law.

Section 5 of Limitation Act (supra) which governs the limitation period for recovery of land 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 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.”

It is the established law that a suit which is barred by statute where the plaintiff has not pleaded grounds of exemption from limitation in accordance with **Order 7 r.6**

CPR must be rejected because in such a suit the court is barred from granting a relief or remedy. See: **Vincent Rule Opio v. Attorney General [1990 – 1992] KALR 68; Onesiforo Bamuwayira & 2 Or’s v. Attorney General (1973) HCB 87; John Oitamong v. Mohammed Olinga [1985] HCB 86.**

Further, **Section 25** of the **Limitation Act (supra)** is to the effect that in actions founded on fraud, the period of limitation shall not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered the fraud. It is also the settled position that in determining the period of limitation, court looks at the pleadings only, and no evidence is needed. See: **Polyfibre (U) Ltd v. Matovu Paul & 3 O’rs,(supra); Madhivani International S.A v. Attorney General(supra).**

The position regarding cause of action was well stated in **Auto garage & or’s v Motokov (No.3) (supra)** that the plaintiff must establish that he or she enjoyed a right, the right was violated, and that the defendant is liable. See also: **Al Hajj Nasser N. Sebagala v. Attorney General & O’rs Constitutional Petition No. 1 of 1999.** Further, that the provision (under **Order 7 r.11 CPR**) that a plaint shall be rejected if it discloses no cause of action appears mandatory. See: **Hasmani v. National Bank of India Ltd., (1937) 4 E.A.C.A.55.**

Consideration.

Form the plain averments in the plaint, the cause of action arose as against each Defendant at diverse times. For the 1st Defendant it arose on 22/7/1976. For the 2nd Defendant it arose on 18/10/1984. For the 3rd and 4th Defendants it is averred in paragraph 11 that it arose on 29/7/1999 when the 3rd Defendant purportedly leased part of the suit land to the 4th Defendant. On the face of the plaint, simple computation of time reveals that the suit filed on 20/11/2006 would be not be maintained as against the 1st and 2nd Defendants, as it was clearly filed outside the limitation period stipulated under **S.5 (supra).**

Regarding the 3rd Defendant, it is averred that it got lease from the 2nd Defendant. To impeach the lease of the 3rd Defendant, therefore, it would be necessary for the Plaintiffs to show; not only fraud on part of the 2nd Defendant from whom the 3rd Defendant derived the lease, but also that the 3rd Defendant was either privy to the fraud or was aware of it and took advantage of it. Fraud must be attributable to the transferee. This position is fortified by *Fredrick J. K Zaabwe v. Orient Bank & 5 O’rs, S.C. Civ. Appeal No. 4 of 2006; Kampala Bottlers Ltd v Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992.*

Furthermore, to impeach the lease the Plaintiffs needed to plead that the 3rd Defendant is not a *bona fide* purchaser for valuable consideration without notice of any the fraud. See: *David Sajjaka Nalima v. Rebecca Musoke, C.A. Civ. Appeal No. 12 of 1985; Ssessazi Kulabirawo v. Robinah Nalubega, C.A.Civ. Appeal No.55 of 2002.*

The particulars of fraud set out in the plaint for the 3rd Defendant have a lot going against them. For instance they state that the 3rd Defendant presented itself as an incorporated company whereas not, and that it purported to acquire interest in *mailo* land in perpetuity with (sic) Minister’s consent. This is not only contradictory but also devoid of merit. The 3rd Defendant could not be a company incorporated under the *Companies Act*, as averred in paragraph 3 of the plaint, and at the sometime misrepresent itself as an incorporated company as set out in the particulars of fraud. Similarly, the 3rd Defendant could not acquire a lease interest in the suit land as averred in paragraph 11 of the plaint, and in the same breath purport to acquire interest in *mailo* land in perpetuity as set out in the particulars of fraud. The averments and particulars of fraud set out do not add up at all.

This court is unable to accept the proposition by Counsel for the Plaintiffs/ Respondents that the contradictions, mistakes, and misrepresentations pointed out are minor and are just as a result of sloppy draftsmanship by the Plaintiffs’ former

lawyers, which can be cured by amendment under **Order 6 r.19 CPR**. If anything, they go to the substance of the whole case which is based on fraud, and without fraud being attributable to the transferee of the lease, there would be no subsisting cause of action against the 3rd and 4th Defendants. With due respect to Counsel for the Respondents, that is not a minor issue that could be cured by amendment. As was held in **Buffalo Tungsten Inc. v. SGS (U) Ltd., Misc Appl. No. 06 of 2012 (Commercial Court)** once a plaint discloses no cause of action, an amendment cannot cure it because in effect there is nothing to amend.

In addition, **Order 6 r.19 CPR** empowers court only to allow either party to the suit to alter or amend its pleadings for the purpose of determining the real question in controversy between the parties. However, as was held in **Muhammad Kasasa v. Jasher Buyonga Sirasi Bwogi, C.A.Civ.Appeal No. 02 of 2008**, in allowing the amendment court must use its discretion judiciously and must reach the decision based on the right principles. It must not be in contravention of statutory law. Applying that principle to this case, court cannot allow amendment contrary to the law. No merit of the case can be investigated whereas the plaint is incurably defective.

On the claim that the mistakes of the former lawyers should not be visited on the Respondents, it needs to be emphasised that a client is bound by actions and omissions of his counsel. As was held in **Cpt. Philp Ongom v. Catherine Nyero, S.C.Civ. Appeal No. 14 of 2001(unreported)** negligently drafting the plaint or incompetence in doing the same is not an excuse for a client to escape being bound by his counsel's actions or omissions. Going by the same principle, it would be absurd to allow the Respondent in this case to flout the strict law of limitation on the ground that his counsel was negligent. If at all Counsel acted negligently or incompetently, the Respondents have the option to sue for professional negligence. See: **Muhammad Kasasa v. Jasher Buyonga Sirasi Bwogi (supra)**.

As regards the 4th Defendant it would appear from the averments in paragraph 12 of the plaint, that it was sued just because it is currently operating a quarry on the suit land. No particulars of fraud are set out for the 4th Defendant. It is trite law that to determine whether or not a plaint discloses a cause of action, the court must look only at the plaint and annexures, if any, and nowhere else. See: ***Kapeka Coffee works Ltd. & A’ nor v. NPART, CACA no. 3 of 2000.*** Further, for a cause of action to accrue the plaintiff must show that he or she enjoyed a right, that right was violated, and the defendant is liable. See: ***Autogarage & O’rs v. Motokov (No3) (supra).***

In the instant case, there is clearly no right of the Plaintiffs that could be said to have been violated by the 4th Defendant. From the facts plainly appearing on the plaint no cause of action is disclosed as against the 4th Defendant.

Mr. Mutyaba pointed out that under ***Section 2*** of the ***Limitation Act (supra)*** court has power to extend the period of limitation for actions founded on fraud. Counsel advanced the view that since the cause of action in the instant case is founded on fraud, this court can extend the limitation period even if the suit could have been filed out of the limitation period.

Section 2(supra) is to the effect that its provisions are applicable subject to ***Part III*** of the Act. For ease of reference I quote it below.

“The provisions of this Part of this Act shall have effect subject to the provisions of Part III of this Act, which provide for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud and mistake.”

Section 25 (supra) under ***Part III*** of the Act, which is the relevant provision specific to actions founded on fraud provides that actions for which a period of limitation is prescribed by the Act which are based upon the fraud of the defendant,

the period of limitation shall not begin to run until the plaintiff has discovered, or could have with reasonable diligence discovered the fraud.

The main thrust of the provision is essentially that in actions founded on fraud the limitation period does not begin to run until such a time when the plaintiff is invariably aware, or could have with reasonable diligence been aware of the fraud. This must be pleaded, and it is premised on such a plea that court may exercise its power under **Section 2(supra)** not to reckon with the period the plaintiff was unaware of the fraud in computation of the limitation period.

Thus the “extension” of the limitation period referred to under **Section 2 (supra)** is not a unilateral action by court to extend the period merely because the action is founded on fraud. No such power, whether residual or inherent, resides in court to extend time fixed by statute. It is up to the plaintiff to raise a plea that conforms to the dictates of **Section 25(supra)** before he can benefit from exemption from limitation for the period he was unaware, or could not have with reasonable diligence been aware of the fraud. It is not that just because a cause of action is founded on fraud the limitation period will automatically apply.

Applying provisions of **Section 25(supra)** to the instant case, the Plaintiffs/Respondents do not plead in the plaint as to when they became aware of the fraud. Counsel Mutyaba half heartedly argued that the Plaintiffs became aware in 1999 when the 3rd Defendant got the lease as averred in paragraph 11 of the plaint. This could not be further from the truth because it is not pleaded in that paragraph or anywhere in the plaint that 1999. Even then, merely leasing land or registration *per se* would not amount to fraud. This leaves the Plaintiffs with July 1978 and October 1984 as the only ascertainable periods on face of the pleadings; and in absence of any plea of exemption from limitation under **Order 7 r.6 CPR** the suit is time barred.

As was observed in *Re Application by Mustapha Ramathan, C.A. Civ. Appeal No.25 of 1996, per Berko JA.*, the purpose of limitation is to put an end to litigation. Statutes of limitations are by their nature strict and inflexible enactments. Their overriding purpose is interest *republicae ut fins litum*, meaning that litigation shall automatically be stifled after a fixed length of time, irrespective of the merits of a particular case. Also in *Hilton v.Satton Steam Laundry [1946] IKB 61 at page 81* it was held that statutes of limitation are not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights.

The effect of a suit being time barred is that it shall be rejected. See: *Vincent Rule Opio v. Attorney General (supra); Onesiforo Bamuwayira & 2 Or's v. Attorney General (supra); John Oitamong v. Mohammed Olinga (supra)*. Accordingly, the application allowed with costs to the 1st and 2nd Applicants. The plaint in *Civil Suit No. 756 of 2006* is struck out, and the suit is dismissed as against the all the Defendants with costs.

BASHAIJA .K. ANDREW
JUDGE
20/11/13

Mr. Bernard Bamwine, holding brief for Mr. Peter Walubiri and Mr. Brian Musika for the Applicants: present.

Mr. Matovu Muhammed, Counsel for the Respondents: present.

Representative of the Applicants: present.

Ms. Justine Namuske, Court Clerk: present

Court: Ruling read to the parties.

BASHAIJA .K. ANDREW
JUDGE
22/11/13