

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO. 0796 OF 2015**

5 **(ARISING OUT OF CIVIL SUIT NO. 0409 OF 2013)**

**M & D TIMBER MERCHANTS &**

**TRANSPORTERS LTD:.....APPLICANT**

**VERSUS**

**HWAN SUNG LIMITED:.....RESPONDENT**

10 ***BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW***

**RULING**

*M&D TIMBER MERCHANTS & TRANSPORTERS LTD (hereinafter referred to as the “Applicant”)* brought this application under **Section 5 of the Limitation Act (Cap.80); Section 98 of the Civil Procedure Act (Cap 71) (CPA); Order 7, r11 (e) and Order 6, r.29 of the Civil Procedure Rules, SI 71 -1 (CPR)** seeking for orders that **HCT-CS-409-2013** be struck out and or dismissed with costs for being time barred by statute.

**HCT-CS-409-2013** was filed in 2013 by *HWAN SUNG LTD (hereinafter referred to as the “Respondent”)* against the Applicant for recovery of land comprised in Plot 30 Mukabya Road (*hereinafter referred to as the “suit land”*).The Respondent seeks for a  
20 declaration that it is the lawful owner of the suit land, and that the Applicant is a trespasser thereon, mesne profits from September 1996, general damages, vacant possession, and costs of the suit.

25 The Applicant filed an affidavit in support of the application sworn by Mr. Ivan Dungu the Director of the Applicant Company. The Respondent also filed an affirmation in reply affirmed by Mr. Mohammed Meraj the Respondent's Manager, which was supplemented by the affidavit of Mr. Okis Richard a Law Clerk with M/s. GP Advocates one of the Law firms representing the Respondent in the main suit and this application. The content and substance of the respective affidavits and affirmation is basically premised on and captured in a nut shell in the summary of the facts stated below.

30 ***Background:***

35 On 07.01.1987 the suit property was registered in the names of one Hussein Abdi who, on becoming Director in the Respondent Company on 14.03.1989, sought to assign the suit land to the Respondent. He applied to the controlling authority, the Kampala City Council (KCC) as it was then called, before the initial five – year term of the lease could expire in November, 1990. KCC had no objection but made the transfer subject to the conditions that the Respondent pays transfer fees within 30 days of the offer plus fresh premium and ground rent. According to the correspondence on court record by the Town Clerk of the KCC dated 31.01.2000, it is stated that the Respondent failed to fulfill the conditions and the offer lapsed.

40 In 1996 KCC re- allocated the suit land to the Respondent which obtained a certificate of title for the suit for the initial term of five years from 01.08.1996. The Respondent then demanded vacant possession from the Applicant which was in occupation of the suit land, but the Applicant refused and instead sued the Respondent and KCC under ***HCCS No. 82 of 2000***; and ***HCCS No.467 of 2003*** respectively. In the suits, the Applicant alleged, inter

45 alia, collusion between the Applicant and KCC and sought orders of quiet enjoyment and  
cancellation of the title of the Respondent, among others. Both suits were subsequently  
consolidated and set down for hearing.

Prior to the filing of **HCCS No.467 of 2003**, the Applicant had on 10.02.2000 filed  
**HCMA No. 101 of 2000** and obtained a temporary injunction order restraining the  
50 Respondent from evicting and or interfering with and or disturbing the Applicant's  
ownership and quiet possession of the suit land. Meanwhile the initial five - year lease for  
the Respondent was due to expire in August, 2001. The Respondent sought to have it  
extended but the controlling authority deferred the application until the court pronounced  
itself in the pending suits.

55 The Respondent also in 2005 filed **HCMA No. 478 of 2005** on 02.01.2006. By consent of  
the parties another order of a temporary injunction was issued but this time restraining the  
Applicant herein from carrying out any developments on suit land until the final  
determination of the consolidated suits.

In 2012, the Respondent filed **HCMA No.605 of 2012** seeking to amend its defence with  
60 the view to introduce a counterclaim. The Applicant herein also filed **HCMA No 431 of  
2013** seeking to withdraw the entire consolidated suit in **HCCS No. 82 of 2000** and  
**HCCS NO 467 of 2003**. The court granted the application to withdraw the consolidated  
suits against the Respondents but declined to allow the application for amendment of the  
defence to introduce a counterclaim on the ground that the head suit had been withdrawn.  
65 However, the court observed that the Respondent was free to file its own separate suit  
against the Applicant.

After the withdrawal of the consolidated suit, the Respondents brought it the attention of the Board which had previously deferred the application, and the Board granted the lease for 20 years with effect from 01.08.2006.

70 The Respondent in 2013 filed *HCT-CS-409-2013* seeking for orders earlier stated. It is out of that suit that the instant application arises seeking for dismissal of the head suit for being statute barred.

***Submissions:***

75 The Applicant was represented by Mr. Kavuma-Kabenge together with Mr. Golooba Muhammed, and the Respondent jointly by Dr. J.B Byamugisha and Mr. George Omunyokol. The respective submissions are on court record, and I will only highlight the salient features.

80 Mr. Kavuma Kabenge contended that the Respondent's suit is statute barred. He premised his contention on the Respondent's claim in the suit that the Respondent has at all material times been the registered proprietor of suit land and seeks for a declaration that it is a lawful owner of the suit land. Counsel noted that the Applicant in its defence and counterclaim also claims to be the lawful owner of the suit land having acquired it on the 30.03.1987 and been in exclusive possession since then. Mr. Kabenge observed that the major issue for determination is; *"Who between the plaintiff and the defendant is the*  
85 *owner of the suit land?"*

Mr. Kabenge also submitted that the Respondent's case is that in 1996 and 1997 it demanded in writing that the Applicant vacates the suit land because the same had been allocated to it by KCC, and that it had obtained registration and title for the suit land.

90 Counsel argued that by the Applicant refusing to vacate, the Respondent has never obtained vacant possession of the suit land.

Mr. Kabenge further noted that **HCT-CS-409-2013** which was filed on 09.09.2013 was filed seventeen years after the Respondent claims to have been allocated the suit land and obtained registration as a proprietor, yet the Applicant has been in possession of the suit land since 1987. That within the terms of **Section 5 of the Limitation Act (supra)**, the Respondent's suit is statute barred, and that is no exemption from the law of limitation that was put forward by the Respondent in its pleadings.

Mr. Kabenge relied on the cases of **Re Mustapha Ramathan, CACA No. 25 of 1996; Muhammad B. Kasasa vs. Jasper Buyonga & Silas Bwogi, CACA No. 42 of 2006;** and **Kikonyogo Jackson vs. Joseph Lwanga HCT-CS-239-2012** in which provisions of **Section 5(supra)** were considered and it was held that statutes of limitation are not concerned with merits but stifling litigation after a fixed period of time.

Mr. Kabenge also attacked the affirmation in reply affirmed by Mohammed Meraj on 25.11.2015, and argued that it being an affirmation in opposition, it needed to rebut the facts set out in the affidavit in support sworn by the Applicant, but that it did not. Counsel cited the case of **Sam Massa vs. Rose Achen, [1978] HCB 29**, where it was held that where certain facts are sworn in the affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted and a deponent needs not to raise them again. Mr. Kabenge maintained that the facts sworn by the Applicant are not rebutted and that instead the Respondent stated its own set of facts and that this court should find that the Applicant's facts are true.

115 Mr. Kabenge further faulted the Respondent's contention that its claim is in trespass which is continuing to tort, arguing that such does not revive the case. Counsel submitted that the court has to look at the claim as a whole and that the Respondent's claim is for recovery of land where the Respondent has never been in physical possession and the major issue is ownership of the suit land. Counsel maintained that it will be only when the issue of ownership is determined and answered in the favour of the Respondent in the main suit that the court can consider the issue of trespass.

120 Mr. Kabenge also submitted the Respondent cannot rely on the existence of the suit by the Applicant in between the period because the Applicant's suit is not the Respondent's suit. Counsel argued that the Applicant had its own rights to sue and to withdraw the suit where it felt convenient. That since the Respondent did not counterclaim in that suit and chose to file its own suit outside the limitation period; the Respondent cannot obtain any relief against the Applicant. Counsel prayed that court dismisses the suit with costs to the Applicant.

125 In reply Dr. J.B Byamugisha submitted that if there was adverse possession by the Applicant, the applicable provision would be **Section 11** of the **Limitation Act (supra)** which provides that no right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run, referred to as adverse possession. Further, that **Sub-section 2** thereof provides that  
130 where a right of action to recover land has accrued and thereafter before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to have accrued until the land is again taken into adverse possession.

135 Dr. Byamugisha submitted that in its amended plaint the Respondent avers that the Applicant obtained an order of a temporary injunction in which the Respondent was restrained from evicting or interfering with or disturbing the Applicant's ownership and quiet enjoyment of the suit land pending final disposal of the main suit. That when this order was issued, the Applicant ceased to be in adverse possession because the Applicant remained on the land under the protection of the court. Referring to copy of a ruling by 140 Justice J.W Kwesiga dated 02.09.2013, when the Applicant withdrew that respective suits, Dr. Byamugisha submitted that it is on that date that adverse possession by the Applicant commenced again for purposes of **Section 11(2) (supra)**.

Counsel further submitted that the said order for temporary injunction was on the application ex-parte by Mwesigwa - Rukuntana, Counsel for the Applicant, seeking the 145 protection of the court for the Applicant to stay in possession, and that it is why adverse possession ceased and time ceased to run.

Dr. Byamugisha also referred to another order of temporary injunction dated 02.01. 2006, which was by consent of both Counsel, in which it was agreed that the Applicant ceases to carry out further developments on the suit land. Counsel submitted that it was at that 150 point that the Applicant exercised control over the suit land together with the Respondent under the authority of the court. To that end Counsel submitted that the Applicant cannot claim that time run at all during that period against the Respondent.

On the point that the facts sworn by Applicant in the affidavit in support are not rebutted, Mr. Gorge Omonyokol submitted that the entire affirmation in reply directly replies to the

155 application and the Applicant's affidavit. That in its entirety it sets out the correct version  
of the facts leading to the suit which was filed.

Mr. Omunyokol also submitted that **Section 11(supra)** overrides the authorities cited by  
Counsel for the Applicant on limitation of actions for the recovery of land. Counsel  
submitted that the objection should be overruled and dismissed with costs, and the suit  
160 proceeds.

Counsel for the Applicant made submissions in rejoinder which essentially reiterate their  
earlier submissions and I need not to repeat them.

**Issues:**

1. ***Whether the HCT-CS-409-2013 is time barred by statute.***
- 165 2. ***What remedies if any, are available to the parties?***

**Resolution of the issues:**

***Issue No 1: Whether the HCT-CS-409-2013 is time barred by statute.***

The issue specifically and directly relates to the time when the cause of action in **HCT-  
CS-409-2013** arose. This position is premised on the principle which was enunciated in  
170 ***F.X Miramago vs. Attorney General [1979] HCB 24*** that the period of limitation begins  
to run as against a plaintiff from the time the cause of action accrued until when the suit  
is actually filed. Once a cause of action has accrued, for as long as there is capacity to  
sue, time begins to run as against the plaintiff. Furthermore, **Order 7 r.6 CPR** also  
requires that;



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***“Where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the grounds upon which the exemption from that law is claimed.”***

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The above provisions were considered by the Court of Appeal in ***Uganda Railways Corporation vs. Ekwaru D.O & 5104 O’rs CACA No.185 of 2007 [2008] HCB 61***, in which it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaintiff, the plaintiff must be rejected.

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The rationale of the law of limitation was aptly stated in ***Caltex Oil (U) Ltd vs. Attorney General, HCCS No. 350 of 2005*** that the intention for the enactment of statutory periods of limitation was to serve several aims among which is protecting the defendant from being vexed by stale claims, and that it designed to encourage litigants to initiate proceedings within reasonable time.

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I must also add that for a plaintiff to benefit from the exemption from the law of limitation, he or she must plead grounds showing his or her disability to file the suit within the time prescribed by the law. The disability must be a legal disability in a sense that ***Section 1(3) of the Limitation Act*** provides that a person shall be deemed to be under a disability while he or she is an infant or of unsound mind. In my view, since the provision is very clear and specific, no other basis of disability calls for recognition under the law.

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Applying the principles to facts averred in the pleadings of the Respondent in ***HCT-CS-409-2013***, it is clear enough that the Respondent became the registered owner of the suit land in 1996. It is also evident that the Applicant has been in exclusive possession of the suit land since 1987, before 1995 when the Respondent first applied, to date. It is further

in the evidence of PW1 J.B Ahn the Managing Director of the Respondent that the Respondent in 1996 and 1997 demanded in writing that the Applicant vacates the suit  
200 land because the same had been allocated to the Respondent by KCC and the Respondent had obtained registration and had a title in its possession, but the Applicant refused.

Given these facts, it is in no doubt that the Applicant has since before 1995 been in exclusive possession of the suit land. It also means that by the Applicant refusing to vacate, the Respondent has never obtained vacant possession since it got registered as  
205 owner of the suit land. More so importantly for this application, it means that the right of action accrued to the Respondent as against the Applicant on 26.09.1996 when the Respondent became the registered owner of the suit land.

The Respondent opted not exercise its right of filing an action for recovery of the suit land from the time the right accrued to it. Time continued to run from then until 2013  
210 when the Respondent filed *HCT-CS-409-2013*. That is a period of about seventeen years from the time the cause of action arose. *Section 5 of the Limitation Act (Supra)* which provides for limitation of actions to recover land states 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  
215 him or her or, if it first accrued to some person through whom he or she claims, to that person.”*

On the facts of this case, the Respondent’s suit for the recovery of land from the Applicant is evidently time barred by statute, and I find so.

220 There was also no any exemption from limitation pleaded by the Respondent in its plaint  
in *HCT-CS-409-2013*. This compounds the problem. In *Okweng Washington vs. AG &  
Mike Okello HCCS No. 16 of 2004*, in which court relied on *Onesifolo Bawayira & 2  
O’rs vs. Attorney General (1973) HCB 87*, it was held that;

*“In considering whether or not a plaint is time barred or discloses no cause of  
action, the court must look only at the plaint and nothing else.”*

225 The court went on to hold that;

*“A plaint that is deficient in that it shows that the action is time barred or  
discloses no cause of action must be rejected. See: Pearl Motors Limited vs.  
Uganda Commercial Bank (1998) III KARL 1. It is a prerequisite of a party  
who seeks to have substantial justice done to him or her that that party  
230 substantially complies with the law, more so where that law is written law.”*

Furthermore, in *James Semusambwa vs. Rebecca Mulira, HCCS No.417 of 1992*, it was  
held that in considering whether a suit is barred by law, court looks at the pleadings only  
and no evidence is required.

235 I have carefully read and properly appreciated the pleadings in the Respondent’s plaint in  
*HCT-CS-409-2013*, but I have not come across any facts suggesting or from which court  
can draw reasonable inference that the plaint is not time barred by statute. It is plainly  
obvious that the plaint was filed out of time and no exemption from the law of limitation  
was pleaded at all.

240 An argument was advanced by Counsel for the Respondent that if there was adverse  
possession, *Section 11* of the *Limitation Act (supra)* would be the applicable provision.  
Counsel argued that when the first order of a temporary injunction was issued the

Applicant ceased to be in adverse possession and remained on the suit land under the protection of the court. Further, that on 02.09.2013, when the respective suits were withdrawn, it is when adverse possession by the Applicant commenced again for purposes of **sub-section 2 of Section 11(supra)**.

With due respect, this argument is not based on the correct reading of the law, and it is erroneous for a number of reasons. Firstly, the party suing in this case is the Respondent which has never been in possession of the suit land other than having possession of title. **Section 11(supra)** presupposes the party suing to be the one in adverse possession of the land in whose favour the period of limitation can run. This inevitably renders the cited provision of the law inapplicable to the Respondent on the facts of this case.

The second reason is that the first order of a temporary injunction obtained in 2000 was in favour of the Applicant at a time. It restrained the Respondent from evicting or in any way disturbing the Applicant's quiet possession of the suit land. The order did not in any way take away possession by the Applicant of the suit land. If anything, it confirmed, and maintained, and protected that particular status quo existing on the suit land and reinforced the Applicant's continued possession uninterrupted.

It is therefore, not true that the Applicant remained in possession "under the protection of court". The Applicant was all along in possession of the suit land, and it cannot be said that the order bestowed any possessory right on the Applicant which the Applicant never enjoyed before the order was issued.

I hasten to add that at the same time the order of temporary injunction did not stop the Respondent from filing its own suit either through counterclaim or by an original suit.

265 The order was not an injunction on the Respondent's right to sue, when such right existed  
and accrued on the date the Respondent was registered as owner of the suit land.  
Similarly, the order did not have the effect of stopping time from running as against the  
Respondent from the date it became the registered owner of the suit land in 1996. The  
Respondent had all that time to bring a suit for recovery of the suit land, but simply did  
not.

270 Court was also referred to a copy of another order of a temporary injunction dated  
02.01.2006. It is actually a consent signed by Counsel for the parties in which it was  
agreed that the Applicant herein ceases to carry out developments on the suit land  
pending the final disposal of the consolidated head suits.

275 The proper reading of the order does not show that it expressly states, or even by  
necessary implication suggests, that the Applicant would exercise control over the suit  
land together with the Respondent under the authority of the court as submitted by  
Counsel for the Respondent. The terms of the order are quite clear and do not suggest  
that. It would also be erroneous to suggest that the time did not run at all during that  
period as against the Respondent as submitted.

280 Apart from the above, the consented position in the order referred to was only in respect  
of developments on the suit land. It did not bestow on or take away any right of any party  
to the suit in the suit land. To that end, I agree with Counsel for the Applicant that  
developments on the land and possession are two different things. The Applicant was  
always in exclusive possession and the consent order did not give the Respondent  
285 possession.

On the point that the Respondent's suit is premised on the trespass and therefore a continuing tort, I find that not to be the correct position. The issue for determination by court, even as agreed in the joint scheduling memorandum, is ownership of the suit land. Trespass to land if any, can only be determined in the main suit after canvassing all the evidence, but ownership issues must be resolved first and that would entail considering the merits of the case; which the law on limitation of actions is not concerned with.

In *Re: Mustapha Ramathan (supra)*; and in *Muhammad B. Kasasa vs. Jasper Buyonga & Silas Bwogi (supra)*, the Court of Appeal held that statutes of limitations are not concerned with merits. They 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. 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.

Even assuming that the cause of action is in a tort of trespass, which it is not, still the date when the cause of action arose is particularly important in determining if the suit was instituted in time. See: *Justine E.M Lutaya vs. Stirling Civil Engineering Co Ltd., SCCA No 11 of 2002*.

Regarding the point that facts sworn in the affidavit in support of this application were not rebutted, once again I agree with Counsel for the Applicant. Rather than specifically rebut the depositions in the affidavit in support of the application, the Respondent in the affirmation in reply affirmed by Meraj instead simply stated its own version of facts.

Mr. Omunyokol strenuously tried to persuade this court that the affirmation in reply in its entirety is a reply to the affidavit in support of the application. I would agree only to the extent that it is titled “*Affirmation in reply...*” Beyond that, it does not specifically rebut the facts sworn to in the affidavit in support of the application. The Respondent merely stated what it considered to be the “correct version of facts”, which was not solicited by any of the depositions it purported to reply to. The primary duty of the affirmant was to deny or rebut those facts sworn to in the affidavit in support of the application. By attempting to give its own version of facts, the Respondent left those facts sworn to by the Applicant unrebutted and undenied.

In such a case the position of the law was aptly stated in ***Sam Massa vs. Rose Achen (supra)*** which was cited by Counsel for the Applicant. Where certain facts are sworn to in an affidavit, and these are not denied or rebutted, the presumption is that such facts are accepted. Based on the facts sworn to and the position of the law articulated above, I find that the suit is time barred by statute.

***Issue No.2: What remedies if any, are available to the parties?***

***Order 7 r.11 (d) CPR*** provides that where a suit appears from the statement in the plaint to be barred by any law, it shall be rejected. It has also been held that a suit which is time barred by law must be rejected because in such a suit the court is barred from granting a relief or remedy. See: ***Vincent Rule Opio vs. Attorney General, [1990-1991] KALR 68; Onesiforo Bamuwaira & 2 Or’s vs. Attorney General (supra).***

330 For the foregone reasons, the Respondent's suit is time barred by statute and the Respondent cannot obtain the reliefs sought against the Applicant. Accordingly, this application is allowed and *HCT-CS-409-2013* is dismissed with costs.

***BASHAIJA K. ANDREW***

***JUDGE***

***15/12/2015.***

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