

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL SUIT NO. 0118 OF 2019

PATRICK IYAMULEMYE:.....PLAINTIFF

VERSUS

- 1. STEPHEN KWIRINGIRA**
- 2. NON PERFORMING ASSETS RECOVERY TRUST (NPART)**
- 3. UGANA DEVELOPMENT BANK LTD**
- 4. THE COMMISSIONER LAND REGISTRATION:.....RESPONDENTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff sued all the Defendants for declaration that;

- 1) Land comprised in Kyadondo block 24 plot 1289 Kisugu belong to him (Plaintiff).
- 2) The Plaintiffs' claims that he is a son of Kato Thomas Iyamulemye who was a former registered proprietor.
- 3) He transferred the land to the Plaintiff on 8th October 1975 and the Plaintiff became the registered proprietor.

In 2015, Plaintiff came on a search and found that 1st Defendant was registered on the land. The Plaintiff avers that the transfer by 2nd Defendant, to 1st Defendant went illegal and fraudulent. He avers fraud on 1st, 2nd, 3rd, and 4th Defendants transactions hence this suit.

When the matter came up for hearing all Defendants raised preliminary objections against the Plaintiff's suit which I now determine as here below;

The 1st Defendant's objection was to the effect that the Plaintiff has no cause of action against the 1st Defendant. He claimed that the plaint does not disclose a cause of cation against him, being barred by limitation.

The 1st Defendant's counsel submitted that Defendant 1 acknowledges that the Plaintiff is the son and one of the Administrators of the late Kato Iyamulemye and director in Syntax Ltd. prior to his death, Kato transferred the suit land to the Plaintiff who became the registered proprietor. Syntax Ltd acquired a loan facility using the suit land's certificate of title as collateral.

When Syntax Ltd defaulted on payment of the loan, UDB sold the Plaintiff's machinery and when it tried to sale the suitland, it discovered that the title deeds had some legal issues. It became a non performing asset and later was transferred to NPART; who advertised the property for sale. The 1st Defendant offered to purchase the property, paid the price and the suitland was transferred into the 1st Defendant's names.

The 1st Defendant's counsel then argued that according to the Law of Limitation, a suit is barred by law when it is brought after the expiry of time within which it ought to be brought. The suit land/property was transferred to the 1st Defendant in 2002 and he has been in possession of the same since then. Counsel referred to Section 3(a) of the Limitation Act.

No action founded on a contract shall be brought after six years. Also, Section 18(1) of the Act, provides that no action shall be brought to recover the proceeds of sale of land after expiration of the 12 years from the date when the right to receive money accrued.

Counsel argued that the Plaintiff's claim is barred by limitation having been brought way after the lapse of 12 years' period. He referred to *Iga versus Makerere University (1972) EA 66* which holds that;

“a plaint which is barred by limitation is a plaint barred by law...”

Also **Dr. Arinaitwe Raphael & 37 others versus the Attorney General; HCCS No. 21/2012** quoting **Hilton versus Sultan Steam Laundry (1964) 161, 81 per Lord Greene** that;

“The statute of limitation is 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”.

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Counsel prayed that the Plaintiff’s claim should not be entertained. He further referred to the provisions of O.7 r11(a) of the Civil Procedure Rules and the Supreme Court decision of **Tororo Cement Co. Ltd versus Frokina International Co. Ltd; SCCA No.2/2001** which defined a cause of action;

“as every fact which is material to be proved to enable the Plaintiff to succeed or every fact which if defined the Plaintiff, must prove in order to obtain judgment”

He further referred to the provisions of O.7 r11(a) of the Civil Procedure Rules and the Supreme court decision of **Tororo Cement Co. Ltd versus Frokina International Co. Ltd; SCCA No.2/2001** which defined a cause of action as ‘every fact which is material to be proved to enable the Plaintiff to succeed or every fact which if defined, the Plaintiff must prove in order to obtain judgment in **Auto Garage & Ors versus Motokov; Civil Suit No.3 of 1971 EA.514** laid down the principles to prove as the requirement for the plaintiff to show that;

- i) The Plaintiff enjoyed a right,
- ii) that right has been violated and;
- iii) the Defendant is liable.

Counsel for the Defendant is a bonafide purchaser for value without notice, having purchased the property; vide an advertisement dated 6th August 2001 by the 2nd Defendant for sale.

In reply, counsel for the Plaintiff argued that prior to his death, the late Kato Thomas Iyamulemye transferred the suitland to the Plaintiff on October 08, 1975; and the Plaintiff took possession that, in the year 2015, when the Plaintiff conducted a search with a view of securing, approved building plan, he discovered that the 2nd Defendant illegally and fraudulently transferred the suit land to the 1st Defendant and 4th Defendant, connived with the 1st, 2nd and 3rd Defendants to register the suitland in favour of the 1st Defendant without property executed transfer forms.

The Plaintiff specifically averred that he has never mortgaged the property to the 3rd Defendant and the purported mortgage and subsequent sale and change of ownership were fraudulent. He complained that the preliminary objection was improperly before court, having been based on smuggled pleadings.

On the 1st issue; on whether the Plaintiff has a cause of action against the 1st Defendant, he relied on the case of *Auto Garage & Ors versus Motokov; Civil Suit No.3 of 1971 EA.514* and argued that the Plaintiff enjoyed a right stated in the plaint under par(8) that Kato transferred plot 1289 to the Plaintiff on October 8, 1975 and he attached the certificate of title and transfer forms as evidence of that right.

He argued that under (paragraph 8(8) that the right was violated, as the property was fraudulently mortgaged in favour of the 3rd Defendant who in collusion with the other co-Defendants, caused it to be sold and transferred to the 1st Defendant.

Under par 10 of the plaint counsel argues that the particulars of fraud are outlined as against the 1st Defendant for failing or neglecting to conduct proper due diligence when purchasing the suit land; and conniving with the 2nd, 3rd and 4th Defendant to deprive the Plaintiff of the suit land cutting the principle in *David Sejjaka Nalima versus Rebecca Musoke; CA No.12 of 1985* and argued further that the issue of whether it was a bonafide purchaser, requires a full trial. He prayed that court overrules the preliminary objection as stated.

In rejoinder, the 1st Defendant maintained their objection.

Before determining the above, it suffices to point out that the 2nd, 4th and 5th Defendant raised similar objections claiming that the plaint does not disclose a cause of action against the Defendants and should be rejected or struck out and secondly that the suit is barred by law of limitation.

In arguing these objections, counsel for the 2nd, 4th and 5th Defendants argued that in line with the case of *Auto Garage & Ors versus Motokov; (supra)*, and whereas in the instant case, the Plaintiff seeks to recover land which had previously been security for a loan given by the 3rd Defendant Bank. The Plaintiff claims that the land was fraudulently sold and transferred by

the 2nd Defendant to the 1st Defendant with the help of the 4th Defendant, the Plaintiff ought to prove that the loan was paid and there was no justification for the sale of land. He argues that such averments, neither evidence of completion of payment attached. Counsel avers that such a plaint is lacking.

He attacked annexure 'F' as a document supporting averments in Defendant (k) of the amended plaint in that the letter was addressed to the administrators of the estate of the late Thomas Iyamulemye seeking attention of Kato Patrick who is not the Plaintiff. He referred to Section 58 of the Evidence Act and argues that there is no evidence that the loan was repaid so the plaint does not disclose a cause of action against all the Defendants since the Plaintiff does not properly plead that the loan was fully paid.

Secondly, he argues that the suit is barred by law of limitation and should be dismissed with costs. Referring to Section 5 of the Limitation Act, he argues that the 1st Defendant has been in possession of the suitland for 18 years undisturbed, both on the land and the Register of Titles.

For the 18 years, the Plaintiff attempted to remove the mortgage. He argued that the transfer occurred in 2002 which is over 17 years ago from the year in which the case was filed in 2019. He recognises that the Plaintiff's attempt to plead disability in paragraph 11 of the plaint, he does not give the particulars of the disability as required under O.6 r3. He also referred to section 21(1) of the Limitation Act – the fact that the Plaintiff claims through his deceased father, the father was not under disability at the time, on the basis of those averments, he argued that the Plaintiffs lacks *locus* to bring the suit. He also raised the issues of not filing a statutory notice. He argued that the suit is *frivolous* and *vexatious*.

In reply, the Plaintiff's counsel answered the preliminary objection, he referred to par 8(c), 8(8) 8(h) to argue that the plaint discloses a cause of action.

Regarding limitation, he argued that par(8f) shows that the Plaintiff discovered the fraud in 2015 when he conducted a search in the Land Registry, so, that is when the cause of action occurred.

Regarding *locus standi*, he referred to paragraph(8c) where he pleads that he is the legal owner of the property in **Kyadondo block 244 plot 1289 – Kisugu**.

Regarding failure to serve the statutory notice, he referred to Article 274 and 20(1) of the Uganda Constitution and the case of *Kabandize & 20 Ors versus KCA 28/2011*, holding that; *'failure to serve a statutory notice is not fatal, and the argument is raised, based on an obsolete law'*.

On being *frivolous*, counsel referred to par 8(h) of the plaint which details the particulars of fraud showing that there are serious questions to be tried, rooted in fraud and this requires adjudication and is not trivial.

In rejoinder, counsel for the 2nd, 4th and 5th Defendant reiterated the earlier submissions. The 3rd Defendant also raised a preliminary objection on similar grounds; that the suit is barred by limitation of time, and secondly that there is no cause of action against the 3rd Defendant.

Counsel's argument on the issue of limitation is that the land in issue was assigned to the 3rd Defendant by a deed of assignment dated 17th July 2001, by the 3rd Defendant which is approximately 18 years, yet the transfer instruments attached to the Plaintiff's pleadings indicates that the suitland was transferred to the 1st Defendant by the 2nd Defendant on 2nd August 2002. This is over 18 years since the 3rd Defendant assigned the suitland to the 2nd Defendant and 17 years since the 2nd Defendant transferred it to the 1st Defendant. The case is filed after the 12 years allowed, under Section 5 of the Limitation Act, hence is barred by law.

The second objection is that the plaint does not disclose a cause of action against the 3rd Defendant. He cited *Lucy Nelima & 2 Ors versus Bank of Baroda Uganda Ltd; Civil Suit No. 55 of 2015* which held that;

“It is settled law that in determining whether the plaint discloses a cause of action, the court must look only at the plaint and its annexures if any, and nowhere else”.

It is argued by counsel that the moment it handed over the suit property to the 2nd Defendant, all right and liabilities vested in the 2nd and 3rd Defendants became *functus officio*’

The 3rd objection is that there was no privity contract between the Plaintiff and 3rd Defendant.

In reply, counsel for the Plaintiff on limitation, he referred to paragraph 8(8) that, that is when he discovered the fraud.

On cause of action against the 3rd Defendant, he referred to 8(c) and 10(e) and on privity of a contract. Counsel referred to *Katuntu versus MTN Uganda Ltd; HCCS No.284/12*, holding that;

“Privity of contract cannot be determined on a preliminary objection, but after full trial”.

He cited 65 of the Contract Act as authority for such third party beneficiary filings to enforce a contract to which they were not party. He insisted that he never mortgaged the property to the 3rd Defendant.

Having analysed all the preliminary objections raised and submissions in lieu thereof, I do reduce all of them into the following issues which sufficiently cover all of them;

Issue No.1: Whether the preliminary objection violates the rules, having been smuggled on record.

Issue No.2: Whether the suit is barred by limitation.

Issue No.3: Whether the Plaintiff has *locus standi* to bring the suit.

Issue No.4: Whether the Plaintiff has a cause of action against each of the Defendants.

Issue No.5: Whether there is privity of contract between the Plaintiff and 3rd Defendant.

Issue No.6: Whether failure by the Plaintiff to serve the statutory Notice was fatal to the case.

Issue No.7: Whether the suit is *frivolous* and *vexatious*.

I will resolve the issues in the above order.

Issue No.1:

Whether the preliminary were smuggled in the pleadings:

The record shows that on 4th February 2020, court gave directions to the effect that the Defendants should amend and serve the amended pleadings upon the Plaintiffs. This was compiled with, within the given time themselves and therefore rightly before me.

Issue No.2:

Whether the suit is barred by limitation.

I agree with the articulation of the law regarding limitation of actions *espoused* in Section 5 of the Limitation Act, Section 21(1) of the Limitation Act, the cases cited of ***Iga versus Makerere University (1972 EA 66) and Dr. Arinaitwe Raphael and 37 Ors versus AG; HCCS No. 201 of 2012.***

Basically in section 5 of the Limitation Act, no action can be brought after the expiry of 12 years. All the Defendants argue that the fact that the Plaintiff brought the suit in 2015, this was out of time since all the Defendants had already dealt with and exchanged interests on the land,

having before, then and the disability referred to by the Plaintiff in par 8 of his plaint is not well articulated in the plaint (per 2nd, 4th and 5th Defendants).

The Plaintiff however, in all, responses in his submissions, insisted that he discovered the fraud in 2015 and when he mounted a search, discovered that his legal interests in the land were fraudulently violated by the collusion of all the Defendants. The law on limitation for cases based on fraud is that time begins to run from the moment the fraud is discovered.

In this case, the Plaintiff insists he was under disability, which the Defendants refute. I have to remind the parties and counsel that whereas they are making an appeal to the provisions of the law, they ought to remain alive to the fact that the law is aimed at facilitating of justice. The law should not be dressed in the gumboots of injustice by its own architects.

From my reading of the pleadings, I find that as rightly argued by counsel for the Plaintiff, the plaint in par 8©, 8(f) and par 10, answers the 1st Defendants concerns. It articulates that Plaintiff enjoyed a right in that, prior to the death of Kato; he transferred plot 1289 to the Plaintiff on October 8, 1975 and a certificate of title and transfer forms were passed to him. This pleading must be taken as is on the plaint. Its sufficient bring out the Plaintiff's nature of right as disabuse in par 8(c) of the plaint.

Paragraph 8(f) shows that the Plaintiff's right as described in par 8(f) shows that the Plaintiff rights to this property was violated by virtue of illegalities and fraud attributed to all Defendants.

Paragraph (10) pleads the particulars of the fraud and counsel for the Plaintiff argues that the failure to conduct a proper due diligence, when purchasing the suitland, shows connivance with 2,3, and 4th Defendants is pleaded. The same is pleaded in par 7(b). The plaint on the face of it alludes to the 1st Defendant being liable. The above articulations are true for the ,3rd, 4th, and 5th Defendants.

Counsel for the Plaintiff in submissions addressed the matters of limitation and cause of action, pleading par 8(f) points at the year 2015 as the first time when he realised that the land was registered in the 1st Defendant's names. He proceeds further to give particulars of steps taken between 2015 – 2017 to contact the 1st Defendant (see paragraph 8(m)).

All these correspondences and averments show that the Plaintiff came to know of the mischief on his land in 2015 and that is when time began running as per Section 25 of the Limitation Act.

The period of limitation is hinged on the time when the Plaintiff discovers the fraud or mistake.

I did not find any avenue to showing that the Plaintiff went to sleep before 2015, yet aware of the Defendant's interests. In the result, I terminate this issue negatively.

Issue No. 3: Locus standi:

Issue No. 4: Cause of action

Issue No. 7: suit frivolous and vexation:

These shall be determined together in that all arguments are acknowledged. I have however examined the pleadings regarding the issue of *locus standi* to bring the suit by the Plaintiff, raised by the 2nd, 4th, and 5th Defendants: reference is made to the plaint under Defendant 8(c), the Plaintiff pleaded that; '*prior to the death of the late Kato, transferred plot 1289 to the Plaintiff on October 8, 1975 and he Plaintiff became the registered owner thereof.*' A copy of the transfer forms is hereto attached and marked 'B'.

I have looked at the annexure 'B', its transfer deed from Thomas Iyamulemye to Patrick Iyamulemye for plot 1289 block 244 – West Mengo dated 8th October 1975, but names of Patrick Iyamulemye registered thereon in 1975 to Stephen Kwiringira in 2002.

Going by the principle laid down in ***Katuntu versus MTN Uganda Ltd***, (*supra*), alongside the principle in that assessing whether the Plaintiff has a cause of action, regard is taken of the plaint and its annexures only. See ***Lucy Nelima & 2 Ors versus Bank of Baroda Uganda Ltd*** (*supra*).

I am constrained to believe that the Plaintiff has *locus standi* as a beneficiary of a legal interest on plot 1889 block 244, to bring the suit against the Defendants in that capacity. This terminates issue 3 on *locus standi*.

On the issue of a cause of action, as raised by all the Defendants, I have in the course of determining issue 1, laid ground for my findings that reading the plaint under Defendants 8 and 10, the plaint specifically shows that the Plaintiff enjoyed a right, the right was violated and he Defendants are liable as follows in Defendant ; the facts constituting the Plaintiff's cause of action jointly and severally against the Defendants arose as under...(a), (b)<...>(f), (g), (h), (i), (j), (k) and (n): as a result of the Defendant's actions, the Plaintiff continues to suffer..."

Paragraph 9 details particulars of fraud against the 1st, 2nd, 3rd and 4th Defendants. The plaint in paragraph 13, specifically (b) prays for a declaration that the 1st Defendant acquired the suit land illegally and fraudulently and in collusion with the 2nd, 3rd and 4th Defendants.

The plaint is clear in apportioning blame against the Defendants. There is a clear cause of action in fraud, collusion and illegality against each of the Defendant. This issue as well terminates by affirming that there is a cause of action against all Defendants.

Issue No. 7, having found as above, the allegations that the suit is *frivolous* and *vexatious*, are not tenable. Issue 7 as well terminates negatively.

5. Whether there is privity of contract raised by the 3rd Defendant.

I am in agreement that this issue requires substantive evidence and evaluation of the same. It cannot be resorted to at this stage before a full trial is held to test the evidence. I agree with the decision in **Katuntu versus MTN** and with counsel for the Plaintiff in his argument that the matter be preserved for determination at the full trial.

6. Whether not serving the statutory notice was fatal

The law on this matter has been settled. It is no longer mandatory to serve a statutory notice; as held in **Kabandize & Others versus KCCA**.

In view of that ruling and the provisions of Articles 27(4) and 20(1), noncompliance with Section 2 of the Civil Procedure and Limitation (Misc.) Pro. Act is not fatal. I do find no merit in this objection and it's overruled.

All in all, the preliminary objections that were raised are dismissed as found above.

The suit shall proceed and costs of the preliminary objections granted to the Plaintiff.

I so order.

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Henry I. Kawesa

JUDGE

12/02/2021

12/02/2021:

Counsel Luyima Declerk holding brief for Counsel Deo Kalikumutima for the 1st Plaintiff.

Counsel Agendo Shabella for the Plaintiff.

Clerk: Kanagwa Grace.

Counsel Brian Kajubi for the 3rd Defendant

Court:

Ruling delivered today to the parties above.

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Henry I. Kawesa

JUDGE

12/02/2021