

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION NO 357 OF 2023
(ARISING FROM CIVIL SUIT NO.116 OF 2023)

STANBIC BANK UGANDA LIMITEDAPPLICANT

VERSUS

SSOZI EDWARD SSEKAYALA RESPONDENT

BEFORE HON.LADY JUSTICE JACQUELINE MWONDHA

RULING

This application was brought by Kyagaba & Otatiina Advocates under Section 33 of the Judicature Act Cap 13, Sections 3 and 5 of the Limitation Act Cap 80, Section 98 of the Civil Procedure Act Cap 71, Sections 64 and 176 of the Registration of Titles Act Cap 230, Order 6 Rule 30, Order 7 rule 11, Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1.

The application was brought seeking declarations that;

- a) Civil suit No.116 of 2023 be dismissed and or struck out for being bad and barred by statute law namely, the Limitation Act and the Registration of Titles Act.
- b) Civil suit No.116 of 2023 does not disclose any reasonable/maintainable cause of action against the applicant.
- c) Civil suit 116/2023 is frivolous and vexatious.
- d) That the respondent bears the costs of this application and those of Civil Suit No.116 of 2023.
- e) Any other orders that this court deems necessary.

Blwonds
29/04/2024

The grounds upon which this application is founded in the affidavit in support of Andrew Mausio the Head, Legal Credit and Recovery of the applicant and they are;

1. The respondent/plaintiff filed HCCS 116/2023 on 19th May 2023 based on a contract dated 14th March 2005, more than 18 years later. The suit challenges the applicant's mortgage registered on 4th October 2007 more than 16 years ago. The suit is barred by the statute of limitation.
2. The respondent's/plaintiff's claim in Civil Suit No.116 of 2023 is based on an alleged unregistered sale agreement of 14th March 2005. The plaintiff alleges to have only entered possession of the suit land in 2018. 11 years after the applicant's mortgage. The alleged sale agreement was undiscoverable even with the exercise of all due diligence. The suit is frivolous and vexatious.
3. The applicant bank's mortgages were preceded by the mortgages of DFCU Bank which were registered on 29th June 2005 and 16th June 2006 respectively. The plaintiff's claim (if at all and which is denied) is against DFCU Bank and not the applicant bank.
4. The respondent/plaintiff's claim is not as lawful and or bonafide occupant of the suit land. His claim is for a legal interest which is unregistered. Competing legal interests in land take effect upon registration and take precedence in priority of registration. The plaintiff's suit is frivolous and vexatious.
5. There is no legal requirement for a mortgagee to inquire of Local Council Authorities before entering s mortgage when the mortgagor's title, occupation of the land, bonafides and spousal consents are authentic and not contested. The Applicant bank is not a purchaser. The main suit is frivolous and vexatious.
6. The plaintiff/respondent's claim is in an unregistered contract enforceable only as against the parties thereto. The applicant bank is not privy to the alleged contract between the plaintiff and the mortgagor.

W. Kuwinda
29/04/2024

7. HCCS 116/2023 is not a bonafide suit. It is an abuse of court process contrived in collusion by the plaintiff and the first defendant to entangle the applicant bank in a frivolous litigation to stop it from realizing its securities in the suit land after the 1st defendant defaulted on his loan with the applicant.

The first issue framed for court's determination was whether the cause of action (if any) is barred by Limitation of time.

Counsel for the applicant submitted that the respondent's cause of action if any is out of time. The respondent's claim in CS No.116/ 2023 is based on an alleged contract dated 14th March 2005 which is more than 18 years ago. The respondent seeks to challenge the applicant's mortgage registered on 4th October 2007 more than 16 years ago. He also submitted that the applicant's mortgage was preceded by mortgages of DFCU bank Limited which were registered on 29th June 2005 and 16th June 2006 respectively. That limitations of actions for recovery of land are governed by Section 5 of the Limitation Act Cap 80 which stipulates 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 right of action accrued to him or her.

Counsel for the applicant also relied on Order 7 rule 11(d) of the Civil Procedure Rules S. I 71-1 which is to the effect that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. The applicant cited the case of **Odyek Alex and Another v Gena Yokonani, Civil Appeal No.09 of 2017** where court noted that limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership. That the claims relating to the respondent's declarations sought are caught by limitation of time.

Shulonda
29/04/2024

The applicant further submitted that Order 7 rule 6 of the Civil Procedure Rules provides that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the grounds upon which exemption from that law is claimed. That in the case at hand the respondent's plaint does not pleaded any exceptions for filing out of time and any attempts to plead them must now be rejected. That even though the respondent pleads fraud against the applicant, the respondent does not specifically plead fraud as an exception to his suit being barred by limitation as required under Order 7 rule 6 of the Civil Procedure Rules.

Counsel for the applicant also submitted that without prejudice to the above **Section 25 of the Limitation Act Cap 80** which provides fraud as an exception provides that "the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it". In this case the respondent contends that he got possession in 2018 after allegedly paying the last installment and discovered the applicant's mortgages in 2021 when he made a search at the land registry. The applicant opined that it was unusual for an interested party in land to take more than 13 years to purchase it and 16 years to discover the applicant's mortgages on the same land and prayed that in light of the above the court finds that the cause of action (if any) of the respondent is barred by statute of limitation and the plaint should be struck out with costs to the applicant.

In relation to the second issue; whether the suit discloses any maintainable cause of action against the applicant, it was the applicant's submission that the respondent had no maintainable cause of action against the applicant. That in determining whether the respondent's plaint/suit raises a cause or reasonable cause of action, court has to look at the pleadings before it. These pleadings should be able to fulfil the requirements / essential elements to the support the cause of action i.e. the plaintiff enjoyed a right, right has been violated and the defendant is liable as stated in **Auto Garage U Motokov (No. 3) (1971) EA 514**.

Blumond
29/04/2024

That as far as order 6 rule 30 (1) of the CPR is concerned, court must first consider the ground of whether there is a reasonable cause of action or defense disclosed and what materials are necessary to establish that. In this case the concern is whether there is a reasonable cause of action as the pleading being attacked is the plaint and not the defense.

Counsel for the applicant relied on **Odgers Principles of Pleading and Practice in Civil Actions of the High Court of Justice 22nd edition page 148**, which stated that "on an application based on this ground alone, no evidence is admissible." The court only looks at the pleadings, particulars, and not any affidavit.

Counsel cited **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** where Wambuzi CJ as he then was held at pages 2 and 3 of the judgment, that in determining whether a plaint discloses a cause of action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 29 (which is currently order 6 rule 30), only the plaint can be looked at. He stated that "in so far as is relevant Order 6 Rule 29 provides as follows; the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action and, in such case, may order the suit to be stayed or dismissed or judgment to be entered accordingly.... I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29, only the plaint can be looked at."

It was the applicant's contention that in the instant case, the acts complained of and orders sought are depicted under paragraphs 5 and 4 of annexure A of the affidavit in support of the application. The respondent's claims mainly relate to challenging the applicant's registered mortgages and are premised on unregistered interests the applicant was not privy to. The claims are neither equitable interests in "kibanja" nor of a lawful or bonafide occupant, but rather a claim for legal interest represented in a certificate of title, on this ground alone,

W. K. Wambuzi
29/09/2024

the respondent has no locus to institute the present suit as the applicant's interests in the suit land is prior in time and or law, and on registered land, and the respondent's claim cannot trump the applicant's. In determining whether the respondent has no locus standi, the court is equally perfectly entitled to look at the pleadings and other relevant matter in its records. The term locus standi literally means a place of standing. It means a right to appear in court, and conversely to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. The lack of locus standi means the person cannot be heard, even on whether or not he has a case worth listening to.

It was further submitted that, for any person to otherwise have locus standi, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one in the subject matter of the suit; the interest must not be too far removed (or remote); the interest must be actual, not abstract or academic; and the interest must be current, not hypothetical. The requirement for sufficient interest is an important safe-guard to prevent having "busy-bodies" in litigation, with misguided or trivial complaints. If the requirement did not exist, the courts would be flooded and persons harassed by irresponsible suits as observed in **High Court Civil Appeal No. 0017 of 2016 Dima Domnic Poro v Inyani Godfrey & Apiku Martin.**

That upon perusal of the plaint under paragraph 5 (k) of the affidavit in support of the application, the applicant perfected its mortgage over the suit land by registering the same thereby creating a legal interest in 2007 under Instrument No. MK088687, 2008 under Instrument No. MK096998, 2009 under Instrument No. MK106989 in 2010 under Instrument No. MK114648 and in 2011 under Instrument No. MK0125594. It is generally recognized that a legal interest is valid and enforceable against the whole world. This means that if a person obtains a legal or equitable interest in property, his or her interest is subject to the interest of a person who created a prior legal interest. Therefore, where there

Handwritten signature
29/04/2024

is a conflict between equitable and legal interests in registered land, legal interests take precedence unless the person having an equitable interest can show that the person who acquired a legal interest was aware of the equitable interest at the time the latter was created. Once a mortgage is registered, no subsequent dealings in the land can be made without the written consent of the mortgagee / applicant. Any purported transactions would, if not void, be subject to the mortgage. In this regard counsel relied on Section 18 (f-g), 64 of the Mortgage Act, John Katarikawe v William Katwiremu [1977] H.C.B 187. That in addition, sections 48, 51 and 54 of the Registration of Titles Act (RTA), only provides for title by registration i.e., one only acquires legal title to land after one's interest has been registered and priority of competing interests is determined in accordance with that date of registration and not the date of transaction.

More to this, the applicant averred that there is no evidence of the applicant having been notified of the respondent's interest in any way, as such the applicant's legal mortgage takes precedence over the respondent's (if any). In any case, equitable rights are only rights in personam, that is, rights which are enforceable against certain categories of persons and not the entire world. Therefore, assuming that the respondent indeed acquired a portion of the suit land from Mr. Ssali, the former's claim would only be against the latter and not the Applicant.

That notwithstanding, the applicant is a bonafide mortgagee for value without notice. It was not privy to the alleged transaction between the respondent and mortgagor. A bonafide purchaser or mortgagee has been defined as one who "buys something for value without notice of another claim to the property and without actual or constructive notice of any other defects in or informalities, claims". A party asserting that it is a bonafide mortgagee has the burden to prove that it paid valuable consideration, had no notice of any fraud or interest affecting the property, and acted in good faith as held in **Yafesi Luganda v Stanbic Bank Uganda Limited CS No. 166 of 2016**.

W/words
29/04/2024

That from the pleadings on record, the applicant, carried out due diligence and also engaged a firm to carry out a valuation of the land. This entailed an on-site inspection of the land. In addition, the applicant ensured that it obtained the consent of the mortgagor's spouse. The land title was in the mortgagor's name and there was nothing to put the applicant on notice of any fraud or interest adverse to that of the mortgagor and there were no signs of the respondent occupying, using, or having an interest in the suit land. Therefore, without the mortgagor's disclosure, the applicant had no way of ascertaining the existence of the respondent's alleged interest in the suit land. The only 3rd party interest the applicant became aware of was the mortgage to DFCU Bank Limited, which interest was bought off by the applicant.

Furthermore, it was submitted that the facts as pleaded relating to fraud as against the applicant are vague and wholly unfounded. Fraud has been defined in several cases to "denote any act of dishonesty". The definition has also been noted in the case of Zabwe Fredrick versus Orient Bank & Others, SCCA No.4 of 2006.

Counsel for the applicant submitted that it is not enough to merely plead fraud; the allegations of fraud have to be strictly proved and attributed to the applicant. The absence of any facts showing connivance or fraud wholly or by necessary implication attributable to the applicant speak to the futility of the respondent's allegations. That therefore, the alleged contract alluded to is only known to the respondent and mortgagor; the applicant was never privy to it, and the respondent has not claimed as much. Further, the said agreement is neither registered as a public document nor admissible in law, for want of payment of stamp duty and lack of certificate of translation.

Counsel for the applicant finally prayed that the court finds that the respondent has no cause of action against the applicant and the bank's interests take precedence over any interests from 3rd parties and prayed for costs of the application and suit.

*Alkward
29/09/2024*

In response to the first issue; whether the cause of action (if any) is barred by Limitation of time, the respondents submitted that the cause of action is not out of time as suggested by the applicant.

Counsel for the respondent submitted that a cause of action is time barred, when the time within which it should have been presented to court lapses on the person who should have brought it. Counsel relied on **HCCS No: 031 of 2011, Gunya Company Limited v Attorney General.**

That whereas the respondent agrees with the consequences of a cause of action being time barred were well discussed by the applicant with the authorities cited, they submitted that the authorities so cited are cited out of context, and are distinguishable. That they were aware that the time when the cause of action arose has to be reckoned, equally to be reckoned is the time the plaintiff discovered the injury which he presents to court for judicial consideration for a redress.

Counsel for the respondent contended that from the facts as presented in the plaint, the respondent purchased a plot of land from one sali Henry (seller) in 2005, and made a down payment of part of the purchase price and took possession of the purchased property. The respondent continued to make payments for the land and these were acknowledged by the seller. The seller kept on asking for the balance of the purchase price, until he even increased the same, on promises that he would avail the certificate of title, mutation forms and transfer forms. He never at all disclosed to the respondent his behind-the-back dealings with the applicant on the same property. The respondent discovered all this fraud in 2021, after finishing the whole payment, and upon the seller becoming elusive on the promise to avail the necessary documents.

That it is the time which from the discovery of these fraudulent mortgages was done, after a search conducted by the respondent in 2021. Additionally, that the time of limitation must, with respect be counted to run. These fraudulent

Handwritten:
29/04/2024

mortgages did encumber the entire land, without first curving out the portion due to the respondent, and which he is in court to claim.

That it was in 2021 after the respondent made a search in the Lands Office, following the elusive nature of the seller (Ssali Henry), that the respondent became aware of all those successive fraudulent mortgages of 2007, 2008, 2009, and 2011. Notably all these successive mortgages came after the respondent's purchase of his portion and after his entry into the said portion of land and fraud like the one forming the basis of the substantive suit, is an exemption to the limitation period.

That the rationale behind is that fraud is not merely to be smeared to the face of its victim. That is why section 25 of the Limitation Act, Cap 80, makes it an exemption to the limitation period. Hence the clock of limitation must start ticking from the day the fraud is discovered. In this case, it was from 2021 after a search Certificate was obtained.

The respondent also submitted that the position would have been different had 12 years lapsed, after the respondent discovered the fraud, and sat on his rights. The respondent relied on the decision by **Luswata J, (as she then was) in HCCS No: 282 of 2013, Sunday Edward Mukooli -vs- Nabbaale Topista & 3 Others**, in which she held that in considering whether a cause of action is time barred, court has to look only and only on the pleadings and annexures.

In relation to the second issue to wit; whether the plaint discloses any maintainable cause of action against the applicant.

The respondent submitted that the law on cause of action has been dissected overly in several cases and in finding whether or not a cause of action is made out in a suit, court must look at pleadings and only the pleadings. Once the pleadings on their face satisfy three conditions, then the cause of action is said to be made out. These are, the plaintiff enjoyed a right, the right was violated, and the defendant is liable. Counsel cited **Auto Garage- vs- Motokov (No: 3) 1971 EA 514**.

W. Mwendu
29/04/2024

It was the respondent's contention that the applicant attacked the respondent's plaint. To the applicant, these pleadings do not make out a cause of action maintainable against her. They submitted that it is not available for the applicant to pick out only pieces of the plaint, and ignore the rest of the parts of the same plaint, and the annexures.

That as far as the respondent (plaintiff) enjoyed a right, the contents of paragraphs 5(a), (b), (c), (d), (e), (f), (g), and (h) plead the detail of the respondent's right. This right stems from his purchase of the suit land from one Ssali Henry, and the respective payments made, in pursuance of his purchase, and his possession of the land he purchased. It must be remembered that this entire ordeal of purchase was instigated at the seller's promise to avail title deeds, and mutation forms to enable the respondent carve off what was rightfully his. That the violation of the plaintiff's right is made clear, the said seller Ssali Henry became elusive on his promise to yield up to the respondent title deeds and mutation forms, which necessitated him to make a search of the land office. From there the respondent discovers the fraudulent mortgages created by the seller to him of his plot, with now the applicant bank, and holds both seller (mortgagor), and the applicant bank (mortgagee) liable for the fraudulent mortgage. Further in paragraph 6, the respondent itemizes the particulars of fraud as against the seller (Ssali Henry), and also as against the applicant bank. The fraud pleaded against the applicant bank include failing in her due diligences before accepting the mortgage of the land, refusing or failing to consult with local administration on ground, conniving with Ssali Henry to defraud the respondent, and accepting successive mortgages since 2007 without ever visiting the land subject of which the mortgage was being created.

That litigants are bound by their pleadings. All the averments including the particulars of fraud as against the applicant bank are subject of proof, through leading evidence. That the plaint made out the cause of action against both defendants, rooted in fraud as pleaded.

W. K. M. M. M.
29/04/2024

In relation to the third issue on what remedies are available to the parties, the respondent submitted that remedies available are two. Firstly, court was invited to disallow the application, with costs. The objections raised in the application, were meritless. The action is not time barred. And a cause of action was clearly made out in the plaint. Whether it is maintainable against the applicant is another thing altogether, which must be decided after going through the trial of evidence. As such the application needs to fail, with costs.

Secondly, the respondent invited court to fix the matter so that evidence can be led in proof of the case against both defendants.

ANALYSIS

Before I delve into the decision of the court on the framed issues I find it pertinent to indicate that one of the issues framed was whether the cause of action (if any) is barred by Limitation of time.

Order 7 rule 11(d) of the Civil Procedure Rules S I-71 provides that a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

Owing to the fact that the gist of this application is ascertaining whether the respondent in fact has a cause of action against the applicant bank, it would be prudent to leave this particular issue to be resolved in the civil suit after scrutiny of the pleadings to establish if the suit is indeed barred by limitation.

2. Whether the plaint discloses any maintainable cause of action against the applicant.

The respondent's cause of action against the applicant is of fraud. The alleged fraud pleaded against the applicant bank by the respondent is failing in her due diligences before accepting the mortgage of the land, refusing or failing to consult with local administration on ground, conniving with Ssali Henry to defraud the

W. Mwendu
29/04/2024

respondent, and accepting successive mortgages since 2007 without ever visiting the land subject of which the mortgage was being created.

In response to the above allegation, the applicant submitted that there is no legal requirement for a mortgagee to inquire of Local Council Authorities before entering a mortgage when the mortgagor's title, occupation of the land, bonafides and spousal consents are authentic and not contested.

Fraud was defined in **Zabwe Fredrick versus Orient Bank & Others SCCA No. 4 of 2006** where it was held that fraud constitutes an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

In order to succeed on an action based on fraud, the plaintiff is required to attribute the fraud to the transferee by showing that defendant is guilty of some dishonest act or must have known of such act by somebody else and taken advantage of such act. **Kampala Bottlers Ltd vs Domanico (U) Ltd SCCA No.22 of 1992.**

The plaint for civil suit No.161 of 2023 under the facts giving rise to the cause of action it is indicated that on 21st November 2018, the plaintiff paid the defendant UGX 9,500,000 in full and final payment for portion 70ft by 80ft on which day he also took possession of the property which was developed with rental premises.

The first mortgage with the applicant bank was first registered in 2007 after the respondent had made part payment for the land and gained an equitable interest in 2005. In **Ismael Jaffer Allibhai and others vs Nandalar Harvijan Karia and another SCCA No.53 of 1995** it was held that in a sale of immovable property upon payment of deposit, property passes to the purchaser who acquires equitable interest.

Shwanda.
29/04/2024

The respondent himself indicated that he only took possession of the land in 2018 therefore even if the applicant bank had carried out a physical inspection on the land they would not have found out about the unregistered interest of the respondent as he was not yet in possession of the land by 2007 when the first mortgage was registered, the certificate of title still bore the names of one Sali Henry so they had no way of ascertaining the existence of the respondent's equitable interest except by disclosure by the respondent or the mortgagor and no such disclosure was made.

I find that the fraud is more attributable to the mortgagor than to the applicant bank as he went ahead and mortgaged land he had already sold to the respondent and concealed this information from the mortgagee.

For the aforementioned reasons, I find merit in this application and make the following orders;

1. Civil suit No.116 of 2023 in as far as it relates to the applicant Stanbic Bank Uganda Limited is hereby dismissed.
2. The costs of this application shall be met by the respondent.

I SO ORDER

..........

JACQUELINE MWONDHA

JUDGE