THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

LAND DIVISION

ARISING FROM CIVIL SUIT NO 574 OF 2020

1. **WANUMI GODFREY**
2. **BUGANDA LAND ROAD**

VERSUS

1. **NZIREJJE RONALD MUTEBI**
2. **MUKASA FRED SSEVVIRI**
3. **SSENDIJJA PETER JORUM**

(Administrators of the estate of Sserwanga James Kalemba)

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

This application seeks orders that the ***Civil Suit No. 574 of 2020*** be dismissed for *not disclosing a reasonable cause of action against the applicant; and being statute barred, frivolous and vexatious, res judicata; and for costs be provided for.*

Grounds of the application:

The grounds of the application are laid out in detail in the supporting affidavit of the 1st applicant, Mr. Wanumi Godfrey and Ms Joyce Bukirwa Samantha, representating the Buganda Land Board, as the 2nd applicant.

Briefly, the 1st applicant purchased a *kibanja* in Dubai Zone and later through the Buganda Landa Board (2nd applicant) became the registered proprietor of land comprised in ***plot 973*** and ***plots 1003.*** He claimed that he had acquired interest in the *kibanja* in 2004 at an auction held in execution of a High Court decree in ***HCCS 31/2003.***

The 1st respondent, Mr. Nzirejje James, a son to James Sserwanga, filed objector proceedings vide: ***MA No. 551 of 2003,*** wherein he claimed that the suit property which had been sold to

the 1st applicant in satisfaction of judgment debt did not belong to their late father Sserwangs James.

The application was however dismissed for want of prosecution. The 1st respondent, later filed ***Civil Suit No.574 of 2020*** challenging the 1st applicant's fraudulent acquisition of the property comprised in ***block 262 plots 973 and 1004,*** land located at Makindye Dubai Zone, and the lease granted to him by the 2nd applicant, whose failure to verify the exact land to which the 1st applicant was entitled amounted to negligence.

The 1st applicant now seeks to challenge the suit contending that it does not disclose a reasonable cause of action against him; is *res judicata;* barred by the statute of limitation and is frivolous and vexatious.

Reply by the respondents:

A response to the application was filed by the 1st respondent, Mr. Ssendijja Peter Joram, one of the sons and administrators of the estate of the late James Sserwanga Kalemba.

He avers that they discovered from the 2nd applicant in 2020 that their late father's land comprised in ***LRV 1273 Folio 8 Kyadondo Block 262, plot 299*** had been illegally sold as a *kibanja* and later subdivided and transferred to the 1st applicant.

The 1st applicant is represented by ***MS Nanyombi, Kyamuhangire Advocates.*** The 2nd applicant is represented by the Legal Department of the Buganda Land Board, while the respondents on their part are represented by ***MS TASSK Advocates.***

Background to the application:

By way of a brief background to the case, the late James Sserwanga who was the original owner of the *kibanja* in Dubai Zone, Makindye and his son, Fred Mukasa were indebted to ***M/S Evergreen International (U) Ltd*** to a tune of ***Ugx 18, 970,000/=.***

It is not in dispute that judgment had been entered against them and no appeal had been lodged against that decision. The property was attached by order of court and before the sale took place on 9th August, 2004, an advert was placed in *Bukedde* Newspaper on 5th July, 2004.

The 1st applicant claims that he developed interest after visiting the property with the court bailiffs and finding the premises vacant, upon which he had paid a sum of ***Ugx 12,000,000/=***, as per the sale agreement dated 9th August, 2004 and receipt, marked ***E and E1.***

The 1st respondent however filed objector proceedings to the attachment and sale vide: ***Zirejje Ronald vs Evergreen International (U) Ltd.& 2 others: MA No. 551 of 2003.***

In the supporting affidavit under that application, the 1st respondent had claimed that the late James Sserwanga no longer had any *kibanja* at Dubai Zone Makindye as he had disposed it off to his children in June, 1996.

He further deponed under that same application that he had interest in the advertised property whose attachment and sale he therefore objected to. The said application however was dismissed on 7th October, 2003 for want of prosecution, as per order, ***annexture F2,*** extracted on 19th December, 2005 by ***M/S Rwakaafuuzi & Co Advocates,*** who was representing *Evergreen International (U) Ltd,* the judgment creditor.

The respondents claim in the present application that ***MA No. 551 of 2003*** had not been heard on its merits and neither its contents nor substance was of any essence in determining the main suit.

That they discovered in 2020 from the 2nd applicant that the land was comprised in ***LRV 1273 FOLIO 8 Kyaddondo, Block 262, plot 299.*** However that the paper work that the 1st applicant presented was in respect of the untitled land, and not the titled land comprised in ***plot 299***.

That ***plot 299*** had been subdivided into two ***plots 1004*** which is still in the names of their deceased father and ***plot 973*** which is now in the names of the 1st applicant.

The family disputed the 1st applicant's claim that he has been in possession ever since the acquisition and division, transactions which they claim to have been fraudulent.

They also contend that the family has been in possession of the titled land since 1983 under a lease of the Uganda Land Commission, (ULC) without any interference from the applicants. That the reversion of the controlling authority from the ULC to the Kabaka of Buganda did not extinguish their lease rights.

The 2nd applicant through Bukirwa Joyce Samantha, however averred that the said lease had already expired and the land reverted to the Kabaka of Buganda. The 1st applicant through the 2nd applicant, the agent of the Kabaka Of Buganda, had applied for and was duly granted the lease, thus passing on the *kibanja* from its original holder to his successor, by way of an order of court.

Issues:

The issues for consideration as identified by this court are therefore:

1. ***Whether the plaint discloses a reasonable cause of action against the defendants;***
2. ***Whether the suit is barred by statute;***

3. ***Whether the suit is frivolous and vexatious;***
4. ***Whether the suit is res judicata.***

Consideration by court:

Issue No. 1: Whether the plaint discloses a reasonable cause of action against the defendants;

And

Issue No. 4: Whether the suit is res judicata

The 1st applicant is the registered proprietorand claims to be currently in possession of, and in occupation of the land comprised in ***Kyadondo Block 262, plot 973 and plot 1003,*** land at Makindye.

He claims to have acquired the interest in a *kibanja* which originally belonged to the late James Sserwanga. The land was divided into two plots which were adjacent to each other. He acquired legal interest for each ***(Annexed as 'A' and 'A1'),*** and secured leases from the 2nd applicant.

He further claims that under the present suit ***HCCS No. 574 of 2020,*** he is sued by the respondents regarding his interest in the land which he contends he had purchased as a *kibanja* he had bought at an auction held in execution of a court decree by a court in the commercial division: v***ide: Evergreen International (U) Ltd vs James Sserwanga and Fred Mukasa T/a Mpola General Merchandise: HCCS No. 31 of 2003.***

The first point of contention by the 1st applicant was that the suit did not disclose a reasonable cause of action against him.

A cause of action has been defined as every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court ***(Read vs Brown (1882) 2 QBD 128 At 131***).

In determining whether a plaint discloses a cause of action, the court must only look at the plaint and its annextures.

A cause of action must therefore show that the plaintiff enjoyed a right; the right was violated and that the defendant is the one who violated it. ***(Tororo Cement Co. Ltd vs Frokina International Ltd SCCA No. 2 of 2001.)***

Furthermore, under ***section 49 of the Civil Procedure Act*** where immovable property is sold in execution of a decree, the sale becomes absolute on the payment of the full purchase price to the court or to the officer appointed by the court to conduct the sale.

I have taken into consideration the points raised in the pleadings and submissions by each side. In alignment with the principles above, since the 1st applicant in this case had paid the full purchase price, the sale made under a warrant of execution of court became absolute.

The respondents cannot therefore maintain an action against the 1st applicant in respect of the *kibanja* in Dubai Zone, Makindye which was subject of the two undischarged orders passed in ***Civil Suit No. 31 of 2003 and MA No. 551 of 2003***.

The orders confirmed the validity of the interest acquired by the 1st applicant in the suit *kibanja,* which was later upgraded into a legal interest, through the office of the 2nd applicant.

Thus for a defence of conclusiveness of judgments as pleaded in this application to succeed, it is necessary to show not only that the cause of action was the same.

It must be proven that the plaintiff has had an opportunity of recovering, and but for his/her own fault might have recovered in the first action that which he seeks to recover in the second action.

In ***section 7 of the Civil Procedure Act, Cap. 71*** the court would therefore decline to entertain any issue which may have arisen in a former suit between the same parties or between parties under whom they or any of them claim in a court competent to try the subsequent suit or the suit which the issue has been subsequently raised, heard and subsequently determined by that court.

The prepositions, as summarized by the Court of Appeal in ***Lt. David Kabareebe vs Maj. Prossy Nlweyiso CACA No. 34 of 2003*** are that the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice over in successive litigation.

It goes without saying therefore that the *kibanja* located in Dubai Zone, Makindye, the subject of court case, was fully and finally resolved by a competent court, execution made under a decree which was not challenged, and the respondents interest in it therefore extinguished by the two court orders.

As noted earlier on, the judgment debtor, Sserwanga James whom court by implication duly recognized as the original owner did not challenge that order prior to execution.

The 1st respondent abandoned his own bid to object against the attachment and execution of the decree, confirming therefore that since the family had not found it necessary to have the order varied, reviewed or discharged in effect, the administrators would have no *locus* to file the head suit since it no longer constituted part of the deceased's estate.

With all due respect therefore to the respondents' assertion that they were not party to the suit, they did not follow the due course of the law applicable for review of offending orders, guaranteed for any aggrieved party under ***section 82 of the Civil Procedure Act, Cap.71*** and ***order 46 of the Civil Procedure Rules.***

The argument by the respondents on that point therefore that the application for objector proceedings was never heard on its merits cannot also be sustained, for in determining whether or not a suit is barred by *res judicata,* the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action, a transaction which has already been presented before court of competent jurisdiction in earlier proceedings which have been adjudicated upon. (***Ponsiyano Semakula vs Susan Magala and others [1979] HCB 89).***

That principle applies equally to the suit ***HCCS No. 31 of 2003*** equally as it did to the dismissed action ***MA No. 551 of 2003,*** the overall effect of which was that there was no registered objection or further dispute to the 1st applicant's acquisition and ownership of the *kibanja.*

If the respondent believed they had interest as actual owners of the *kibanja,* then they ought to have applied to join as parties in that suit, which thy never did. I cannot agree more therefore that neither applicant had been privy to any prior arrangement between the respondents' father and *Evergreen International (U)* ,

From the above findings, the respondents therefore had no cause of action against the applicants in respect of the *kibanja* in dispute and in any case the position as established indicates that the matters regarding the ownership of the *kibanja* were *res judicata.*

The objections raised under ***issues 1 and 4*** are therefore upheld.

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

and

Issue No. 3: Whether the suit is frivolous and vexatious

A distinction must be made here between the actual *kibanja* as described in the concluded suit and the titled land, as invariably pleaded by each side. The pleadings indicate ***plots 299, 973, 1003, and 1004***, each having a nexus with the *kibanja* in contention.

The respondents claim that the land in contention was originally registered as ***LRV 1273 Folio 8, plot 299*** which formed part of their father's estate. That by virtue of a lease dated 24th October, 1983 between KCC (then) and their late father a lease had been granted for the land measuring 0.219 hectares which was registered in the names of James Sserwanga, their late father. It is attached to the plaint.

According to the respondents, the 1st applicant fraudulently acquired land beyond what he had been entitled to and in respect of which he had later been issued with a lease by the 2nd applicant.

However, according to the applicants, and indeed as confirmed by this court, the original lease under ***LRV 1273 Folio 8 plot 299*** had since expired, the land reverted to the Kingdom of Buganda as the lessor and the purported interest therein of the respondents extinguished by subsequent developments which saw the 1st applicant as the new lessee of that land.

The respondents also refer to ***plot 1004,*** alleging that it is still registered in the names of their deceased father. The 1st applicant however denies having any interest in that land.

His interest lies in ***plots 973*** measuring 0.059 hectares, ***and 1003*** measuring 0.50 acres, the two plots which he contends constitute the *kibanja* he purchased, as divided up by the 2nd applicant. The size of the *kibanja* in its original form was not known, as it was never indicated in the pleadings and orders made in the earlier suits before this court.

In *paragraph 2* of the application, the 1st applicant states:

> *The 1st applicant does not know **plot 1004** and has no claim therein. The applicant's additional interest is in **plot 1003** which together with **plot 973** form the kibanja I bought.(emphasis mine).*

The above averment has several implications for the main suit. In the first place that the respondents have no cause of action against the applicants in relation to ***plot 1004.***

But secondly, from the contents of that *paragraph,* the suggestion by the 1st applicant on the one hand is that ***plot 1004*** is different from ***plot 1003*** which is adjacent to ***plot 973.*** It was acquired by the 1st applicant as additional interest to that which he purchased originally as the *kibanja* in Dubai Zone, Makindye. That cannot be reconciled with what he avers in that same *paragraph* that the two plots he claims as his were part of the original *kibanja.*

The respondents in highlighting the inconsistencies in the applicants' defences, maintain that the 2nd applicant had as a matter of fact from the evidence given out only ***plot 973*** to the 1st applicant and that ***plot 1003*** had not been referred to by the applicants in their defence.

The 1st applicant's explanation in response is that in the WSD, the applicants had restricted themselves to ***plot 973*** since ***plot 1003*** had not been in dispute. Based on those facts it would appear that just as the 1st applicant had no interest in ***plot 1004,*** the respondents had no interest in both ***plots 973 and 1003,*** the latter being the additional interest acquired by the 1st applicant from the 2nd applicant.

Whichever way one would choose to look at it, considering the period it had taken the respondents to file the suit for the necessary corrective action, the question now becomes whether they were barred by law from filing the suit to recover the land.

Consideration of the issues:

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."***

Section 6 of the Limitation Act (supra) of the same Act provides;

> ***"The right of action shall be deemed to have accrued on the date of the dispossession."***

The direct import of ***section 5 and 6*** is, first, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued; which is the date of dispossession.

In the case of ***F. X Miramago v. Attorney General [1979] HCB 24***, it was held 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.

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 Civil Procedure Rules S.I 71-1*** 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 Others v. Attorney General (1973) HCB 87; John Oitamong v. Mohammed Olinga [1985] HCB 86).***

In addressing ***objections 2 and 3*** the presumption here is that these were irregularly granted. As duly noted by this court in the instant case, the said ***plots 973 and 1003*** had two separate leases, both issued on 11th March, 2008,

In the affidavit in rejoinder by the 2nd applicant, *para 4* thereof, this is what the deponent states:

> *In 2005 which makes more than 15 years today and on 5/1/2008 slightly more than 13 years ago the Secretary Buganda Land Board received letters addressed to the board by Kafuko Ntuyo Advocates written by them on behalf of the very same respondents herein. (See Annexture A and B).*

Annexture A1 indicates that the Muluka Chief Makindye 11 Mr. Lubega Matovu Khalifa had written to the Secretary of the 2nd applicant board on 14th March 2005.

He pointed out in that letter that Mr. James Sserwanga (1st respondent's father) had applied for the lease, but lacked the requisite documents to prove his claim. ***Annexture A2*** was on the other hand the recommendation made by the LC to the 1st applicant, in 2005 supporting his application for a lease. Mr Sserwanga during his life time never took any further step to question that state of affairs.

Annextures B2 and C were correspondences made to the 2nd applicant board as early as 2005 by ***M/S Rwakafuuzi & Co. Advocates,*** the counsel for the 1st applicant and ***MS Kafuko Ntuyo Advocates*** for Mr. Dan Kalemba a brother to the respondents.

As duly submitted, the respondents were at all material times duly represented by the firm of ***MS Kafuko Ntuyo Advocates*** and as early as 2003 the firm had represented the 1st respondent in ***MA No. 551 of 2003***. This was the same firm which on 5th January, 2008 had written to the 2nd applicant board, to lodge their objection to the issuance of the lease to the 1st applicant.

Accordingly, the family was fully aware of everything that had been taking place as early as 2003 and in 2005 or presumed to have known about any intended action by the 2nd applicant board to grant the leases to the 1st applicant.

Where by reason of disability, fraud or mistake the operative facts were not discovered immediately, ***section 21 (1) (c) of The Limitation Act*** would come in to confer an extension of six years from the date the facts are discovered. What ***section 21 (1) (c)*** does is not to give a fresh starting point of limitation, but to extend the period of limitation prescribed in ***section 5.***

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 others (supra); Madhivani International S.A v. Attorney General (supra).***

It is also worth noting that the plaint did not indicate any grounds of exemption from limitation in accordance with ***order 7 rule 6 of the CPR***.

The cause of action in this case for the any additional interest the 1st applicant may have acquired started running prior to 2005 when the respondents got to learn about the 1st applicant's intention to apply for the leases and thereupon instructed their counsel to lodge the objection against the move.

I could not agree more that the respondent could not have learnt about the prospects of the lease offer in 2020 as they claimed in this application. The truth as confirmed from the evidence on record was that the family had through their counsel, ***MS Kafuko Ntuyo Advocates*** not only knowledge about the decision in ***HCCS No. 31 of 2003 and MA No. 551 of 2003,*** but they also knew about the subsequent grant of the leases but chose not to challenge any of these decisions in court within the time as prescribed by law.

Even if therefore court were to believe that the respondents had no inkling, (which cannot be correct) with reasonable diligence they could have discovered any illegality/ fraud committed by the 1st applicant prior to 2005 instead of waiting for more than 15 years later to file the suit. In short they sat on their rights and were therefore caught in the web of laches.

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims. ***See Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321; Rawal v. Rawal [1990] KLR 275, and Iga v. Makerere University [1972] EA 65.***

There must be an end to litigation. The preliminary objections raised therefore are upheld.

In the final result the respondents have no locus to file the head suit. They held no interest in ***plot 973*** and the 1st applicant indeed has none in ***plot 1004*** both being the subject of the main suit.

In the unlikely event that they did, after more than 12 years of sitting on their rights and feeling sorry about the opportunity they lost to renew their lease, the main suit brought at this point in time is perceived by court as merely intended to vex the applicants, and an abuse of court process therefore.

The objections raised in the i***ssues 2 and 3*** are therefore also upheld.

For the above reasons, the plaint in ***Civil Suit No. 574 of 2020*** is accordingly rejected for offending ***order 7 rule 11 (a), (d,) and (e) of the Civil Procedure Rules.***

Costs awarded to the applicants.

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Alexandra Nkonge Rugadya

Judge

30th March, 2021