

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 412 OF 2010

POLY FIBRE (U) LTD.....PLAINTIFF

VERSUS

- 1. MATOVU PAUL
- 2. FLORENCE NALUBEGA.....Defendants
- 3. NORAH MBAWONYE
- 4. MATOVU BETTY

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is a ruling on a preliminary objection (PO) raised by Counsel Rashid Babu for the Defendants when this suit was called for hearing on 29 - 06 - 2011. The PO was to the effect that the suit filed by the Plaintiff against the Defendants is barred by limitation under section 5 of the Limitation Act, cap 80. Counsel Babu contended that the suit was brought after a period of 12 years from the date when the Plaintiff obtained registration of the suit property. He argued that the suit was filed in court on 14th December 2010 yet the Plaintiff registered the suit property on 13th January 1997. He relied on the case of **Hajati Ziribagwa & Anor V Yakobo Ntate Civil Suit No. 117 Of 1991** to support his position.

In opposition to the PO, Counsel Milton Ochieng for the Plaintiff contended that the action against the Defendants was for trespass and not recovery of land. He argued that trespass is a recurring continuous wrong, and every time there is trespass on a piece of land, a new cause of action arises. He submitted that though the Plaintiff got registered on the land on 13th January 1997, the acts of trespass in issue were on 15th June 2008 and 13th December 2010 as indicated on the exhibited photographs when the Defendants started digging foundations on the suit property. He maintained that the acts of trespass on the suit property are not time barred, and that section 5 of the Limitation Act does not apply to this situation of trespass. He prayed court to dismiss the PO with costs.

In rejoinder, Counsel Rashid Babu contended that an action for trespass and the prayer for a declaration in the plaint all drive to one point which is recovery of land. He argued that if court makes a finding of trespass against the Defendants, they must leave the land, implying that the Plaintiff will have recovered the land in issue. He also questioned the authenticity of the

photographs relied on by the Plaintiff's Counsel since they had not yet been subjected to cross examination and could not therefore be foolproof. He argued that the Plaintiff's right of action accrued from the time he purchased the land which is 13 years ago. He cited the case of **Remedius Kironde V Margret Nabatindira & Ors. HCCS No. 337 of 1992.**

I have carefully addressed the submissions of both Counsel and the authorities cited, including the pleadings on the court record.

Section 5 of the Limitation Act 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..."
(emphasis mine).

It is the legal position that when the court is considering whether a suit is barred by any law, it looks at the pleadings only, and no evidence is required. This was so held by the court of appeal in **Madhvani International S. A V Attorney General Civil Appeal No. 48 of 2004.**

In the instant case, as per paragraph 3 of the plaint, the Plaintiff's claim against the Defendants jointly and severally is for trespass on the Plaintiff's land. The alleged trespass, as implied from the photographs which were exhibited by the Plaintiff during the scheduling conference (exhibit P5), was allegedly committed by the Defendants on the dates indicated on the photographs. In his submissions to the PO Counsel for the Plaintiffs maintains that his action is based on the acts of trespass he alleges the Defendants committed between the years 2008 and 2010. On the face of it, the plaint indicates that the action is for trespass and not recovery of land. With respect to learned Counsel for the Defendants' submissions on the issue of authenticity of photographs, it is pre mature at this stage, in line with the decision in the **Madhvani International S. A V Attorney General, supra**, to consider whether the photographs are authentic or not. This will be done when the case is being heard on the merits. Suffice it to say at this stage, as is indicated on the court record, which Counsel for the Defendant did not object when the said photographs were being exhibited during the scheduling conference.

Learned Counsel the Defendants however argued that that the action for trespass and the prayer for a declaration that the plaintiffs the proprietors of the suit property infers recovery of land against the Defendants. In addition to challenging the authenticity of the exhibited photographs, he argued that if court makes a finding of trespass against the Defendants, they must leave the land, implying that the Plaintiff will have recovered the land in issue. I have carefully addressed this argument. I have also addressed the Defendant's Written Statement of Defence (WSD) which among other things seeks a court declaration that the Defendants are *bona fide* and/or lawful occupants of the suit land. These are matters that can only be determined when the case is heard on the merits and evidence to that effect is adduced.

In **Sayikwo Murome V Yovani [1985] HCB 68**, Odoki J, as he then was, held that where a Plaintiff pleads facts from which a reasonable inference can be made that the suit is not time barred, then the issue of limitation is a triable issue which can only be determined after hearing the evidence on the matter.

In paragraphs 3 and 4 of the plaint, the Plaintiff pleaded as follows:-

“3. The plaintiff’s claim against the defendants jointly and severally is for trespass on the plaintiff’s land comprised in Block 204 Plot 224 and Plot 107 Kyadondo, Kawempe.”

4. The facts giving rise to the cause of action are as follows;

*i) The plaintiff is the registered proprietor of land comprised in **Block 204 plot 224 Folio 5** and **Block 204 plot 107 Kyadondo contained in LRV 2543 Folio 4** and was registered as such since 13th January 1997.*

ii) The defendants and or their agents, representatives and others persons acting on their instructions have and continue without authority, to enter upon both plots and disturb the possession of the plaintiff/registered proprietor.

*iii) The defendants have further stealthily and under the cover of darkness caused the construction of a small structure on **plot 107** without the authority or acquiescence of the registered proprietor.*

iv) The plaintiff has therefore suffered great damage from the disturbance of her quiet enjoyment and impediment to her plans.”

On the face of it, the plaint indicates that the action is for trespass and not recovery of land. The dates of the acts of trespass complained of do not place it within the limitation periods set by the Limitation Act. This would place it in the category of actions for trespass in which case section 5 of the Limitation Act which deals with recovery of land, and the authorities cited by Counsel, would not apply to it. Thus, on the face of the plaint, as indicated in the quoted paragraphs, the facts pleaded give raise to a reasonable inference that the suit is not time barred.

On the authority of **Sayikwo Murome V Yovani**, supra, from which I have no basis to depart, I would hold the considered opinion that the issue of limitation raised by Counsel for the Defendants in the instant case becomes a triable issue which can only be determined after hearing the evidence on the matter.

The preliminary objection is accordingly overruled with costs to the Plaintiff.

Dated at Kampala this 29th September 2011.

Percy Night Tuhaise

JUDGE.