

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO.250 OF 2019**  
**(ARISING OUT OF HCCS NO. 320 OF 2018)**

**GENAGRI PLANTATIONS LTD:.....APPLICANT**

**VERSUS**

- 1. KABUGO YUNUS**
- 2. SSENTOGO MOSES**
- 3. TAMALE SULAIMAN**
- 4. NAKIGUDDE SARAH**
- 5. NAKABUGO MARIAM**
- 6. TAMALE TIFU:.....RESPONDENTS**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**RULING:**

This application was brought by chamber summons under Section 5 of the Limitation Act Cap 80, Section 98 of the Civil Procedure Act Cap 71, O.7 rr11(d),(e) and 19 of the Civil Procedure Rules SI 71-1 seeking for orders that;

1. The Plaintiffs' suit be rejected, struck out and dismissed for being statute barred.
2. The Plaintiff's suit be rejected and/or dismissed for being *frivolous* and *vexatious*.

3. That costs of the suit be provided for by Court.

The application arises from HCCS No.320 of 2019 wherein the Respondents, in the capacity of administrators of the estate of the late Sulayiman Kapapali Kuzala Kuzibu (*hereinafter the Deceased*), sued the Applicant and 2 others for;

1. A declaration that land comprised in LRV 1698 Folio 2 and known as Bulemezi Block 917 Plot 4 (*hereinafter the suit land*) belongs to the deceased.
2. A declaration that the suit land was fraudulently registered in Ngoma Galyawamu Farmers Ltd which subsequently changed its name to Genagri Plantations Ltd to the prejudice of the deceased's estate.
3. An order for cancellation of entry of the 3<sup>rd</sup> Defendant from the Register Book in respect of the suit land.
4. An order that the suit land be registered in the names of the Plaintiffs as administrators of the estate of the deceased, among others.

The facts as pleaded by the Plaintiffs in the main suit are that on the 5<sup>th</sup> March, 1974, the deceased applied for the suit land from Uganda Land Commission using the trade name of Ngoma Galyawamu Farmers Family, an unincorporated. That the Uganda Land Commission granted the deceased's application in respect of the suit land vide Minute No.57/74(a) (79) December 1974.

That after approval of the application, the deceased embarked on a survey and registration process but unfortunately died in 1982 before obtaining the certificate of title. That following his death, Maliyamu Nalukwago and Abdul Bisaso (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants), who are children of the deceased, hatched a plan to defraud the suit land to the exclusion of other beneficiaries of the estate.

That in pursuance of this plan, they incorporated a company known as Ngoma Agaliwamu Ltd in 1988 which had identical names to the names of an unincorporated body and obtained a certificate of title to the suit land which was issued on the 29<sup>th</sup> September, 1988. That they then sold off all their shares in the said company to Gerri Benis and Ibrahim Abdulla Benis thereby relinquishing their interest in the company. Further, that after the purchase of the shares by the duos, Ngoma Agali Awamu Farmers Ltd changed its name in 1994 to Genagri Plantations Ltd to conceal the original name which had been used to acquire the suit land.

Lastly, that Genagri Plantations Ltd then notified the registrar of the change of name who then changed the certificate of title in 1997 to reflect the 3<sup>rd</sup> Defendant.

According to the Applicant's application, the main suit is statute barred, and frivolous and vexatious. The application is supported by an affidavit deponed by Hanif Mohamed Moledina, being the Applicant's director. He averred therein that the Applicant is the registered proprietor of the suit land. That the shareholders of the Applicant are Ebrahim H. Moledina, Karim H. Moledina, Hanif H.

Moledina and Sherbanu H. Moledina having purchased all the assets and shares in Ngoma Galyawamu from its former shareholders and directors Ibrahim Abdulla Benis and Gerry Benis. *A copy of the share transfer form was attached as "B"*. This indicates that the shares in Ngoma Agali-Awamu Farmers Ltd were bought by a company known as Genagri Ltd. The deponent averred further that in 1994, the Applicant under its current management passed a resolution to change the name from Ngoma Galyawamu Farmers Ltd.

It was also his evidence that before purchasing the assets from Ngoma Galyawamu, the Applicant's shareholders made the necessary due diligences wherein they confirmed that the suit land belonged to Ngoma Galyawamu Farmers Ltd. That the Applicant took over possession of the suit land following purchase and has enjoyed quite possession until 2018 when the Respondents sued it.

It was also his averment that the plaint does not disclose a cause of action against the Applicant on ground that it purchased a company and its assets including the suit land from Ngoma Galyawamu Farmers Ltd whose ownership of the suit land has never been disputed by the Respondents.

No reply was made by the Respondents to the Applicant's averments despite being served with the application. It is trite law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not they are presumed to have been accepted. See *Samwiri Massa versus Rose Achen [1978] HCB 297,*

**and Kalyesubula Fenekansi versus Luwero District Land Board & Others, Miscellaneous Application No. 367 of 2011.** Accordingly, I find that the Respondents accepted all matters of fact contained in the Applicant's affidavit in support of its application.

I shall now only proceed to determine the points of law raised by the application on a presumption that all facts stated in the affidavit in support are true.

Counsel for the respective sides filed written submissions in support of their clients' contentions. These I shall consider accordingly.

In his submissions, Counsel for the Applicant raised three issues for determination that is;

- 1. Whether the Plaintiff's suit was filed out of time and liable to be struck out?**
- 2. Whether the Respondents suit is frivolous and vexatious?**
- 3. Whether the Respondents are liable to costs of the suit?**

Issue No. 1:

Whether the Plaintiff's suit was filed out of time and liable to be struck out

Both Counsel in their respective submissions were alive to the position that actions for recovery of land must be commenced within 12 years from the date the cause of action arose. They both cited Section 5 of the Limitation Act Cap 80 in support of this view. In addition to this, Counsel for the Applicant also cited Section 6 and

11(1) of the same Act and the case of **FX Miramango versus Attorney General [1979] HCB 24**. According to Counsel for the Applicant, the Respondents' cause of action arose in 1997 when the Applicant became registered on the suit land. It was his argument that since then, it is now 21 years which renders the main suit statute barred.

That notwithstanding, both Counsel acknowledge that there is an exception to time limitations in suits for recovery of land. Accordingly, Counsel for the Respondents relied on Section 25 of the Limitation Act to submit that the Respondents' suit was filed within time despite the passage of 12 years. According to that Section, in actions founded on fraud or concealment of fraud, time does not start to run until the fraud is discovered by Plaintiff or until the Plaintiff could have discovered it by reasonable diligence. This proposition was further supported with the case of **Victoria Kayizi versus Juma Sewaalinte HCCS No. 438 of 2013** by Counsel for the Respondents.

However, much as Counsel for the Applicant acknowledged this as the true position in his submissions in rejoinder; he asserted that the Plaintiff/Respondents did not plead this exception in their plaint. Relying on the case of on the case of **Amin versus Haji Muhammad Civil Appeal No.10 of 2016 and Hammermann Ltd versus Ham Ssali & Anor; HCMA No.449 of 2013**, he submitted that a plaint which does not plead an exception to the law of limitations is bad in law. In the alternative, Counsel for the Applicant also asserted that

the Respondents have since 1988 always been aware of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' fraud and therefore cannot benefit from the exception under Section 25 of the Limitation Act.

In arguing so, he invited me to pay close scrutiny to paragraph 6(iii), (iv) and (v) of the Respondents' plaint. Additionally, he also argued that the Respondents could have discovered the alleged fraud with reasonable diligence since there is a close proximity between them and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the main suit. All this was however disputed by Counsel for that Respondents who argued that paragraph 8 and 9 of the plaint clearly bring out the fact that the Respondents' cause of action is founded on fraud which they discovered in 2012. It was therefore his view that the suit was commenced 6 years after the discovery of the fraud and thus is within time. In support of this, I was referred to the case of *Solomon Kaddu Luwaga & 8 Others versus Arthur Segawa Baliruno & Others HCCS No.418 of 1998.*

I have had the benefit of appreciating the law and submissions of both Counsel. I now decide as follows;

I agree with both Counsel that time in actions based on fraud does not start to run against the Plaintiff until he or she discovers the fraud or he or she could with reasonable diligence have discovered the fraud. I also agree that for the Plaintiff to benefit from this exception, he or she must have pleaded the grounds upon which the exception is claimed as required by O.7 r6 Civil Procedure Rules.

According to paragraph 8 of their plaint, the Respondents clearly pleaded that *“they become aware of the fraud leading to this suit after the cancellation of letters of administration which were granted to Twaha Bisaso as administrator of the late Kapapali’s estate in the year 2012.”*

By this, it meant that by 2018 when the main suit was instituted, the Respondents were 6 years away from the limitation period. I am mindful of paragraph 6(iii), (iv) and (v) of the plaint as referred to me by Counsel for the Applicant. This looked at together with paragraph 8, it became difficult for me to infer that the Respondents were indeed aware of the alleged fraud since 1988.

In my view therefore, the Respondents’ suit was commenced within time and thus not statute barred.

Issue No.2:

Whether the Respondents suit is frivolous and vexatious?

Regarding this, Counsel for the Applicant relied on *Ainomugasho & Others versus Nalumansi & Others HCMA No.2084 of 2016* wherein Court observed that the beginning point is an examination of 0.7 r1 (e) of the Civil Procedure Rules. This provides that the plaint must contain facts constituting the cause of action and when it arose. He further defined a fact according to the Oxford English Dictionary as;

1. A piece of information about circumstances that exist or events that have occurred.



2. A concept whose truth can be proved
3. A statement or assertion of verified information about something that is the case or has happened.
4. An event or assertion of verified information about something that is the case or has happened.
5. An event known to have happened or something known to have existed.

In his view, he argued that from the foregoing, facts must be detailed.

He further relied on the **Online Law Dictionary** which states that;

**“In every case which has to be tried, there are facts to be established and the law which bears on those facts. Facts are also to be considered as material or immaterial. Material facts are those which are essential to the right of action or defence; and therefore of the substance of the one or other, these must always be proved or immaterial, which are those not essential to the cause of action and these need not be proved.”**

Accordingly, Counsel argued that the fact that the Applicant acquired the suit land from Ngoma Galyawamu and its former shareholders/directors Ibrahim Abdulla Benis and Gerry Bennis is material. In his view, not pleading this fact renders the main suit frivolous and vexatious.

On the other hand, Counsel for the Respondents began by citing the case of *Auto Garage versus Motokov (1971) EA 51* to submit that to

prove a cause of action, the Plaintiff must show that he enjoyed a right; that the right was violated and; that it is the Defendant that violated that right. He accordingly submitted that the Respondents in this case have a right over the suit land which was fraudulently registered by Ngoma Galyawamu Farmers Ltd which subsequently changed its name to Genagri Plantations Ltd.

Further that their right has been violated by the Applicant who was fraudulently registered on the title to the suit land. Counsel then cited Section 176(3) of the Registration of Titles Act Cap 230 which is to the effect that title of a registered owner is indefeasible except in an action founded on fraud.

Premised on the Section, he argued that the Respondents had a liberty to sue the Applicant in order to reclaim the suit land from the Applicant. Ultimately, he submitted that the omission Abdulla Benis and Gerry Benis in the plaint does not render the Respondents' suit frivolous and vexatious especially since the suit land is registered in the Applicant's name.

I have also had the benefit of appreciating the law, and the submissions of both Counsel on this issue. I now decide as follows;

As observed in **R versus Ajit Singh s/o Vir Singh (1957) EA 822 at 825** a suit is frivolous and vexatious if it is;

*“Paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose.”*

I am persuaded by Counsel for the Applicant's submission that the beginning point in investigating this point is O.7 r1(e) Civil Procedure Rules which requires a plaintiff to disclose facts constituting the cause of action and when it arose. Consequently, once a plaintiff discloses a cause of action, it cannot be said that the suit is frivolous and vexatious. I also agree with Counsel for the Respondents regarding what constitutes a cause of action. Ultimately, in order to succeed on this issue, it must be clear that the plaintiff does not disclose material facts constituting the cause of action against the Applicant.

Having carefully looked at the entire plaintiff and its annexures, my conclusion is that the plaintiff discloses that the Respondents enjoyed a right in the suit land which was violated. The question now is whether it also discloses facts showing that the violation was by the Applicant. The Respondents' suit being based on fraud, it is pertinent to remember under O.6 r3 of the Civil Procedure Rules, the particulars of the alleged fraud must be specifically pleaded.

In addition to this, the facts supplied by the plaintiff must attribute the fraud to the transferee, in this case the Applicant, either by expressly or by necessary implication. See **Kampala Bottlers Ltd versus Domanico Brothers SCCA 22 of 1992**

I shall now quote the particulars of the alleged fraud as pleaded in the plaintiff for consideration;

Particulars of fraud

- i) Using the Uganda Land Commission minute granting the suit land to Sulayiman Kapapali Kuzala Kuzibu to obtain a certificate of title in the names of Ngoma Agali-Awamu Farmers Ltd.
- ii) Registering a company by the names of Ngoma Agali-Awamu Farmers Ltd to take over the property of the late Sulayiman Kapapali Kuzala Kuzibu without the consent of the beneficiaries of the late Sulayiman Kapapali Kuzala Kuzibu.
- iii) Registering a company by the names Ngoma Agali-Awamu Farmers Ltd to defeat the interest of the late Sulayiman Kapapali Kuzala Kuzibu in the suit land.
- iv) Registering the suit land in the names of Ngoma Agali-Awamu Farmers Ltd, a company which was not yet incorporated at the time of application for a lease and grant of the same in respect of the suit and.
- v) *Allowing the company, M/S Ngoma Agali-Awamu Farmers Ltd in which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the only shareholders to be registered as proprietors of the suit land yet the company had never applied for the suit land from Uganda Land Commission and the same had never been granted to it.*
- vi) *Changing the names of the company from Ngoma Agali-Awamu Farmers Ltd to the 3<sup>rd</sup> Defendant to conceal the*

*fraudulent transactions leading to registration of the land into the 3<sup>rd</sup> Defendant's previous name.*

vii) *Taking over the suit land which was granted to Sulayiman Kapapali Kuzala Kuzibu without the consent of the beneficiaries.*

It is undisputed that the Applicant in this case was formerly named Ngoma Agali-Awamu Farmers Ltd which was first registered on the suit land. According to the law, a change in the name does not affect any rights or obligations of the company and any legal proceedings that might have been commenced against it by its former name may be commenced against it by its new name. This was the position under Section 19(5) of the Companies Act Cap 110, and is still the position under Section 40(5) of the Companies Act, 2012. In that sense, it does not matter that there was a change of name as the law regards the Applicant as though it were Ngoma Agali-Awamu Farmers Ltd.

It is now crucial to note that at the time of the alleged fraudulent registration, Ngoma Agali Awamu Farmers Ltd was owned, and managed by Maliyamu Nalukwago and Abdul Bisaso, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the main suit. These being the directing minds by then, their acts were the alter ego of the Applicant itself. See **Lennard's Carrying Co versus Asiatic Petroleum Co. Ltd [1915] AC 705** for the directing mind principle.

It is, however, undisputed that management and membership of Ngoma Agali-Awamu has since changed twice that is; from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, to Abdulla Benis and Gerry Benis, and now Ebrahim H. Moledina, Karim H. Moledina, Hanif H. Moledina and Sherbanu H. Moledina who bought in the name of Genagri Ltd in 1993. What then must be the position if the change in name is accompanied by the change in management?

Putting on clear lenses, one can liken the situation at hand to having the same bottle [*the company*] but with different wine [*the management*]! Going by the directing mind principle, the purity of the bottle depends on its substance. To say therefore that the facts pleaded are sufficient, the plaintiff must disclose that despite it being new wine, it contains contents of the old wine which render the whole bottle impure. By this I mean that the plaintiff must illustrate facts which bring the alleged fraud of the Applicant's former managements to the current management. From the particulars of fraud as pleaded above, it is clear that this is lacking.

What perturbs most is even that the Respondents did not seem to know that the Applicant's ownership and management has since changed twice as the plaintiff only ends at stating Abdulla Benis and Gerry Benis. Merely stating that the Applicant changed its names from Ngoma Agali-Awamu Farmers Ltd in order to conceal the fraudulent transactions without disclosing facts attributing the alleged fraud to its current management, the directing mind, in my view, insufficient. As I have already noted above, the change of name

in 1997 had no effect to the liability which may have been created in 1988 when Ngoma Agali-Awamu Farmers Ltd was registered on the suit land.

In fact, this is to say that the cause of action, if any, arose in 1988 and not 1997 after the change of name. Since the management of the Applicant has since changed, it was crucial for the plaint to illustrate that the Applicant's current management knew or ought to have known of the alleged fraud committed in 1988. It would be otherwise impossible to attribute the alleged fraud on the Applicant without implicating it to its current directing mind. In my opinion, therefore, the plaint does not disclose that it is the Applicant who violated the Respondent's right in the suit land. Consequently, Respondents' suit against the Applicant not worthy of serious attention and; thus frivolous and vexatious. This issue is answered in the affirmative.

Issue No.3: Whether the Respondents are liable to costs of the suit

As regards this issue, I agree with both Counsel that costs follow the event unless for good cause the Court decides otherwise. Both Counsel's submissions were premised on Section 27(2) of the Civil Procedure Act and *Banco Arabe Espano versus Bank of Uganda SCCA No.8 of 1998* and *Hon. Ababiku Jesca versus Eriya Jesca Osuuna EP No.2 of 2011.*

In this case, the Applicant has succeeded partly in its application. I find no reason to deny it costs.

Ultimately, the following orders are hereby made;

1. An order rejecting the Respondents' plaint in ***HCCS No.320 of 2018 under O.7 r11(e) of the Civil Procedure Rules SI 71-1.***
2. An order that the Respondents pay costs incurred by the Applicant in the main suit and this application.

I so order.

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Henry I. Kawesa

**JUDGE**

22/08/2019



22/08/2019:

Sempala David for the Applicants.

Kiboneka absent.

Sempala:

Kiboneka asked me to receive the Ruling for him.

Mr. Han'f Mohamed; Applicant's MD.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

**JUDGE**

22/08/2019