

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

5 **CORAM: HON. JUSTICE C.N.B. KITUMBA, JA.  
HON. JUSTICE C.K. BYAMUGISHA, JA.  
HON. JUSTICE S.B.K. KAVUMA, JA.**

**CIVIL APPEAL No.42 OF 2008.**

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**MOHAMMAD B.KASASA :::::::::::::::::::: APPELLANT**

**VERSUS**

15 **JASPHAR BUYONGA SIRASI BWOGI :::::::::::::: RESPONDENT**

*[Appeal from the ruling and order of the High Court of Uganda at Kampala (Maitum,J),  
dated 17/10/2007 in Miscellaneous Application No.1216 of 2006, arising from Civil Suit  
No.280 of 2003]*

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**JUDGEMENT OF C.N.B.KITUMBA, JA.**

This is an appeal from the ruling of the High Court, whereby, the learned trial judge allowed the respondent's application to amend the plaint.

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Briefly the following are the background facts to the appeal.

The respondent/plaintiff filed HCCS No.280 of 2003 in May, claiming for recovery of land comprised in Block 10 Plot 147 at Namirembe, an order for damages for trespass and costs against the appellant and two others.

The respondent averred in his plaint that in 1953 the second defendant and first defendant conspired and fraudulently transferred the suit land in the names of the third defendant. The respondent sought for cancellation of the certification of title.

5 In paragraph 3 of the second defendant's written statement of he stated that he would raise a preliminary objection that the suit was time barred.

The respondent who had changed advocates, through his new advocates, M/s Lutaakome & Co. Advocates, filed an application for leave to amend the plaint. The purpose of the amendment was to include the time when the respondent discovered the alleged fraud of the appellant because the respondent's former counsel omitted to include it in the original  
10 plaint.

During the hearing of the application the respondent's counsel contended that the omission to state the date of discovery of fraud was a mistake of his former counsel.

15 The appellant strongly opposed the application on the ground that if it was granted, it would have the effect of defeating the statutory defence of limitation.

The learned trial judge, in her ruling allowed the application to amend the plaint to include the time when the respondent discovered the fraud. She allowed the application on the ground that there were serious allegations of fraud which merit court's investigation.

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Mohammad Kasasa, the second defendant, hereinafter to be referred to as the appellant, was dissatisfied with the ruling of the learned trial judge and is the only one who filed his appeal to this Court on the following grounds-

25 ***"1. The Honourable Trial Judge erred in law when she disregarded the law and allowed the respondent to amend his plaint to include the time when the respondent discovered the fraud.***

***2. The Honourable Trial Judge erred in law in allowing an amendment of the plaint whose effect is to deprive the appellant of his statutory defence of limitation."***

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He prayed this Court to allow the appeal, set aside the order allowing the amendment and dismiss the entire suit. He prayed for costs in this Court and below.

At the scheduling conference the following two issues were agreed upon for determination by this Court.

- 5    1.     *Whether the learned trial judge erred in law and fact when she allowed the respondent to amend his plaint to include the time when he discovered the fraud.*
  
2.     *Whether the appellant is entitled the relief sought.*

10    Mr. Joseph Kyazze, learned counsel for the appellant, contended that the learned trial judge erred in law and fact when he allowed the application to amend the plaint on the ground that there were serious allegations of fraud which required to be investigated by court. He argued that the judge has the discretion to grant an application for amendment of the plaint. However, such discretion can be challenged successfully on appeal if it was based  
15    or wrong principles of law or was exercised contrary to the specific provisions of the law. Appellant’s counsel submitted that for a claim for recovery of land the time of limitation is twelve years from the date the cause of action arose and the time begins to run from that date. When a suit is instituted after the limitation period, the plaint is incurably defective and the application to amend it ought to be rejected. He submitted that allowing to amend  
20    the plaint which has been instituted after the time of limitation would amount to defeating the statutory defence of limitation. Counsel argued further that in the instant appeal the cause of action arose sometime in 1983 and the suit was filed in May 2003. The respondent did not plead any disability why the suit was filed well after twelve years. He argued that the need to investigate the merits of the case can not override the defence of  
25    limitation.

In support of his submissions appellant’s counsel relied on the following authorities –

**Section 5 and 25 of the Limitation Act Cap.80.**

**Dhanesvar V.Mehta Vs Manilal M.Shah [1963] E.A.**

30    **Lovel Vs Lovell [1970] 3 AU ER 727, Aridad Atobong Vs Attorney General,Civil Appeal No.6 of 1990 S.C.** (unreported)

Mr. Simeo Lutaakome, learned counsel for the respondent, supported the ruling of the learned trial judge.

5 Counsel contended that the judge judiciously exercised her discretion when she granted the appellant leave to amend the plaint.

Counsel argued that according to uncontroverted evidence from the supplementary affidavit of Godfrey Kiwanuka, the respondent became aware of the fraud in 1998.

He submitted that though the respondent told his former counsel the date when he discovered the fraud, counsel failed to include that in the plaint. He argued that this was a  
10 mistake of counsel which should not be visited on his client. He submitted that the authority of **Dhanesvar V Mehta V Manilal M. Shah** (supra) is distinguishable from the instant appeal as in that case there was a delay in making the application. Mr. Lutaakome argued that he was instructed to handle the case in 2006 and immediately applied to amend the plaint. He contended that there was no delay.

15 He argued that the respondent is a lay man and does not know the technicalities of limitation of action. He prayed court to dismiss the appeal with costs.

In reply, counsel for the appellant contended that the principle that a mistake of counsel should not be visited on his client is not of general application.

20 Relying on the authority of **Handon Daniel V Yolamu Egondi, Civil Appeal No.67 of 2003 C.A.** (unreported) He submitted that actions and omissions of counsel bind his client.

I have carefully perused the record the authorities quoted and listened to the submissions of both counsel. It is not in dispute that the time of limitation for instituting the action Civil  
25 Suit No.280 of 2003 was twelve years.

The suit was filed out of time and counsel for the respondent did not indicate in the plaint the time, when he came to know of the fraud. The application from which this appeal arises was intended to put that right. Order 6 Rule 19 of the Civil Procedure Rules empowers the court to allow either party to the suit to alter or amend its pleadings for the  
30 purpose of determining the real question of controversy between the parties. However, in

allowing the amendment the court must use its discretion judiciously and must reach the decision based on the right principles. It must not be in contravention of statutory law.

In **Dhanesvar V Mehta Vs Manilal M Shah** (supra).

5 The Court of Appeal for Eastern African did not allow the substitute of the legal representative of the deceased because there was a delay in making the application. It was beyond the time of limitation Spry. JA quoting from the English authorities stated as follows: -

**“The leading case is Mabro V Eagle, Star and British Dominions Insurance Co. (8), in which SCRUTION, L.J.,said:**

10 *“In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court had never treated it as just to deprive a defendant of a legal defence.”*

*GREER, L.J., in the same case said:*

15 *“Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. [That is, that the defendants would be deprived of the benefit of the Statute of Limitation]. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not be allowed.”*

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With due respect Mr. Lutaakome’s argument that the present appeal is distinguishable from the above case is not tenable.

25 The purpose of the law of limitation is to put an end to litigation. This law is applied by courts strictly.

**In Re Application by Mustapha Ramathan for Orders of Certiorari, Prohibition and Injunction, Civil Appeal No.25 of 1996.**

Barko, JA, as he then was stated –

30 *“The application was in fact made on 25<sup>th</sup> day of April 1996. That was obviously more than six months after the Minister’s order or decision. We are not persuaded by learned counsel’s argument that the judge ought to have based his*

*calculation on the time the Minister's decision was communicated to the appellant.*

5 *Statutes of limitations are in their nature strict and inflexible enactments. Their overriding purpose is interest reipublicae ut sit finis litum, meaning that litigation shall be automatically stifled after fixed length of time, irrespective of the merits of the particular case. A good illustration can be found in the following statement of Lord Greene M. R in Hilton Vs Sutton Steam Laundry [1946] 1 KB 61 at page 81 where he said-*

10 *“But the statute of limitations 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.”*

15 In the appeal before court the learned judge granted the application for amendment of the plaint as she stated in her ruling.

20 *“I have considered the issues raised in counsel's submissions, but I find that the allegations of fraud are very serious and would merit court investigations into the issues by a trial of the suit. It would be a pity if the applicant's application is dismissed without the matter being put to trial.*

*I therefore will grant the application to amend the plaint to include the time when the applicant discovered the fraud. The rest is a matter of evidence to be adduced at the trial.*

25 *Since fraud has been alleged in the acquisition of the suit property by the defendant, it is only just that the suit be heard to canvass the facts on both sides. Leave to amend is here granted.”*

From the above quotation it is evident that the learned judge allowed the amendment contrary to the law.

She wanted to investigate the merits of the case whereas the plaint was incurably defective. The case of **Dhanesvar V Mehta Vs Manilal M.Shah** (supra) was quoted to her but she didn't consider it in her ruling.

5 Counsel for the respondent has ingeniously argued that failure to plead the time when he came to learn of the appellant's fraud was a mistake of his former counsel and should not, therefore, be visited on his client.

A client is bound by the actions of his counsel. Negligently drafting the plaint or  
10 incompetence in doing the same is not an excuse for a client to escape being bound by his counsel's action. See: **Capt. Philip Ongom Vs Catherine Nyero** Civil Appeal No.14 of 2001 SC (unreported) and **Handon Daniel Vs Yolamu Egondi** (supra).

It would be absurd in this case to allow the respondent to flout the strict law of limitation on the ground that his counsel was negligent. In case counsel has acted  
15 negligently/incompetently the respondent has the option to sue for professional negligence.

I find merit in the appeal.

I would allow the appeal, strike out the plaint in Civil Suit No.280 of 2003 and dismiss the suit with costs to the appellant here and in the High Court.

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Since Byamugisha, JA and Kavuma, JA agreed the appeal is allowed with costs to the appellant. H.C.C.S No. 280 of 2003 is struck out and the suit is accordingly dismissed with costs to the appellant in this Court and below.

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**Dated at Kampala this ...19<sup>th</sup> ..day of...October,....2009.**

**C.N.B.KITUMBA**

30 **JUSTICE COURT OF APPEAL**

**JUDGMENT OF BYAMUGISHA, JA**

5 I concur.

*Dated at Kampala this ...19<sup>th</sup> ..day of..October... 2009*

C.K.BYAMUGISHA

10 Justice of Appeal

**JUDGMENT OF S.B.K.KAVUMA, JA**

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I have read, in draft the judgment prepared by C.N.B.Kitumba, JA. I am in agreement with the judgment, the reasoning in it and the orders made by her Lordship.

**Dated at Kampala this ....19<sup>th</sup>....day of ....October.....2009**

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S.B.K.KAVUMA

Justice of Appeal.