THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND DIVISION] CIVIL APPEAL NO. HCT-00-LD-CA-0044-2017 (Appeal from the judgment of Her Worship Kimono Juliana, Magistrate Grade One, Civil Suit No. 0026 of 2013, Chief Magistrate's Court of Entebbe at Entebbe delivered on the 30 March 2017)

VERSUS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

 Legal issues considered in this case include, the applicability of the law of adverse possession in relation to long and unchallenged possession of land by the appellant having settled on the land for approximately slightly over 12 years from the year 1997 up to 2009 when her possession was challenged by the respondents; admissibility of oral or extrinsic evidence to provide clarity and meaning to a written contract; and grant of remedies not included in pleadings.

Background:

2. This case concerns disputed land situated at Namulanda, along the Kampala – Entebbe Highway. It is an appeal against the judgment of Her Worship Kimono Juliana, Magistrate Grade One in the Chief Magistrate's Court of Entebbe at Entebbe, Civil Suit No.26 of 2013 delivered on 30 March 2017 in favour of the respondents. The appellant in the lower court sued the respondents for trespass on her kibanja located on land comprised in Busiro Block 401 Plot 131 at Namulanda (hereinafter referred to as "the suit land").

Page 1 of 29

Demonstance 10

She sought an order of vacant possession of the respondents on the suit land; a permanent injunction restraining the respondents from further encroaching on her kibanja; general damages; exemplary damages; aggravated damages; mesne profits; costs of the suit; interest on general damages; exemplary damages; aggravated damages; and interest at the rate of 30% per annum from the date of judgment until payment in full.

- 3. The appellant's case is that she purchased a kibanja on the suit land on 27 June 1997, from Sam Lwanga. She took possession of the kibanja, and had quiet enjoyment until December 2009, when the respondents encroached on a portion of it by demolishing structures thereon, and constructing their own structures on it.
- 4. The respondents through their amended joint written statement of defence and counterclaim, averred that they are the joint registered proprietors of the suit land which they have developed since 1986. That their developments do not extend into the appellant's land. They counterclaimed against the appellant and contended that it is her who trespassed on their property. They prayed for the dismissal of the suit with costs, a declaration that the appellant is a trespasser on their property, an order evicting the appellant from their land and general damages.
- 5. In the lower court, the following issues were framed for determination by the court: i) whether the defendants trespassed onto the plaintiff's kibanja; ii) whether the counter defendant trespassed on the counter claimant's land; and iii) what remedies are available to the parties. The appellant called 2 witnesses: PW1 (Maria Specioza Mukasa) and PW2 (Nsigalira Apophia Nabunnya). The appellant adduced evidence of the following documents that were admitted in evidence: i) PEX No.1 a copy of a sale agreement

Page 2 of 29

Demonstarcese

dated 22 July 1997 between the appellant and Samuel Lwanga for the sale of a house; and ii) PEX No.2 – a copy of a sale agreement dated 27 June 1997 between the appellant and Samuel Lwanga for the sale of land comprised in Block 401 Plot 131 at Namulanda. The respondents called 1 witness DW1 (Lekobowamu Mukwanga). The respondents adduced evidence of the following documents that were admitted in evidence: i) DEX No. 1 – a copy of a certificate of title for land comprised in Block 401 Plot 844; and ii) DEX No. 2 – (same as PEX No. 2) – a copy of a sale agreement dated 27 June 1997 between the appellant and Samuel Lwanga for the sale of land comprised in Block 401 Plot 131 at Namulanda. The trial Magistrate conducted a locus in quo visit to the suit land on the 11 November 2016.

Trial court's findings:

6. The lower court ruled that the appellant intended to purchase registered interest in the suit land, but that since she did not succeed in having the land registered into her name, she only owns an equitable interest in the land. The court also ruled that on account of the appellant's failure to prove boundaries of her equitable interest in the land, she failed to prove a case of trespass against the respondents. The trial Magistrate dismissed the appellant's suit as well as the counterclaim filed by the respondents and ordered each party to bear its own costs of the suit.

Grounds of the appeal:

- 7. Dissatisfied with the judgment of the lower court, the appellant lodged this appeal on the following grounds:
 - i) The learned trial Magistrate erred in law and in fact when she misdirected herself on the law on kibanja (equitable) interest in land;

Benerstlance 19

- ii) The learned trial Magistrate erred in law and fact when she found that there had been no trespass on the appellant's kibanja by the respondents;
- iii) The learned trial Magistrate erred in law and fact when she did not make and/or read a report on the locus in quo visit to the parties thereby occasioning a miscarriage of justice.
- 8. In his submissions, counsel for the appellant attempted to amend the grounds of the appeal, arguing that this will help to narrow down the dispute to specific issues of controversy. It is my considered view that the issues in controversy between the parties are clearly laid out in the grounds of the appeal as presented in the memorandum of appeal, and I will therefore restrict my decision to those grounds.

Representation:

9. At the hearing of the appeal, the appellant was represented by Mr. Peter Allan Musoke and Mr. Betunda Yusuf of M/s. Musoke & Marzuq Advocates, while the respondents were represented by Ms. Annet Nanfuma of M/s. Lukwago & Co. Advocates.

Additional evidence at the hearing of the appeal:

10. During the hearing of the appeal, the appellant adduced one additional witness, Sam Kakembo (surveyor) as well as the following documents: Exh.A1 – a copy of a survey report dated 15 April 2019, addressed to the appellant. The respondents adduced one additional witness, Serunjogi Joseph (surveyor) as well as the following documents: i) Exh.R1 – a copy of a letter dated 12 November 2019; ii) Exh.R2 – a copy of a report dated 6 March 2020 on opening boundaries; iii) Exh.R3 – a copy of a certificate of title for Busiro, Block 401 Plot 843; and iv) Exh.R4 – a certificate of title for Busiro Block 401 Plot 844.

Page **4** of **29**

Demonstbucere 10

Locus in quo visit:

11. On the 23 November 2023, the High Court (appellate court) carried out a locus in quo visit to the suit land in the presence of counsel for the appellant; and counsel for the respondents. The parties present were the appellant and the respondents. The witnesses – Sam Kakembo (surveyor); Serunjogi Joseph (surveyor); Maria Specioza Mukasa; and Kasifa Nambi took the oath and gave evidence at the locus in quo visit. Both counsel were given the opportunity to cross examine and re-examine the witnesses. The court observed that the disputed land is located at Namulanda Trading Centre on Kampala – Entebbe Highway, and is developed with several permanent structures. There are several other bibanja claimants who are not parties to the case, who include: Kabanda Paul; Rosemary Nakitende (who claims the ownership of a house adjacent to that of the appellant), and Nakiyimba Mary Nakatikombi. This locus in quo visit was in addition to the one that was conducted by the trial court.

Duty of the first appellate court:

12. The duty of the first appellate court is to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal, before coming to its own conclusion. While doing so, the first appellate court must keep in mind that, unlike the trial court, it had no chance of seeing and hearing the witnesses while they testified, and therefore had no benefit of assessing the demeanour of the witnesses. To this effect, the first appellate court must be guided by the impression made on the judicial officer who saw the witnesses. The case of *Fr. Narsensio Begumisa and Ors v Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002) [2004] UGSC 18 (Coram: Oder, Tsekooko, Karokora, Mulenga & Kato JJ.S.C)* sets out the duty of the first appellate court in the following words:

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"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

13. I shall keep the above principles in mind while resolving the grounds of this appeal.

Consideration and determination of the grounds of the appeal:

14. I will consider all the three grounds of appeal as presented in the memorandum of appeal concurrently.

Did the appellant purchase registered interest in the land or kibanja (unregistered interest in the land)?

- 15. It was strongly submitted by counsel for the respondents that the appellant purchased a registered interest in the land, and not a kibanja (unregistered interest in the land). That the appellant does not meet the requirements set out under section 29 of the Land Act to qualify as a lawful occupant on the respondents' land, and that therefore the learned trial Magistrate was right in holding that the appellant did not own a kibanja interest and that neither could she legitimately claim a registered interest in the land.
- 16. As to whether the appellant purchased registered interest in the land or kibanja (unregistered interest in land); the learned trial Magistrate held as follows:

Page 6 of 29

"During the hearing of the suit, Court noted that there was an issue as to whether the plaintiff had purchased registered land or

Demonstance 1

kibanja? It is the submission of the [Plaintiff's] Counsel that by an agreement dated 22/7/1997 (P Exh No.1) with one Sam Lwanga, the Plaintiff purchased a kibanja. [Defendant's] Counsel in his submission asserted that none of the agreements dated 22/7/1997 and 27/6/1997 and marked P Ex No. 1 and P Ex No. 2 respectively...support her assertion that she acquired a kibanja interest. Further that both agreements stated that she was purchasing Busiro Block 401 Plot 131. PWI in her evidence stated that she bought land from one Samuel Lwanga on the 27th June 1997. It was described as Busiro Block 401 Plot 131 land at Namulanda. The sale agreement was admitted and marked P Exh N.2...PW1 also stated that on 22/7/1997, she bought a house from Sam Lwanga. According to the agreement...the house was on Mpiima's titled land on Plot 131 Block 401/402. The agreement was admitted and marked P Exh No.1...Clearly P Exh 1 and 2 are not about purchase of kibanja. The plaintiff was purchasing a house on Busiro Block 401 Plot 131 and all lands described in Busiro Block 401 plot 131. However, Court notes that the Plaintiff did not process a registration of her name as registered proprietor onto the certificate of title for Busiro Block 401 plot 131...It is the finding of the court that the plaintiff acquired an equitable interest in Busiro Block 401 Plot 131. The correct framing of the issue should therefore, be whether the defendants trespassed on the *Plaintiff's equitable interest...The land that the plaintiff claims is* an equitable interest on registered land. According to the foregoing definitions, it is imperative that [the] plaintiff demonstrates what land is in her possession, the boundary of the land such that court can determine the point of entry onto her land by the defendants...[plaintiff's] side did not inform court of

Page 7 of 29

Demonstarces

boundaries of her equitable interest. The agreement of purchase for Plot 131 (P Exh 2) did not describe the boundaries...Under such circumstances, the court was unable to determine the point of entry onto her land by the defendants...at the locus in quo visit of the suit land...the plaintiff attempted to show court the boundaries of what she claimed was her kibanja. The court rejected this evidence. The reason is that during the hearing of the case at court premises, the [plaintiff's] side did not talk about boundaries of what she claimed was her kibanja. This evidence was an afterthought intended to get unfair advantage over the defendants...there is no basis for the court to find that there was trespass if the plaintiff could not show the extent of her equitable interest and also the point of entering of land in her possession by the defendants. The court therefore finds that there was no trespass proved by the Plaintiff."

- 17. The above holding by the learned trial Magistrate requires me to consider and resolve a legal question that came up at the hearing in the lower court, but which was not resolved. The legal question is this: *under what circumstances can any information that is not included in a written contract, be admissible?*
- 18. The general rule is that any information leading up to a contract that is not included in a written contract is inadmissible (parol evidence rule). See Section 92 of the Evidence Act (Cap 6). However, there are exceptions to the general rule. Thus, under Section 92(b) of the Evidence Act (Cap 6), when a written contract is silent on a critical issue, oral or extrinsic evidence is admissible to provide clarity, and give meaning to the intention of the parties. See General Industries (U) Ltd v. Non. Performing Assets Recovery

Page 8 of 29

Demonstarces

Trust (Civil Appeal No. 5 of 1998) [1999] UGSC 8 (Coram: Oder, J.S.C., Karokora, J.S.C., Mulenga, J.S.C., Kanyeihamba, J.S.C., Kikonyogo, J.S.C); and Plant v. Bourne [1897] 2 Ch 281.

19. Section 92(b) of the Evidence Act (Cap 6) provides that:

"92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—...

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;"

20. Therefore, according to the law, if a written contract is silent on a matter that is material to both parties, then oral evidence may be admitted to provide clarity to the contract, and give meaning to the contractual relationship between the parties. In the case of *General Industries (U) Ltd v. Non. Performing Assets Recovery Trust (supra),* it was held that:

"...the way to give effect to the intention of the parties in the instant case is not to discard the mortgage as invalid for lack of consideration, but to take the extrinsic evidence into account to ascertain what the real consideration for the mortgage was...In conclusion my opinion is that neither the Court of Appeal nor the

Page 9 of 29

Demonstance

Tribunal erred in relying in Exhs. P2, P3 and any other extrinsic evidence to discover and determine the true consideration provided by UCB for the mortgage."

- 21. In the lower court, the appellant gave oral testimony to the effect that she purchased a kibanja, and that whereas the respondents own registered interest in the land, she owns a kibanja interest. The respondents countered the appellant's line of argument, and contended that Exh.P1 (agreement dated 22 July 1997) and Exh.P2 (agreement dated 27 June 1997), make no mention of a kibanja interest, and that in fact, the appellant purported to acquire a registered interest in the land comprised in Busiro Block 401 Plot 131 and not a kibanja. I have perused both exhibits. Exh.P1 states that the appellant purchased a house from Sam Lwanga on land comprised in Plot 131 Block 401/402 owned by Mpiima. Exh.P2 states that the appellant purchased all lands comprised in Busiro Block 401 Plot 131 land at Namulanda from Samuel Lwanga.
- 22. Exh.P2 (agreement dated 27 June 1997) seems to suggest that the appellant purchased a registered interest in the land. However, Exh.P1 (agreement dated 22 July 1997) which came approximately 1 month after Exh.P2 was signed, clarifies that the appellant only purchased a house from Sam Lwanga on land belonging to Mpiima. Upon perusal of Exh.P1, it is clear that the intention of the parties was the purchase of a house on land owned by Mpiima, and not the registered interest in the land itself.
- 23. Accordingly, it is my decision that in the instant case, extrinsic or oral evidence is admissible, to provide clarity and meaning to the intention to the parties under a contract, pursuant to *Section 92(b) of the Evidence Act (Cap*

Page 10 of 29

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6). In this respect, in the lower court, the appellant, PW1 (Maria Specioza Mukasa) testified as follows:

"...I bought this land [on] 27/6/1997. I bought from Sam Lwanga who is dead now. I have a document to show that I bought. It is the one because it had witnesses. LC Chairman signed, Vice Chairman signed, mobiliser signed and Lwanga Sam from [whom] I bought the land. The agreement is dated 22/7/1997. Joseph Senkatuuka LCI Chairman, Kamya Deogratius Vice Chairman, Lekobowamu Mukwanga. I was shown the boundaries of the kibanja. He told me I could buy the title of the land if I was prepared. I was buying a kibanja. I did not try the process of getting a title. Not straight away... I bought a plot. It was plot 131. Yes, I ascertained – I bought plot 131. I did not ascertain that Sam Lwanga had COT for plot 131. Lwanga told me that once I settle down, I would get a title also when I get the money I would work on the title. No, I never got the money up to now I have no title. I did not get or conduct a search at the land registry. He just showed me the boundaries. Yes, I ascertained the size. I know registered land- when one has a title. I do not have a title. Lwanga told me Mpiima was owner. I did not ascertain who the registered proprietor was. I do not know defendants as owners of plot 844. I do not know that where I am, is plot 844. I have never conducted a survey to ascertain where plot 131 is. I have interest in plot 844 that is where I am. I did not buy plot 844...I bought a kibanja from Sam Lwanga who was owner. I bought kibanja on plot 131 not 844. It should have been helpful to conduct a survey to find out where plot 131 is. I have no document to show I bought plot 844. I do not have interest in plot 844. I bought the house. Sam Lwanga

showed me boundaries soon after buying. I can show Court my boundaries if we go to the land..."

24. Therefore, when Exh.P1 (agreement dated 22 July 1997) is considered together with the oral testimony of the appellant, it is clear to me that what the appellant purchased from Sam Lwanga, was an alleged kibanja interest on land owned by Livingston Mpiima Kataza.

Is the alleged kibanja on Plot 131 or Plot 843 or Plot 844?

- 25. Exh.P1 adduced by the appellant states that she acquired a kibanja interest on Block 401/402 Plot 131 at Namulanda, Entebbe Road. On the 29 October 2019, this court, presided over by Justice John Eudes Keitirima, issued a court order allowing the parties to this appeal to open boundaries for land comprised in Block 401 Plots 84, 843, 844, and 131 Land at Namulanda; and adduce additional evidence of the survey reports. Pursuant to the above court order, the parties to the appeal adduced the following additional evidence from their respective surveyors.
- 26. The appellant adduced evidence from a surveying firm, Redeem Consult Ltd, through Sam Kakembo, whose report (Exh.A1) stated as follows:

"...property A was found to be comprised on plot 843, with a very small portion of the structure extending out of the digitalised plot boundaries as shown on the drawing attached. Plot 843 also wholly comprises another small commercial structure, and a section of two small residential structures. The plot fronts Entebbe Road and a small existing access road on side CM1-CM2, and is bordered by mostly residential developments on sides CM1-CM4 and CM3-CM4, and small commercial structures on side CM2-CM3. The acreage of plot 843 was computed as 0.081 Hectares,

Page 12 of 29

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or 0.20 acres, which is in tandem with the acreage on the area schedule availed to us by Wakiso Land office..."

27. The respondents adduced evidence from a surveying firm, Geo-Earth Consultant Surveyors, through Serunjogi Joseph, whose report (Exh.R1) stated as follows:

"...Plot 84 was subdivided to produce plots 353 and 354, plot 353 has an acreage of 0.063 hectares in the names Livingtone, Plot 354 was further subdivided to produce plot 843 and 844 as per area schedules attached, however documents for plot 131 were not provided. The plots on the ground as surveyed are plots 844 with area 0.7635 acres... in the names of Lekobowamu Mukwanga and Kasifa Nakigudde and 843 with area 0.20 acres in the names Kasifa Nakigudde. Plots 843 and 844 are developed with permanent structures (houses) however the boundary lines pass through the buildings as shown in the google image. The land has other encroachers who are not plaintiffs in the matter before court..."

28. I have considered the additional evidence from both surveyors. Whereas the surveyors disagree on the extent of the location of the appellant's developments on Plots 843 and 844; they both agree that the appellant's developments are on Block 401 Plots 843 and 844. Therefore, the additional evidence from both surveyors help to clarify one point: that the appellant's disputed land is located on Plots 843 and 844; and not Plot 131 as stated in Exh.P1 (agreement dated 22 July 1997). As already observed, this evidence is admissible to give meaning to the agreement dated 27 July 1997 (Exh.P1), with the result that whereas the agreement refers to Plot 131, the exact location of the house purchased by the appellant is on Plot 843 and Plot 844.

Page 13 of 29

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See General Industries (U) Ltd v. Non. Performing Assets Recovery Trust (supra) and Section 92(b) of the Evidence Act (Cap 6).

- 29. Sam Kakembo (appellant's surveyor) testified that the bulk of the appellant's developments are on Plot 843 which is owned by Kasifa Nakigudde (Exh.R3). However, according to the respondents' surveyor, Serunjogi Joseph, the bulk of the appellant's kibanja developments are on Plot 844 owned by both Lekobowamu Mukwanga and Kasifa Nakigudde (Exh.R4). This difference of opinion is minor, in my view; the fact is that the appellant's developments were confirmed to exist on Plots 843 and 844, both of which are registered in the names of the respondents.
- 30. The major shortcoming of the two survey reports adduced by the appellant and the respondents, is that they do not define the exact measurements of the appellant's developments on both plots. It ought to be remembered that the agreements pursuant to which the appellant claimed to have purchased the kibanja (Exh.P1 and Exh.P2), also do not define the exact measurements of the kibanja.

Does the appellant own a kibanja interest on the land?

31. The next question for me to consider is whether the appellant's interest qualifies to be a kibanja under the law. In the case of *Owembabazi Enid v. Guarantee Trust Bank Limited, High Court (Commercial Division), Civil Suit No. 63 of 2019, Justice Stephen Mubiru defined a kibanja as follows:*

"A kibanja is a form of land holding or tenancy that is subject to the customs and traditions of the Baganda, characterised by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behaviour, distinct and separate from ownership of the land on

Page 14 of 29

Demonstarcese

which the developments are made and in respect of which the user and occupancy rights exist."

- 32. In order for the appellant to prove a kibanja interest in the land, she must prove that she occupied the land by virtue of the repealed Busuulu and Envujjo Law of 1928; or that she entered or purchased the land with the consent of the registered owner. See Section 29(1) of the Land Act (Cap 227); Muluta Joseph v. Katama Sylvano, Civil Appeal No. 11 of 1999 (Coram: Oder, Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyogo J.J.S.C); and Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA).
- 33. To qualify as bona fide occupant, it must be shown that the appellant falls within the ambit of the provisions of Section 29(2) of the Land Act (Cap 227). A bona fide occupant means a person who before the coming into force of the Constitution, had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or had been settled on land by the Government or an agent of the Government, which may include a local authority. See the case of Kalya & 2 Ors v. Macekenyu (Court of Appeal Civil Appeal No. 82 of 2012) [2014] UGCA 25 (Coram: Hon. Mr. Justice A.S. Nshimye, JA; Hon. Mr. Justice Kenneth Kakuru, JA; Hon. Lady Justice Prof. L. E. Tibatemwa, JA).
- 34. I have considered the evidence adduced by the appellant but she doesn't qualify as either a lawful or bona fide occupant on the land. The appellant claims to have acquired the kibanja interest on the 27 June 1997. Exh.P1 (agreement dated 22 July 1997) provides that the kibanja is located on land

Page 15 of 29

Demonstances

owned by a one Mpiima. According to Exh.R4 (certificate of tittle for Plot 844), Livingston Mpiima Kataza was entered as the registered owner of the land on the 18 December 1985. The area schedules attached to both survey reports prove that Plot 354 was subdivided to create Plots 843 and 844. This proves that Livingston Mpiima Kataza was the registered owner of the land when the appellant purported to purchase the kibanja on the 27 June 1997. Both Exh.P1 (agreement dated 22 July 1997) and Exh.P2 (agreement dated 27 June 1997) do not show that the registered owner of the land (Livingston Mpiima Kataza) rendered his consent to the purchase of the kibanja. Also, the appellant does not qualify as a bona fide occupant because she entered on the land in 1997, and yet the Land Act (Cap 227) requires a bona fide occupant to have settled on the land 12 years before the year 1995 unchallenged by the registered owner.

Is the law of adverse possession applicable to the appellant?

- 35. In the circumstances of this case, where it is proved that the appellant entered on the land in 1997 and has been on the land unchallenged by the registered owner for more than 12 years, but is neither a lawful nor a bona fide occupant, can the appellant derive protection from the law of adverse possession?
- 36. The law of adverse possession is a common law doctrine that allows a person to acquire ownership of land, after 12 years of continuous and unchallenged factual possession of the land. See Megarry & Wade: The Law of Real Property, 9th Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs, 7-001; 7-004; 7-084). The law of adverse possession is closely related to limitation which is a rule of litigation that prevents the recovery of land by the registered owner from a trespasser after the expiry of 12 years. See Megarry & Wade (supra) at

Page 16 of 29

Demarco forcere 19

paragraph 7-001; and Section 5 of the Limitation Act (Cap 80). According to this doctrine, after 12 years, a registered owner loses the right to challenge a person's occupation of the land, even though the initial entry was illegal, and the registered owner's title is extinguished, and acquired by the person who is in occupation of the land.

37. The law of adverse possession is provided for in the laws of Uganda: Thus *Section 16 of the Limitation Act (Cap 80)* provides that:

"16. Extinction of title after expiration of period Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished."

38. *Part V of the Registration of Titles Act (Cap 230)* lays out the procedure that a person who claims to have acquired land by possession, may follow to acquire registered title; *Section 78 of the Act* provides that:

"78. Person claiming title by possession

A person who claims that he or she has acquired a title by possession to land registered under this Act may apply to the registrar for an order vesting the land in him or her for an estate in fee simple or the other estate claimed."

39. The law of adverse possession was considered in the case of *Hope Rwaguma* v. Jingo Livingstone Mukasa (Civil Suit No. 508 of 2012) [2015] UGHCLD 26. The brief facts of the case were that the plaintiff's late husband Dr. Rwaguma B.E bought the suit land as a kibanja at Lugo/Sukka zone from one Lwanga William on 15 June 1996. He immediately took possession and

Page 17 of 29

Demonstance p

constructed a homestead, planted a banana plantation and grew crops. He also grazed livestock thereon. The suit land was previously occupied and utilised by Philipo Musoke who died around 1978. William Lwanga then took over the estate before selling the suit land to the plaintiff's late husband. On the 25 August 2008, the plaintiff obtained letters of administration for the estate of her late husband. She continued in occupation and use of the suit land without any person laying a claim on it until the 4 October 2012, when she received a notice to vacate from the defendant's lawyers. One of the issues framed for determination by the court was whether the plaintiff can legally acquire legal title by adverse possession. Justice Bashaija K. Andrew held as follows:

"... This raises the issue of whether it is possible for a person to claim and obtain title to land as against the registered owner by adverse possession. A wealth of authorities seems to suggest that it is possible. Whereas a registered proprietor of land is protected and his or her title is in absence of fraud and other infirmities indefeasible under Section 59 and 176(2) RTA, adverse possession appears to provide the exception to the general principle of indefeasibility of the title. The RTA under Section 78 thereof recognises adverse possession as a basis on which a person in use and occupation of land can claim title to the land of the registered owner...On facts of the instant case, the plaintiff showed that she came into actual physical possession of the suit land through her late husband on 15/06/1996. Proof is Exhibit P6 (a) and (b) the sale agreement between Lwanga Willian as vendor and the plaintiff's late husband as purchaser. The plaintiff showed that she continued to remain in possession for a period of twelve years thereafter. She showed that her occupation and use of the suit land was open, exclusive and continuous undisturbed by

Page 18 of 29

Demerstarces

anybody until May 2012, when the defendant issued her with a notice to vacate the suit land. It follows that even without taking into account the period of her predecessors in title on the suit land, the plaintiff was in open and continuous possession of the suit land and remained in that capacity unchallenged by the registered owner far beyond the statutory period of twelve years. She therefore meets all the considerations of an adverse possessor of the suit land. I am acutely alive that mere long possession for a period of more than twelve years without anything more does not ripen into a title. In the instant case, besides the period of twelve years, I have taken into account the fact that the plaintiff satisfactorily showed her hostile intention to take over, occupy and use the suit land. The plaintiff's animus possidendi was open and manifested to exist at the inception of the occupation by acts such as construction of permanent residential houses, cultivation of land with permanent crops such as banana plantation, and rearing of livestock on the suit land to the exclusion of the registered owner ... "

40. In the textbook by *Megarry & Wade (supra) at paragraphs 7-007; 7-014;*7-029 to 7-110), the learned authors provide more clarity on the operation of the law of adverse possession:

"...Possession is a legal concept which depends on the performance of overt acts, and not on intention. It requires an appropriate degree of physical control of the land and it must be a single and exclusive possession...it is in the public interest that a person who has long been in undisputed possession should be able to deal with the land as owner. It is more important that an established and peaceful possession should be protected than that

Page 19 of 29

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the law should assist the agitation of old claims. A statute which effects this purpose is "an act of peace." Long dormant claims have often more cruelty than of justice in them...Adverse possession runs counter to the principle of the indefeasibility of a registered title and can only be justified in limited circumstances...To establish adverse possession, a squatter must prove both factual possession of the land and the requisite intention to possess (animus possidendi)...The principles which determine whether conduct amounts to adverse possession were affirmed by the House of Lords in J A Pye (Oxford) Ltd v. Graham [2002] UKHL 30; [2003] 1 AC 419...the House held that where licensees remained in possession of grazing land for more than 12 years after the expiry of the licence, they had acquired title to the land by adverse possession, because they were in factual possession and shown the requisite intention."

41. The case of *Afard Nebbi & Another v. Alex Manano Ajoba, High Court Civil Appeal No.3 of 2005 (Arua) [2016] UGHCLD 32* provides further context for the applicability of the law of adverse possession in Uganda, and Justice Stephen Mubiru held that:

> "...the doctrine of adverse possession is part of the law to be applied by courts...The doctrine provides a convenient method for recognising the claim of the person in long-standing and unchallenged possession, to restore the marketability of the land. Policy indicates that it is better to recognise a long-standing possessory claim, even by a bad faith adverse possessor, than to leave the land effectively res nullius...Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land...".

> > Page 20 of 29

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42. In the case of J A Pye (Oxford) Ltd and Others v. Graham and Another [2002] 3 All ER 865; [2003] 1 AC 419; [2002] UKHL 30, the brief facts of the case were that the defendants, as personal representatives of the late Michael John Graham, sought to establish a possessory title to 25 hectares of agricultural land. At all material times the paper title to that land had been vested in the first plaintiff, J A Pye (Oxford) Land Ltd and its predecessor in title in the same group, JA Pye (Oxford) Ltd ("Pye") as registered proprietors of the land. At the trial, Neuberger J ([2000] Ch 676) held that the defendants had established title by possession but his decision was reversed by the Court of Appeal [2001] Ch 804 (Mummery, Keene LJJ and Sir Martin Nourse). The defendants appealed to the House of Lords, who allowed the appeal, and restored the judgment of the trial judge. Lord Browne-Wilkinson held that:

"...there are two elements necessary for legal possession: 1. a sufficient degree of physical custody and control ("factual possession"); 2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess") ... "

43. The position of the law may be summarised as follows: under limited and exceptional cases, a registered owner of land may lose ownership of registered land if it is proved that a person has been in factual occupation of the land for a period of 12 years or more without being challenged by the registered owner. To prove factual possession, a person must show that he or she had an appropriate degree of physical control of the land; that her possession was a single possession and not of several persons; that her possession was to the exclusion of the dispossessed registered owner; and that he or she dealt with the land as an occupying owner might have been expected to deal with it. *See Megarry & Wade (supra) at paragraph 7-030.*

Page 21 of 29

Demarot bucese

Accordingly, where a person has been in effective and physical possession of registered or unregistered land for 12 years or more, and has undertaken developments on the land, unchallenged by the registered owner of the land, and is neither a lawful nor bona fide occupant, as defined under *Section 29* (1) & (2) of the Land Act (Cap 227), he or she can derive protection from the law of adverse possession, and claim ownership of the land.

- 44. The appellant has proved to my satisfaction that she purchased a house on the 27 June 1997 from Samuel Lwanga. She has remained in possession and effective control of the house from 1997 to date. When this court visited the locus in quo on the 23 November 2023 at Namulanda on the Kampala-Entebbe Highway, it was observed that the appellant is in effective control of the building; her caretaker, Apophia Sigarila lives in one of the rental units, and the rest of the rental units are occupied by tenants of the appellant and utilized for retail shops, hardware shop and residence. The appellant's occupation of the land was undisturbed by the registered owner, until December 2009. That was after a period of approximately 12 years and 6 months. The 1st respondent (Kasifa Nakigudde) became registered owner of the land (Plot 843) on the 12 July 2007. The 1st respondent (Kasifa Nakigudde) and the 2nd respondent (Lekobowamu Mukwanga) became registered owners of the land (Plot 844) on the 28 March 2008. Before the respondents became registered owners of the land, the registered owner was Livingston Mpiima Kataza. There is no evidence that the current or former registered owners of the land ever challenged the appellant's long occupation, and development of the land.
- 45. The appellant's long ownership of the house on the land is even acknowledged by the respondents. In the lower court, DW1 (Lekobowamu Mukwanga) testified as follows:

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Page 22 of 29

"I know the plaintiff. I know Specioza Mukasa. She has a piece of land she bought in our area...She bought Plot 131 Block 401. The one I own with [the] other defendant, is Plot 844 Block 401. I do not know about the kibanja. They bought registered land. To really show, their lawyer gave us a copy of this agreement showing they were buying land. Agreement says Block 401 Plot 131. Mukasa Specioza is the one who bought...The plaintiff's house is on the upper side. I cannot say the disputed land is unknown to me. No, we came in 1986 up to now I am Chairman LC2. Yes, I saw Sam Lwanga. I do not know where his house was...I bought my land from Mpiima plot 844 in the 1980's – I have forgotten a bit..."

- 46. I have already decided that the disputed property is located on Plot 843 and Plot 844; and not Plot 131, and so DW1's reference to Plot 131 is inconsequential.
- 47. The case before me is exceptional, and requires the intervention of the court to prevent a miscarriage of justice. The situation before me is that the appellant is neither a lawful nor bona fide occupant as defined under Sections 29(1) & (2) of the Land Act (Cap 227). It is only the application of the law of adverse possession that can protect the appellant's long-standing interest in the land. Not every person in illegal occupation of the land will succeed in acquiring land by adverse possession, because to do so, would be to perpetuate an injustice on the registered owner of the land, but in exceptional cases, the court will declare a person who has been in effective occupation and physical control of the land, and has undertaken developments on the land for 12 years or more, to have acquired the land by adverse possession. This is because such a person, although initially an

Page 23 of 29

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illegal occupant, is for all intents and purposes, the undisputed owner of the land.

- 48. Therefore, it is my decision that the appellant is an adverse possessor because she succeeded in establishing effective physical control and occupation of the land for a period of more than 12 years. As a result, the respondents' registered title or that of her predecessors in title over the land under occupation by the appellant was extinguished, and the appellant is entitled to have the land registered into her name by virtue of the law of adverse possession. Accordingly, with respect to the *portion of the land* comprised in Block 401 Plot 843 and Plot 844, that has been *under the effective physical control and occupation* of the appellant since the 27 June 1997, by virtue of the law of adverse possession, this court declares that the respondents' registered title in the land was extinguished, and the appellant is the lawful owner of the land and property that is in her possession.
- 49. I am fortified in this conclusion by the earlier persuasive decisions of Justice Bashaija K. Andrew and Justice Stephen Mubiru in the cases of *Rwaguma* v. Jingo Mukasa (supra) and Nebbi v. Ajoba (supra); and also, by the textbook Megarry & Wade (supra) at paragraphs 7-001 to 7-110.

Did the appellant prove trespass against the respondents?

50. In order for the appellant to establish the case of trespass against the respondents, she was required to prove that the respondents made an unauthorised entry upon her land, and interfered with her lawful possession. See the case of *Justine E. M. N. Lutaya v. Stirling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002 (per Mulenga, J.SC).* PW2 (Nsigalira Apophia Nabunnya) testified that on the 17 June 2012, she found Kasifa Nambi (2nd respondent) digging a foundation near the appellant's house, and told her to stop but she did not oblige. Having regard to the

Page 24 of 29

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evidence on court record, it is my decision that the appellant did not satisfactorily prove the case of trespass against the respondents considering that the purchase agreement (Exh.P1) does not have specific boundaries of the appellant's land. It is therefore not possible to tell with certainty where the alleged illegal entry took place.

Un-pleaded remedies:

- 51. My final declarations and orders include remedies that were not sought by the appellant directly in her plaint, but which I believe are necessary for the final determination of the controversy between the parties. I will therefore provide the legal context for my decision to grant remedies that were not directly sought by the appellant.
- 52. It is an established principle of law that courts can only render decisions on un-pleaded matters or issues where both parties have adduced evidence on the matter, and both parties have been heard on the matter. The effect of this is that whereas the general rule is that a party cannot be granted a relief which it has not claimed in its pleadings, where evidence has been adduced on a matter or issue, and both parties have been heard, a Court can render a decision on an un-pleaded matter or issue. See the case of *Jennifer Nsubuga v. Michael Mukundane (supra)*. The Supreme Court of Uganda in the case of *Sinba (K) Ltd & 4 Others v. Uganda Broadcasting Corporation, Civil Appeal No. 3 of 2014 (Coram: Katureebe C.J, Arach-Amoko, J.S.C, Tsekooko, Okello and Kitumba, Ag. JJ.S.C) (per the judgment of Justice Stella Arach-Amoko, J.S.C) gave the context for the application of the above principle of law as follows:*

"It is clear from the above that there was no specific prayer for cancellation of the 5th Appellant's certificate in the application directly. The orders specifically sought for in the application were

Page 25 of 29

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for cancellation, nullification and setting aside of the execution and the attachment and sale of the suit property. It is my finding, therefore, that the order of cancellation of the 5th Appellant's title was a consequential order which the two learned Justices rightfully gave as a direct consequence of their orders nullifying and setting aside not only the decree of the High Court and the Consent judgment on which it was based, but the execution and the sale of the suit property as well. In my view, and on the basis of their findings and orders which I shall address in details later on in this judgment, they could not leave the matter hanging. Further, the case of Odd Jobbs v Mubia [1970] EA 476, is to the effect that a court can decide an un pleaded matter if the parties have led evidence and addressed court on the matter in order to "arrive at a correct decision in the case and to finally determine the controversy between the parties. In the instant case, the record shows that all the parties not only led evidence by way of affidavits in support of their respective positions in the application but their lawyers addressed court on all the issues raised in the pleadings and by the court during the course of hearing the application as well. On top of that, the learned Justices of Appeal had before them; the Record of Appeal in CACA No. 107 of 2012 which included the record of proceedings right from the High *Court to the Court of Appeal pertaining to all the transactions that* had led to the sale of the suit properly to the 5th Appellant. It follows, therefore, that notwithstanding the finding that there was no pleading or prayer for the cancellation of the 5th Appellant's certificate of title, since the evidence before the court had disclosed that the whole transaction leading to the sale of the property to the 5th Appellant was based on an illegal consent

Page 26 of 29

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judgment and thus null and void, the court was obliged to make that order, after establishing that fact, in line with the authority of Odd Jobs (supra)." underlining is mine for emphasis

53. In the instant case, the contest between parties is over land and property ownership which has been going on since 2009. The respondents claim that they are registered owners of the suit land, and do not recognise the interest of the appellant who is actual possession of a portion of the land and a building housing business premises since 27 June 1997. Both parties adduced evidence on this very issue, and the declarations and orders that I shall shortly pronounce, are aimed at finally determining the controversy between the parties, and preventing a multiplicity of suits.

Final order of the court:

- 54. In conclusion, this appeal has succeeded, and the judgment of Her Worship Kimono Juliana, Magistrate Grade One in Civil Suit No. 0026 of 2013, Chief Magistrate's Court of Entebbe at Entebbe, is set aside, and is replaced with the following declarations and orders:
 - i). That the respondents' counter claim in Civil Suit No. 0026 of 2013, Chief Magistrate's Court of Entebbe at Entebbe is dismissed with costs.
 - ii). That the appellant is the owner of the portion of the land that has been under her effective physical control and possession since the 27 June 1997, by operation of the law of adverse possession.
 - iii). That the portion of the respondents' registered title in land comprised in Block 401 Plot 843 and Plot 844 land at Namulanda, that interferes with the appellant's land which has been under her physical control and possession since the 27 June 1997, is extinguished.

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- iv). That the Registrar of this court shall appoint a surveyor who is duly registered by the Surveyors Registration Board under <u>The Surveyors</u> <u>Registration Act (Cap 275)</u>, to undertake a survey, and determine the exact measurements of the land that has been under the appellant's physical control and possession since 27 June 1997.
- v). That basing on the findings of the survey report, the Commissioner for Land Registration is ordered to process a certificate of title of the land occupied by the appellant, and register a separate certificate of title in the name of the appellant, independent of the respondents' certificate of title.
- vi). That a permanent injunction issues restraining the respondents, their agents, servants, workmen and all those claiming under them and/or deriving authority from them from trespassing, encroaching, interfering and/or in any way dealing with the appellant's land and developments thereon.
- vii). That the respondents shall pay general damages of Uganda shillings 11,000,000 (eleven million) to the appellant.
- viii). That the respondents shall pay interest of 20% per annum on general damages from the date of judgment until payment in full.
- ix). That the respondents shall pay the costs of this appeal, and in Civil Suit No. 0026 of 2013, Chief Magistrate's Court of Entebbe at Entebbe.

IT IS SO ORDERED.

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BERNARD NAMANYA JUDGE 6 March 2024

<u>6 March 2024 at 11:49am</u> <u>Attendance for delivery of the Judgment</u>

Mr. Betunda Yusuf

Ms. Nanfuma Annet

Both respondents are in court

The appellant is absent

Allena Kanyakire

<u>Betunda Yusuf:</u>

Counsel for the appellant Counsel for the respondents

Court Clerk

I am ready receive the judgment.

Nanfuma Annet:

I am ready to receive the judgment.

<u>Court:</u>

Judgment delivered in open chambers.

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BERNARD NAMANYA JUDGE 6 March 2024