THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA)

CIVIL APPEAL NO.272 OF 2017

KIWANUKA FREDRICK KAKUMUTWE :: APPELLANT

VERSUS

KIBIRIGE EDWARD :: RESPONDENT

[Appeal from the Judgment and orders of the High Court of Uganda at Jinja (Hon. Justice Godfrey Namundi), delivered on the 17th March 2017 in Civil Appeal No.0068 of 2013]

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

Background

This is a second appeal arising from the judgment and orders of Hon. Justice Godfrey Namundi made on the 17th March 2017 in Civil Appeal No. 00068 of 2013 of the High Court of Uganda at Jinja.

The background to this appeal is that the Appellant was the original Plaintiff in the trial court proceedings before the Magistrate Grade One of the Chief Magistrate's Court of Mukono at Mukono (trial court), while the respondent was the original defendant. For purposes of this appeal, I will refer to the appellant as "Plaintiff" while the respondent will be referred to as "defendant".

The Plaintiff instituted Civil Suit No.0007 of 2010 in the trial Court against the Defendant for a declaration that he is the lawful owner of the suit *kibanja* located at Kabimbiri, Kasawo Subcounty, Kyaggwe County, in Mukono District (suit land), a permanent injunction restraining the Defendant from trespassing on the suit land, general damages and costs of the suit. It was the Plaintiff's case that he was the lawful owner of the suit land and that in March 2009 the defendant had forcefully entered the suit land, claimed its ownership and started trespassing on it by cultivating on it and cutting down trees despite the protests from the Plaintiff.

The Defendant denied being a trespasser on the suit land and contended that he was in possession of the suit land as its owner having bought the same from a one Dezi Kyebakutika on 26th of June 1988. That he had since taken possession of the suit land, erected a house on it, and cultivated diverse crops on it.

The trial court entered judgment in favour of the Plaintiff, declared him the owner of the suit land. The trial court also issued a permanent injunction restraining the Defendant from trespassing on the suit land, general damages of 3,000,000/= and the taxed costs of the suit.

The Defendant being dissatisfied with the decision of the trial court appealed to the High Court of Uganda at Jinja (1st Appellate Court). The 1st appellate court allowed the appeal, set aside the orders of the trial court, and replaced them with an order dismissing the original suit for being barred by limitation. The 1st appellate court granted the costs of the appeal to the defendant.

Being dissatisfied with the decision of the High Court on appeal, the Plaintiff appeals to this Court on the sole ground that:

> ***"The learned Appellate Judge erred in law and in fact when he held that the Appellant's suit was barred by limitation and cannot stand thereby causing a miscarriage of justice as well as an injustice to the Appellant"***

Representation

During the hearing, the Plaintiff was represented by Mr. Edward Mukwaya of M/s Kafeero & Co. Advocates. The Defendant and his advocates on the court record, M/s Sseryanzi, Mugabi & Co. Advocates, were absent despite the Defendant's Counsel having been served with the hearing notice. Accordingly, court granted leave to the Plaintiff to proceed *ex parte*.

The Plaintiff proceeded by way of written submissions filed in court as directed by the Court. The defendant having failed to file his Written Submissions within the timelines given by the Registrar of this court and to appear in court and orally submit when the appeal was called on for hearing, this judgment has therefore been prepared on the basis of the appellant's Written submissions.

Plaintiff's submissions

It was submitted for the Plaintiff that in order to establish whether Civil Suit No. 0007 of 2010 was time barred, it was necessary to consider the nature of the cause of action as well as the entire plaint in order to ascertain when the cause of action was discovered by the plaintiff.

Counsel submitted that the 1st appellate Judge came to the decision that the suit was time barred after erroneously treating the plaintiff's suit as one for recovery of land whereas the Plaintiff's cause of action was for trespass upon the suit land by the Defendant. That the defendant denied the alleged trespass and relied upon the purchase agreement he made in 1988 with Dezi. Counsel argued that it was an error on the part of the 1st appellate Judge to hold that the Plaintiff's right to claim the suit land accrued in 1988 when the Defendant took possession of the suit land after purchasing it from the said Dezi and that the Plaintiff's suit was time barred. The first reason for faulting the decision of the 1st appellate court was that the plaintiff never lost and/or got dispossessed of the suit land. As such, argued Counsel, the issue of recovery of land could not arise. Counsel submitted that limitation is computed based on the date of dispossession of land. Counsel argued that the Plaintiff was never dispossessed of the suit land; he simply let a portion of his land to Dezi to use and this did not imply that he ceased to have an interest in the land. That Dezi was simply a licensee and had no title to pass onto the defendant. For this submission, Counsel relied on the decision of Gulu High Court in *Erina Lam Oto Ongom Vs Opoka & Another, Civil Appeal No. 91 of 2019 (Unreported)* where it was held that the right to sell unregistered land is vested only in the person who holds a valid title to that land, and that he or she who has no title cannot sell. As such, argued Counsel, the issue of recovery of land could not arise in the circumstances where the plaintiff never lost interest in the suit land.

The second reason for Counsel faulting the 1st appellate court was that the Plaintiff's claim was in trespass to land and not recovery of land. Counsel submitted that the trespass complained of was a continuing tort, and not subject to the dictates of time limitation of 12 years under Section 5 of the Limitation Act, Cap. 80. Counsel referred to the High Court decision in *Mukuha Vs*

Maliro HCCS No. 0029 of 2013 and the Supreme Court cases of *Justine E.M.N. Lutaya Vs Sterling Civil Engineering Company, SCCA No. 11 of 2002 (Unrepoted)* and *Eridad Otabong Waimo Vs Attorney General, Civil Appeal No. 6 of 1990 (Unreported)*.

The last reason for faulting the 1st appellate court was that its decision that the suit was time barred was based on evidence as opposed to the Plaint. Counsel submitted that the law is to the effect that when court is considering whether a suit is barred by any law, it looks at the pleadings only and no evidence is required. For this submission, counsel relied on Order 7 Rule 11(d) of the Civil Procedure Rules, S.I. No. 71-1 and the decision of this court in the case of *Madhvani International SA – Vs Attorney General, Civil Appeal No. 48 of 2004*.

Counsel concluded by praying to this Court to allow the appeal, set aside the Judgment and orders issued by the High Court and restore the orders issued by the Trial Magistrate in Civil Suit No.0007 of 2010. Counsel also prayed that the defendant pays costs of this appeal, and in the lower Courts.

Duty of Court

The duty of this court as a second appellate court is to decide whether the first appellate court failed in its duty to re-evaluate the evidence presented before the trial court and reach its own conclusion. In the discharge of this duty, this court is not required to re-evaluate the evidence at the trial as that is the duty of the first Appellate Court unless this court has established that the first Appellate Court failed to carry out that duty. See *Pandya Vs R [1957] EA 336*, *Kifumante Henry Vs Uganda SCCA No. 10 of 1997*, *and* Narsensio Begumisa and Ors v Eric Tibebaga [2004] UGSC 18.

Section 72(1) of the Civil Procedure Act also limits second appeals to this Court to only questions of law.

Furthermore, under *Rule 32 (2) of the Judicature (Court of Appeal) Rules, S.I No 13 -10,* this Court is obliged to appraise the inferences of fact drawn by the trial court. The Rule is couched thus:

"On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

It is with the above principles in mind that I will proceed to resolve the appeal.

Analysis

The sole ground of appeal raised by the Plaintiff is that the 1st appellate court erred in holding that the Plaintiff's suit was barred by limitation which not only resulted in a miscarriage of justice but an injustice as well as. The reasons advanced by Counsel for faulting the decision of the 1st appellate court as already summarized in this judgment are analysed below:

Dispossession and/or loss of interest in the suit land by the Plaintiff

The first reason raised by the plaintiff to fault the impugned decision of the 1st appellate Judge is that he treated the plaintiff's claim as one for recovery of land whereas it was for trespass to land. Counsel argued that "recovery of land" presupposes that the plaintiff had lost interest in the suit land which was not the case in the instant matter where the defendant obtained no lawful title to the suit land in so far as he purchased it from Dezi who was simply a licensee and had no title to pass. Counsel contended that by treating the plaintiff's action as one for "recovery of land" instead of "trespass to land", the 1st appellate court created for itself the ground for bringing the plaintiff's claim under the ambit of Section 6 of the Limitation Act which provides for computation of the period of limitation starting from the date on which the plaintiff was dispossessed of the suit land. On the other hand, so argued Counsel, had the 1st appellate judge treated the appellant's claim as "trespass to land" then he would have found that trespass to land is a continuous tort and not subject to what Counsel termed as "the dictates of time limitation of 12 years under Section 5 of the Limitation Act.

The differentiation sought to be made by Counsel for the plaintiff between an action for "recovery of land" and an action of "trespass to land" for purposes of extricating the latter from the scope of application of the Limitation Act is without any valid legal basis. The Limitation Act provides for periods of limitation for what it terms ***"actions to recover land and rents"*** in sections 5 to 17.

The Act goes ahead to define the term "***action***" to include any proceeding in the High Court and a magistrate's court (see section 1(1) (a) & (c).

Further, the Act provides in section 1(6) that *"references in this Act to a right of action to recover land shall include references to a right to enter into possession of the land..."*[Emphasis added].

From the above, it is my finding that since the tort of trespass to land deals with possessory rights to land, an action for trespass to land falls squarely within the scope of "actions to recover land" whose limitation period is prescribed by the Limitation Act. Said differently, the Limitation Act applies to actions in trespass to land.

I have also carefully read the Supreme Court cases of *Justine E.M.N. Lutaya Vs Sterling Civil Engineering Company (supra) and Eridad Otabong Waimo Vs Attorney General (supra)* which the plaintiff relied upon in support of his argument that the tort of trespass to land, being a continuing trespass, is not subject to the limitation period of 12 years provided by Section 5 of the Limitation Act. The subject matter of *Eridad Otabong case* (supra) was the tort of unlawful arrest and unlawful detention, while the case *Justine E.M.N. Lutaya Vs Sterling Civil Engineering Company (supra)* is the one which dealt directly with the tort of trespass to land. In the lead judgment of Justice Mulenga, JSC in the case of *Lutaya Vs Stirling Civil Engineering Company Ltd, (supra)* with which the other Justices concurred, he stated the legal position about a right of action based on a continuous trespass to land thus:

> *"Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land."* [Emphasis added]

The above decision is still good law and binding on this court under the doctrine of *Stare decisis*. Accordingly, I would reject the argument by the plaintiff's Counsel that the Limitation Act does not apply to the tort of trespass to land.

When dealing with the issue of limitation of the plaintiff's claim, the 1st appellate Judge considered the Plaint filed by the Plaintiff, the Written Statement of Defence of the Defendant and evaluated the evidence adduced by the respective parties and concluded thus:

> *"The [Defendant] has been in occupation of the suit land since 1988 after he bought it from the said Dezzi who had been in use of the land. The [Plaintiff] was seeking declaration that the land belongs to him. In essence he was seeking to recover the suit land on the basis that in 2008, he discovered that the [Defendant] was in occupation of it and secondly that he did not know Dezzi had sold his land. To him, he only gave the land to Dezzi to grow crops in 1968 and that was the last time he used it. This is totally a different story from what the [plaintiff] pleaded. His evidence at trial contradicts his allegations in the plaint.*
>
> *The [Plaintiff's] right to claim the suit land in my view accrued in 1988 when the [Defendant] took possession of the suit kibanja after the said Dezzi had sold the kibanja to him. In 2008 when the [Plaintiff] discovered that the [Defendant] was in occupation of the kibanja was exactly 20 years later.*
>
> *Limitation of actions for the recovery of land is governed by Section 5 of the Limitation Act cap 80 which provides as follows:*
>
> *"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."*
>
> *The main suit was filed in 2010, which was about 22 years later after the right of action to sue accrued to the Respondent [Plaintiff]. The Respondent's [Plaintiff's] suit was time barred in the first place and had the Trial Magistrate addressed her mind to these issues and evaluated her evidence sufficiently, she ought to have dismissed the Respondent's [Plaintiff's] case. This disposes off grounds 1, 2, 3 and 4 of the appeal."*

In determining whether the 1st appellate Judge erred in holding that the plaintiff's claim was time barred as contended by the Plaintiff, it is important to identify the date on which the computation of the limitation period commenced.

According to Section 6 of the Limitation Act, the computation starts from the time a claimant's right of action accrues as below:

> ***"6. Accrual of right of action in case of present interests in land***
>
> *(1) Where the person bringing an action to recover land, or some person through whom he or she claims, has been in possession of the land, and has while entitled to it been dispossessed or discontinued his or her possession, <u>the right of action shall be deemed</u>*

to have accrued on the date of the dispossession or discontinuance ..." [Emphasis mine]

I have reviewed the record of appeal in this matter. In the Plaint filed in Mukono Chief Magistrate's court, the plaintiff claimed ownership of the suit and sought a declaration to that effect. He also sought a permanent injunction restraining the Defendant from trespassing on the suit land, general damages and costs of the suit. It was the Plaintiff's case that he was the lawful owner of the suit land and that in March 2009 the defendant had forcefully entered the suit land, claimed its ownership and started trespassing on it by cultivating on it and cutting down trees despite the protests from the Plaintiff.

In the Written Statement of Defence (WSD) filed by the defendant, he denied being a trespasser on the suit land and contended that he was in possession of the suit land as its owner having bought the same from a one Dezi Kyebakutika on 26th of June 1988. That he had since taken possession of the suit land, erected a house on it, and cultivated diverse crops on it.

From the evidence on the record, 1988 was the year the defendant purchased the suit land from Dezzi and started possession of the same as its owner. The evidence of the parties to the agreement (DW1 Edward Kibirige and DW3 Nathan Kawooya) coupled with the evidence of the Local Council Chairman of the village (DW3) and one of the neighbours to the suit land, DW2 Hafiswa Namirimu, all proved that the plaintiff's right to commence action accrued to the plaintiff in 1988. As such, the finding by the 1st appellate court that the plaintiff's right to claim the suit land accrued in 1988 cannot be faulted. For the plaintiff to commence the suit in 2010, the action was clearly outside the 12 year period prescribed by Section 5 of the limitation Act for instituting the land action.

The contention of the plaintiff's counsel that the plaintiff still had interest in the suit land at the time he commenced court action in 2010 in so far as the defendant had purchased the suit land from Dezi who was simply licensed by the plaintiff to use the land and could not pass title to the defendant, is misguided. After the defendant had continuously occupied the suit land for 12 years unchallenged, whether his original entry into possession of the suit land had been lawful

or unlawful became irrelevant. Section 16 of the Limitation Act automatically came to the defendant's aid to extinguish the title of the plaintiff (if any). Section 16 provides thus:

> ***"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."*

Accordingly, at the time the plaintiff commenced court action in 2010, his title to the suit land had long been extinguished by operation of law and in law he no longer had any interest or estate or title in the suit land upon which to base the action seeking the remedies sought from court.

The principle of "continuous trespass" cannot also come to the aid of the plaintiff as contended by his Counsel. I have scrutinised the Plaint in this matter, the question of the trespass by the defendant being continuous was not pleaded by the Plaintiff. The plaintiff's claim was that "*around 2009 the defendant forcefully entered the [suit land belonging to the plaintiff] and claimed ownership thus trespassing on it*". In response, the defendant denied the claim in the WSD and stated that he was in possession of the suit property as its owner, having purchased it in 1988 from Dezi and immediately taken possession thereof. The Plaintiff did not file a Rejoinder to the defendant's WSD to plead continuous trespass. In the circumstances, the plaintiff cannot be allowed to set up the issue of "continuous trespass" which was not part of his pleadings. This Court and the Supreme Court have held in a number of cases including *Interfreight Forwarders (U) Ltd Vs East Africa Development Bank, Supreme Court Civil Appeal No. 33 of 1992 (unreported), Fangmin Vs Belex Tours and Travel Ltd, Supreme Court Civil Appeal No. 6 of 2013 (unreported) and Electoral Commission and Another vs. Tumwesigye, Court of Appeal Election Petition Appeals Nos. 73 and 74 of 2021 (unreported),* that a person is not allowed to succeed on a case not set up in their pleadings.

In all, I would reject the first two reasons advanced by the Plaintiff to fault the judgment of the 1st Appellate Court. I now proceed to analyse the remaining leg upon which the plaintiff sought to fault the decision of the 1st appellate court.

Time Limitation based on evidence instead of the Plaint

The plaintiff faulted the 1st appellate Judge for basing his decision that the suit was time barred on evaluation of evidence instead of considering only the Plaint. It was Counsel's submission that the law restricts the court determining the question of whether a suit is barred by any law to looking at the Plaint only and not the evidence. Counsel relied on Order 7 Rule 11(d) of the Civil Procedure Rules and the case of *Madhvani International S.A Vs Attorney General Civil Appeal No. 48 of 2004* to back his submissions.

It is true that the impugned decision of the 1st appellate court was not based on the exclusive consideration of the Plaint but upon its examination of the pleadings of both parties to the appeal and re-evaluation of the evidence adduced by each party in support of its case. Was this an error on the part of the 1st appellate Judge as submitted by the Plaintiff?

Order 7 Rule 11 (d) of the Civil Procedure Rules provides that one of the instances where the Plaint shall be rejected is "*where the suit appears from the statement in the plaint to be barred by any law*". [Emphasis mine]

The point of law which the 1st appellate court used to resolve the dispute before him was that the respondent's claim before the trial Magistrate was barred by the Limitation Act. It has been held in numerous decisions of the Supreme Court and this court including *Madhvani International S.A Vs Attorney General (supra)* that when the court relies on Order 7 Rule 11 (d) of the Civil Procedure Rules, it should examine the Plaint alone and any annextures to it, and that no evidence is required.

I have examined the Judgment of the 1st appellate court, it is not stated anywhere in the said Judgment that Order 7 Rule 11 (d) of the Civil Procedure Rules was the basis of the court's decision to dismiss the Plaintiff's suit for being barred by the Limitation Act. Order 7 Rule 11 (d) CPR is applicable when the question of law is raised as a preliminary objection or a preliminary point of law by the defendant whose resolution does not require evaluation of evidence but can be achieved by simply looking exclusively at the Plaint and annextures to it (if any). It is in that

context that the decision in the case of *Madhvani International S.A Vs Attorney General (supra)* should be understood. The Rule is **NOT EXCLUSIVE** of any other circumstances under which a court of law may find itself as warranting consideration of a point of law critical to the resolution of the dispute pending before it.

In *A.I.R Commentaries on the Code of Procedure V of 1908* by Manohar and Chitaley, Volume 3, 10th (1985) Edition, the learned authors while discussing the scope of the Order 7 Rule 11 of the Indian Code of Procedure V of 1908 which is in *pari materia* with our Order 7 Rule 11 of the Civil Procedure Rules, state at page 228 thus:

> *"[The] rule enacts that the plaint shall be rejected in the four classes mentioned in clauses (a) to (d). But the instances given cannot be regarded as exhaustive of **all** the cases in which a court can reject a plaint, or as limiting the inherent powers of the court in respect thereof…An appellate court has the same powers of rejecting a plaint as the court of first instance"*

With specific reference to Order 7 rule 11(d) which provides for rejection of the Plaint *where the suit appears from the statement in the plaint to be barred by any law*, the Learned authors state at page 235 thus:

> *"Where a legal bar against maintainability of a suit is not made out from the statements in the plaint but facts showing such a bar are brought to the notice of the court by the defendant, the court is not powerless to take notice of those facts and give relief to him. The court, in such a case, may raise an issue on the point and dismiss the suit itself instead of rejecting the plaint."*

The A.I.R Commentaries and the Indian cases relied upon by the learned authors are not binding on this court. However, I am satisfied that the Commentaries are a proper statement of the law as to the scope of operation of Order 7 rule 11(d) CPR.

In the instant case, mere perusal of the plaint could not have disclosed that the plaintiff's claim was barred by the limitation Act. The issue of limitation could only be inferred from the WSD of the defendant in which he stated that he was in possession of the suit land as its owner and had had uninterrupted possession of the suit land for close to 22 years by the time the suit was commenced against him by the plaintiff. Evidence was thereafter adduced by the defendant to prove, among others, the fact of possession of the suit land by the defendant as claimed. In

those circumstances, the trial Magistrate was obliged to evaluate the evidence of both parties and determine and grant appropriate remedies in respect of the apparent point of law. Upon failure of the trial Magistrate to live up to the expectation of the law, the 1st appellate court upon re-valuation of the evidence was enjoined with the same powers over the point of law as the trial court and grant appropriate remedies. This is exactly what transpired before the 1st Appellate Court. The plaintiff has no valid legal basis to fault the 1st appellate Judge for resolving the issue of limitation after evaluation of the evidence.

Conclusion

Upon review of the record of appeal, I am satisfied that the appeal has no merits. I would accordingly dismiss it and confirm the orders of the High Court granting the costs in the High Court and the trial court to the defendant. However, I would deny the defendant the costs in this court as he never participated in the proceedings before this court despite service being effected upon his Counsel.

DATED at **KAMPALA** this .... 7th ..... day of ..... Oct ..... 2022.

MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA)

CIVIL APPEAL NO.272 OF 2017

(Arising from Civil Appeal No. 68 of 2013 of the High Court of Uganda at Jinja)

BETWEEN

KIWANUKA FREDRICK KAKUMUTWE ==========APPELLANT

AND

KIBIRIGE EDWARD ==========RESPONDENT

[Appeal from the Judgment and orders of the High Court of Uganda at Jinja (Namundi, J.), delivered on the 17th March 2017 in Civil Appeal No.0068 of 2013]

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity of reading in draft the judgment of my brother, Kibeedi, JA. I agree with it and have nothing useful to add.

[2] As Gashirabake, JA, also agrees this appeal is dismissed with no order as to costs in this court. The decision of the High Court is affirmed.

Signed, dated and delivered at Kampala this 7th day of October 2022

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi, Gashirabake, JJA]

CIVIL APPEAL N0. 272 OF 2017

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BETWEEN

KIWANUKA FREDRICK KAKUMUTWE :: APPELLANT

VS

KIBIRIGE EDWARD ::RESPONDENT

RULING OF CHRISTOPHER GASHIRABAKE, JA

I have had the benefit of reading in draft the lead Judgment by Muzamiru M. Kibeedi, JA. I concur with the reasoning and conclusions therein. I have nothing useful to add.

Dated at Kampala this.......7th............day of ......October..........2022

Christopher Gashirabake,
JUSTICE OF APPEAL