

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 201 OF 2016**

*(Arising from H.C.C.S No. 001 of 2013)*

5    **PAUL RWIJA        ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**YEHU RWAKABIRA ::::::::::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA**

10                    **HON. JUSTICE STEPHEN MUSOTA, JA**

**HON, JUSTICE IRENE MULYAGONJA, JA**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

15    This is a second appeal arising from the decision of Hon. Justice  
Batema N. D. A at the High Court at Fort Portal.

**Background**

20    In 2004, the Respondent reported a case in the LCII Court of Binunda  
Parish alleging that the Appellant was trespassing on his land. The  
LC 11 Court entered judgment in favour of the Respondent. The  
Appellant appealed successfully to the LC 111 Court of Kyarusozi  
Sub-county in Kyenjojo District. In 2007 the Respondent appealed to  
the Chief Magistrate and the Chief Magistrate ordered a retrial in Civil  
Appeal No. 38 of 2007.

The Respondent filed Civil Suit No. FPT-00-CV-CS-047 of 2011 in the Chief Magistrates Court of Fort Portal for trespass against the Appellant and judgment was delivered in his favour. The Appellant was dissatisfied with the judgment and he appealed to the High Court of Uganda at Fort Portal in HCT-01-CV-CA-001 of 2013. On appeal to the High Court, the learned appellate Judge upheld that orders of the Chief Magistrate and dismissed the appeal with costs.

The appellant filed a second appeal to this court on the grounds that;

1. The learned Judge on appeal erred in law when he failed to properly re-evaluate the evidence on record which showed that the appellant acquired the land in 1963 and has been in effective possession since then and this occasioned a miscarriage of justice to the appellant.
2. The learned Judge on appeal erred in law when he failed to find that the appellant was a lawful owner of the suit land on account of adverse possession.
3. The learned Judge on appeal erred in law in holding that the appellant was a trespasser on the suit land.
4. The learned Judge on appeal erred in law in awarding interest on general damages to the respondent which was unjustified and excessive.

### **Representation**

When the appeal, came up for hearing, Advocate Stella Nakamya appeared on brief for Advocate Bwiruka Richard for the Appellant

while Advocate James Byamukama held brief for Advocate Busingye for the Respondent.

### **Appellant's submissions**

Counsel submitted that there was clear evidence that the Appellant entered the suit land in 1963 with the permission of a Chief and by the time the Respondent sued the Appellant, he owned the suit land by adverse possession. Counsel relied on **Black's Law Dictionary 8<sup>th</sup> Edition Bryan A. Garner** to define adverse possession as the use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious. Counsel further relied on the decision in **Hellen Namukabya Vs Nelson Kawalya CACA No. 72 of 2001 [2007] KALR 110** which cited with approval **Modern Law of Limitation by Prime and Scanian Butterworths 1993** which held that for adverse possession to occur, there must be three aspects in place namely; the owner must lose possession, the intruder must take possession and the intruder must act with requisite intention.

Counsel argued that since 1963 when the Appellant acquired the suit land to 2002 when litigation started in Local Council Courts, he had never seen the Respondent on the suit land making any claims of ownership. The Appellant had been in actual possession of the suit land since 1963.

While arguing ground 3, counsel submitted that the Respondent admitted having found the Appellant on the land in 1976 and he continued to use the land. The statutory limitation period of 12 years

to bring an action for recovery of land was around 1988 and thus, the suit was bared by limitation.

Counsel submitted that the Appellant was not a trespasser on the land which he acquired from the Parish Chief called Rwaheru Polikalipo who was responsible for allocating the land to the people in 1963.

### **Respondent's submissions**

Counsel submitted that the learned appellate Judge rightly re-evaluated the evidence on record and found that the respondent acquired the land from a Parish Chief in 1961, which was earlier than the Respondent who acquired in 1963. That the eucalyptus trees and the building were found to be recent developments on the suit land. Whereas adverse possession was not pleaded by the Appellant at the lower courts, the learned appellate Judge evaluated evidence and found that the Appellant was not in adverse possession of the suit land.

Counsel argued that the issue of limitation did not arise in this case since the Respondent reported the appellant to the local authorities immediately the trespass was discovered.

### **Consideration of the appeal**

I reiterate that this is a second appeal and the role of this court as a second appellate court is laid down under **Rule 32(2)** of the **Judicature (Court of Appeal Rules) Directions** which provides that;

*“on any second appeal from a decision of the High Court acting in 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.”*

- 5 This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

**Section 72 of the Civil Procedure Act**, which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction, provides;

10 *72. Second appeal.*

*(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—*

- 15 *(a) the decision is contrary to law or to some usage having the force of law;*
- (b) the decision has failed to determine some material issue of law or usage having the force of law;*
- 20 *(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.*
- (2) An appeal may lie under this section from an appellate decree passed ex parte.*

The effect of this provision is to bar appeals on matters of fact or matters of mixed fact and law.

The duty of a second appellate court is intertwined with the duty of a first appellate court although the two are different. The Supreme Court has distinguished clearly the duties cast on each court in the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** thus;

*"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See **Pandya v. R [1957] EA 336, Okeno v. Republic [1972] EA 32 and Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985** at page 5.*



Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles:" See **P.R. Pandya v. R (supra), Kairu v. Uganda 1978 HCB 123.**

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied were properly applied and if it did not, for it to proceed and apply the said principles.

#### **Grounds 1, 2 and 4**

I will resolve grounds 1, 2 and 4 concurrently as they all address the issue of who the rightful owner of the suit land is.

The evidence on record from the proceedings at the Chief Magistrates Court is that both the Appellant and the Respondent acquired the land by way of allocation from the Parish Chiefs. The Appellant claimed to have acquired the land in 1963 from the Parish Chief, one Rwaheru Polycalipo while the Respondent claimed to have acquired the land by allocation by a Parish Chief names Samson Nyanduru in 1961 for purposes of tea growing. The Respondent produced three witnesses who testified as PW2 (Kasumba Swithen), PW3 (Katama Godfrey) and PW4 (Samuel Kachope).

The Appellant and the Respondent were allocated the suit land by different parish chiefs around the same time thus 1961 and 1963. The learned Chief Magistrate properly evaluated this contradiction at page 47 of the Record of Appeal and held that;

5        *“The plaintiff’s evidence indicates that Samson Nyanduru was a Parish Chief up to sometime in the 70’s. The defendant indicates that Samson Nyanduru ceased to be a Parish Chief in 1962 and by 1963, Rwaheru was the parish chief. Whereas the plaintiff’s evidence regarding Nyanduru’s stay in office is corroborated by*  
10        *PW3 and PW4 who appeared to know Nyanduru well (PW4 was a son), the defendant’s testimony on the same issue is not corroborated.*

*...there was also evidence by PW3 that the said Rwaheru Polycalipo was not a parish chief but a cell leader...”*

15        From the evaluation of the Chief Magistrate and the re-evaluation by the learned appellate Judge, it is clear that up to 1963, Nyanduru Samson was the Parish Chief and Rwaheru could not have allocated land which the parish chief had already allocated.

20        The Appellant’s claim that he was in adverse possession of the land was properly re-evaluated by the learned appellate Judge who relied on the testimonies of both the Appellant and the Respondent together with their witnesses that they used to graze on the suit land under the customary practice of communal grazing. The Appellant himself admitted that one could graze on another person’s land without any  
25        impact. This meant that communal grazing was not an act of trespass



*per se*. The trespass on the suit land only occurred when the Appellant first cultivated the land in 1998 and it was at the same time that the Appellant was sued in the LC Courts by PW3.

5 It is my considered view that the learned appellate Judge properly re-evaluated the evidence on record and came to a correct conclusion that the Appellant was a trespasser on the suit land.

### **Ground 3**

10 Ground 3 faults the learned appellate Judge for holding that the law of limitation did not bar the Respondent from laying his claim on the suit land.

**Section 5** of the **Limitation Act** provides that

*5. Limitation of actions to recover land.*

15 *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.*

20 I reiterate that the evidence of both parties and the witnesses at the Magistrates Court was that grazing at the time was communal and grazing on another person's land did not amount to trespass. The dispute in this case arose when the appellant started cultivation on the suit land in 1998 and as soon as he begun cultivating, PW3 sued him in the LC Courts. I find no reason to depart from the finding of the learned appellate Judge that the law of limitation was not applicable to the Respondent.

## Ground 5

Ground 5 faults the learned trial Judge for awarding the Respondent interest on general damages.

The learned appellate Judge upheld the award of damages of 5,000,000/= to the Respondent and awarded an interest at 8% per annum from 27.1.2012.

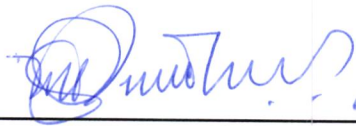
It is a settled position of law that interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case. **See Uganda Revenue Authority vs Stephen Mabosi SCCA No.1 of 1996.** An award of interest is discretionary and the basis of such an award is that the Appellant has kept the Respondent off his land and the Appellant has had use of it so the Respondent ought to be compensated accordingly; **Harbutt's Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447.**

The Appellant has planted tea, trees and his sons built on the suit land and deprived the Respondent of the same for 24 years now since 1998. I would agree with the learned appellate Judge that an award of 5,000,000/= in general damages is a lenient award and granting interest at the court rate of 8% per annum serves the interest of justice in this case.

Ground 5 accordingly fails.

In light of the above, this appeal is dismissed with costs to the Respondent in this court and the courts below.

Dated this 15<sup>th</sup> day of Dec 2022



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**Stephen Musota**  
**JUSTICE OF APPEAL**

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**THE REPUBLIC OF UGANDA**  
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**CIVIL APPEAL NO. 201 OF 2016**

**Coram: Hon. Justice Catherine Bamugemereire, JA**  
**Hon. Justice Stephen Musota, JA**  
**Hon. Justice Irene Mulyagonja, JA**

**PAUL RWIJA::: APPELLANT**

**VERSUS**

**YEHU RWAKABIRA ::::::::::::::::::::::::::::::::::: RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Fort Portal before N.D.A Batema, J in C.S No.001 of 2013, dated).

**JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA**

I have had the privilege of reading in draft the Judgment of my learned brother Stephen Musota, JA.

I need not go into any level of detail as to the facts as they are well articulated in the lead judgment and I agree with them.

I agree with the finding in Grounds No. 1, 2 and 4 that the learned appellate Judge properly evaluated the evidence on record and came to a correct conclusion that the appellant was a trespasser on the disputed land.

I concur with the reasoning of my learned brother in Ground No. 3 that there was no reason to depart from the finding of

the learned appellate Judge that the law of limitation was not applicable to the respondent.

I further concur with the finding on Ground No. 5 regarding the award of interest on general damages. I agree with my learned brother that awarding interest at a court rate of 8% per annum serves the interest of justice in this case.

Since my learned sister Irene Mulyagonja, JA also agrees with the above conclusions, I see no basis for this appeal and it is hereby dismissed with costs in this court and in the courts below.

Dated at Kampala this.....15<sup>th</sup>.....day of.....Dec.....2022.



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**Catherine Bamugemereire**  
**Justice of Appeal**

**THE REPUBLIC OF UGANDA**

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

**(Coram: Bamugemereire, Musota and Mulyagonja, JJA)**

**CIVIL APPEAL NO. 201 OF 2016**

**PAUL RWIJA :::::::::::::::::::::::::::::::::::::: APPELLANT**

## VERSUS

**YEHU RWAKABIRA::: RESPONDENT**

***(Appeal from the decision of Batema N.D.A, J in HCCS No. 001 of 2013)***

**JUDGMENT OF IRENE MULYAGONJA, JA**

I have had the benefit of reading in draft the judgment of my learned brother Stephen Musota, JA. I agree with his decision and the reasons for it and the conclusion that the appeal should be dismissed with costs to the Respondent.

Dated at Kampala this .....day of November, 2022

Iskender Yagöz

Irene Mulyagonja

### Justice of Appeal

15/12/2022