THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

HCT – 02 – CV – CA – 029 – 2007

1 **RAYMOND OTUCU**

2 **AYO OTWII C.D.K ::::::::::::::::::::::::::::::::APELLANTS**

VERSUS

1. **OTWII TOM**
2. **OKWIR JAMES**
3. **ALELE JAMES**
4. **ACAN BENON**
5. **ADONYO LUCEPO**
6. **OJOK STEPHEN**
7. **AROMA PETER & 41 OTHERS::::::::::::RESPONDENTS**

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

This judgment is in respect of an appeal against the Magistrate Grade 1 (Her worship Amono Monica) Lira Court's Order dated 21.03.2006 dismissing Chief Magistrate's Court Civil Suit Number LIR – 00 – CV – CS – 0010/2001:Raymond Otucu & Ayo Otwii C.D.K versus Otwii Tom and 49 others.

The appellants were plaintiffs and respondents Defendants in the dismissed suit.

On 11.03.2008 when the appeal was heard, court was informed by second appellant: Ayo Otwii C.D.K., that the first appellant had died since the filing of the appeal. There is thus now one appellant, Ayo Otwii, to this appeal.

The appeal was filed for the appellants by Messrs Twontoo & Co. Advocates. The same firm of lawyers represented the appellants at the original trial.

While the second appellant was present in the day of hearing of the appeal, his Counsel from the firm of advocates representing him, was absent, even in spite of an adjournment of the appeal for some hours so as to enable the appellant get in touch with his legal Counsel. The appellant thus argued his appeal in person as court had no basis to adjourn the hearing.

Learned Counsel Jude Otim Atiang represented the respondents.

The appeal has four grounds of appeal:

1. That the learned trial magistrate erred in law and fact and misdirected herself when she held that the appellants had no cause of action.
2. That the learned trial magistrate erred in law and fact and misdirected herself when she failed to consider the relationship that existed between the appellants and the respondents.
3. That the learned magistrate misdirected herself in failing to consider the law relating to limitation period in as far as land matters are concerned.
4. That the learned trial magistrate erred in law and fact in failing to consider the law relating to consent in as far as family land is concerned.

In the court below the appellants sued the respondents to recover damages for trespass to land, an eviction order and a permanent injunction restraining the respondents from remaining on, cultivating, grazing or continuing occupation or in any way interfering with the quiet possession and enjoyment of the land situate at Bar-Opuu village, Boroboro Parish, Adekokwok sub-county, Erute County, Lira District.

In paragraph 4 of the plaint, the plaintiffs set out the facts constituting the cause of action:

" 4. The plaintiffs cause of action arose as follows:-

(a) ***The plaintiffs are bonafide holders of the estate of the late OKOT YEREMIAH and ADONYO KOKOCAL situated at Baar – Opuu village, Boroboro Parish, Adekokwok Sub-county, Erute County, Lira District, Uganda.***

(b) ***That sometimes back, the first defendant and the plaintiffs' paternal uncle one OTWII TOM entered into an illegal transactions of hiring and/or selling of land belonging to the plaintiffs and their entire estate to the defendants.***

(c) ***The defendants threaten and intend, unless restrained by this Honourable Court to remain in wrongful occupation, continue cultivating and grazing on the said land and to trespass thereon.***

(d) ***Otwii is non-resident of Bar opuu. Has no buildings there even but is living in Boke parish.***

5. By reason of the matter aforesaid, the plaintiffs have met gesture of aggressiveness, intimidation and threat to the plaintiffs' lives every time they requested the defendants to evacuate their land.

6. The cause of action arose from Boroboro Parish within the jurisdiction of this Honourable Court"

In the summary of evidence accompanying the plaint the plaintiffs stated that they shall adduce evidence to show that they are customary owners and holders of their late fathers estate at Bar-opuu village, Boroboro, Erute County, Land District, and that the defendants have wrongfully entered into the said land and have wrongfully taken possession of the same and have thereby trespassed and are still cultivating and trespassing thereon.

The defendants in their written statement of defence denied the plaintiff assertions as lies and counter-claimed against them asserting that they, defendants, are lawfully on the suit land either as customary owners, (1st, 3rd and rest of defendants), or by purchase (19th, 10th Defendants), through being administrator of his father's estate (27th defendant), or that there is no cause of action against them (11th, 43rd Defendants).

All defendants pleaded in paragraph 5 of the written statement of defence that:-

" 5. The defendants shall contend that the plaintiffs do not have Locus standi, have no cause of action and that the suit is incurably defective and bad in law, whereof the defendants shall pray at the commencement of the hearing that it be struck off and /or dismissed with costs"

Pursuant to that pleading, defendants Counsel raised a preliminary objection that the plaintiffs have no cause of action against the defendants and prayed for the plaint to be struck out under Order 7 Rule 11 of the Civil Procedure Rules.

The grounds of the preliminary objection were that plaintiffs had not attached to the plaint any Letters of Administration that they are administrators of the estate of late Okot Jeremiah, that the plaintiffs did not show in the plaint that they are of a degree of consanguinity set out in schedules 2 and 9 to the Succession Act that entitles them to participate in the estate of Okot Jeremiah without first obtaining Letters of Administration to the estate. That at any rate the plaintiffs' claim was barred by the provisions of the Limitation Act.

For the plaintiffs it was submitted in the court below that the plaintiffs averred in the plaint that they were customary owners of the suit land and were suing as stake holders and beneficiaries of the land.

Before this court, the appellant Ayo Otwii C.D.K. submitted that he had a cause of action against the defendants and that the court acted wrongly to dismiss the suit. He prayed court to examine the pleadings on record and allow the appeal.

For the respondents, learned Counsel Jude Otim Atiang submitted that without Letters of Administration to estates of OKOT YEREMIAH and **ADONYO KOKOCAL** , being part of the plaintiffs pleadings, the plaint showed no cause of action against the defendants.

Further, to the extent that there was no indication of time frame as to when the defendants entered the suit land, in the plaint, the plaintiffs claim was barred by limitation as the defendants had been on the land for more than 12 years.

The essence of grounds one (1) and three (3) of appeal is whether or not the learned trial magistrate was justified to hold that the plaint filed in court by the plaintiffs disclosed a cause of action against the Defendants, and whether the plaintiff's claim was time barred under the Limitation Act. These grounds will be considered by court together.

The law as to the existence of a cause of action in a plaint is that: If a plaint shows in its averments that the plaintiff enjoyed a right and that that right has been violated and that the defendant is liable for that that violation, then the plaint discloses a cause of action.

In determining whether a plaint discloses a cause of action, court must only consider and look at the averments contained in the plaint. Court is not to consider extraneous matters outside the plaint.

See:

AUTO GARAGE VS MOTOKOV (NO. 3) 1971 EA 514 at page 519,

JOSEPH MPAMYA VS AG (1996) 11 KALR 121 at p. 124

And

HIGH COURT OF UGANDA HOLDEN AT GULU CIVIL APPEAL NO. 8 OF 2007 MARY OCENG & 2 OTHERS VS SANTO ADOKO, UNREPORTED.

Since now in Uganda the law i.e. Order 6 Rule 2, of the Civil Procedure Rules, is that every pleading must be accompanied by a summary of evidence, in the humble view of this Court, it would not be wrong of court, to consider what is stated in the summary of evidence when considering whether a plaint discloses or does not disclose a cause of action. Since this is a new development in the law of Civil Procedure in Uganda, in this particular case under consideration this court shall, in deciding the issue, confine itself to what is stated in the plaint only.

It was incumbent of the learned trial magistrate to look at and consider only the plaint in determining whether or not the plaint disclosed a cause of action.

With respect to the learned trial Magistrate, she based her decision in reaching the decision she made by considering and taking into account matters that had to be proved by evidence at the actual hearing of the case, which stage had not yet been reached by the time the preliminary objection was raised. Thus on page 2 para 8 of her Ruling the learned magistrate holds:

> ***" It is thus improper and unbecoming of a person who comes empty handed to dislodge all these persons and even if this was not the case I think the plaintiff s sat on their rights for too long".***

The learned trial magistrate had had no evidence at all from the parties to reach the above conclusion.

The learned Magistrate then proceeded to consider the issue of consent from the plaintiffs before the defendants can transact business on the suit land and then concluded:-

> ***" I am convinced that the land in issue is customary land belonging to the plaintiff and 1st and 2nd defendants since they all come from a common decency."***

And then she concluded

> ***" The claim that the defendants needed to have***

consulted the plaintiff before selling off or hiring out the said land to the rest of the defendants do not then stand",

and

" It should be noted that the use or ownership of customary land is governed by the practice, customs or traditions of the particular clan or by local customary regulations. The plaintiff in this case did not show or make mention of such a breach by 1st and 2nd defendants".

Basing on the above conclusions the learned trial magistrate concluded that the plaintiffs did not show a cause of action because:-

" First all their own land or share is not disturbed. Each and every party is on his or her land. There is therefore no violation of any right of the plaintiffs. Even if this was so time has barred them from instituting the suit. Their consent is also not necessary here"

and

" Besides, any person cultivating any land adjoining a residential holding owned by an intestate prior to his/her death have a right to do so for as long as the person is resident there. I believe this is applicable to defendants."

The learned magistrate finally held that:

" I am convinced the plaintiff did not satisfy the requirement of Order 0.7 r. 11 (a) and has no locus standi"

She then dismissed the suit as there was no cause of action.

The order to dismiss the suit was itself wrong. The court should have rejected the plaint under Order 7 Rule 11 (a) of the Civil Procedure Rules.

More fundamental however is the fact that, as born out by the above extracts from the Ruling of the learned trial magistrate, she reached her decision by considering matters that needed to be proved and had not been proved before her by any evidence from any of the parties. They were matters she had to resolve upon if a full trial of the case had taken place.

The learned trial magistrate ought to have restricted herself to looking at the plaint only.

Admittedly, the plaint was badly and carelessly drawn. It is a matter of regret to the legal profession that the same is a product of a firm of lawyers. The legal profession, more than any other profession, enjoins its members to exhibit the best proficiency of expertise when handling and pursuing instructions of clients. This is because, more often than not, what is being handled for the clients involves determination of their fundamental rights and obligations.

In this particular case, the firm of lawyers who drew up the plaint and filed the same for the plaintiffs, cannot be said to have measured up to that high level of professional efficiency and expertise.

Be that as it may, it is clear from paragraphs 4, 5 and 6 of the plaint that, amongst the averments of the plaintiffs, is one where the plaintiffs state that the suit land belongs to the plaintiffs and that sometime back the first defendant and one OTWII TOM, through illegal transactions began hiring and/or selling the plaintiffs said land to the defendants who are now occupying and using the land; and have refused to leave the same.

This averment, on its own satisfies the test of the existence of a cause of action: the plaintiffs as owners of the land have a right to the land, that right is being violated by illegal sale and hiring and the defendants are liable as the ones selling and hiring or the ones to whom the land is being hired and sold and are wrongly occupying the land and have refused to vacate. It cannot therefore be said that the plaint of the plaintiffs, on its own face, did not disclose a cause of action. It is a matter of evidence to be resolved upon by court as to how the plaintiffs are owners and how the Defendants are trespassers.

From the above paragraphs 4, 5 and 6 of the plaint, the plaintiffs aver that the defendants are trespassers on the land the plaintiffs assert they own.

A trespasser is one who remains in possession of the land against the will of the owner: **See Christopher Katongole v Yusufu Ssewanyana (1990 – 1991) KALR 41 at 43.** Possession would, in appropriate cases, include occupation and use of land. Trespass is a

continuous tort. To the extent therefore that the plaintiffs stated in the plaint that the defendants are in wrongful occupation and continue cultivating and grazing on the said land and to trespass thereon (paragraph 4 (c) of the plaint) the submission and holding that the plaintiffs suit is time barred cannot be sustained since the tort of trespass continues to go on even as when the case remains pending in court.

As to grounds number two (2) and four (4) the issues of relationship between the parties to the suit and consent as regards family land, are ones that are of law and fact and can only be resolved upon by court on the basis of some evidence. To the extent that the trial court purported to resolve them without any evidence, then that court was wrong.

This court allows this appeal. The order of the Magistrate Grade I, Lira, dated 21st March 2006, dismissing Civil Suit No. LIR – 00 – CV – CS – 0010 OF 2001 is hereby set aside. The said suit is reinstated on the Register and it is ordered that the trial of the same be conducted by another magistrate Grade I, other than Her Worship Amono Monica.

The appellant is awarded the costs of this appeal and those of the preliminary objection in the court below.

.....

Remmy K. Kasule

Judge

27th June 2008