

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

HCCS NO. 22 OF 2015

ABABIRI MUHAMOOD & FOUR ORS.....PLAINTIFFS

VERSUS

1. MUKOMBA ANANSTANSIA

2. TAITA WILFRED.....DEFENDANTS

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

Brief Introduction and background

1] When the suit came up for hearing on 31/1/17, counsel Balidawa for the 1st and 2nd defendants raised three preliminary points of law that is to say;

- 1. The present suit is barred by limitation**
- 2. The plaint was presented under the wrong law**
- 3. The plaint discloses no cause of action against the defendants.**

2] Ngobi made an oral submission, and Ouma Francis for the plaintiff filed a response in writing. Ngobi then also filed a rejoinder in writing, and the following is my ruling:-

Issue 1 - Whether the suit is barred by limitation?

3] According to Mr Ngobi, the defence is that the 1st defendant, the widow of the late Mukomba Isiah (hereinafter referred to as the deceased) has been in possession of the suit land since 1953. That upon her settlement on the land with the deceased, they purchased a customary interest from one John Mukwangu (a Kenyan) and boundary marks were planted. (Reference was made to paragraphs 6 and 8 of the written statement of defence). He continued that in paragraphs 17, 20 and 21 of the plaint, it is admitted that the 1st defendant and deceased have been in occupation and utilization of the suit land since 1955 and the first attempt to dislodge them (which failed) was in 2013. He continued that even after the 1st plaintiff attained majority age, he took no step to seek Court remedy. He concluded therefore that the suit being filed in 2015 would be out of time. Citing authority, counsel argued that statutes of limitation are strict in nature and are a complete shield to litigation. He invited the Court to dismiss the case on that ground.

4] Defendants' counsel did not contest the law on limitation but argued that the Court can only make a determination on this fact from the plaintiffs' pleadings only and not the written statement of defence, which ordinarily falls outside the plaintiffs' claims. Counsel denied the fact that the plaint puts the inception of the defendants' occupancy to be 1955. That the time when the plaintiffs' rights accrued to them (especially the 1st plaintiff) should be a matter of evidence.

5] Counsel explained further that the deceased's occupancy was only temporary (grazing rights) and the defendants only assumed occupation thereof at his demise. That the rights of the plaintiff accrued to them in 2013 when they offered and the defendants declined to take a portion of the suit land or vacate it. That infact, the rights of the deceased who is referred to as a licensee in the

plaint, can only be ascertained with evidence. That contrary to counsel Ngobi's submission, a licensee can exist on any tenure of land, but cannot acquire proprietary interests. That the deceased remained a licensee until his death around 2004, and only after then did it become apparent to the plaintiffs that the defendants were intent on wrongfully taking over the suit land. Citing authority, counsel argued that a cause of action can be constituted only after it is confirmed that there is a party to sue and be sued and when all facts necessary to constitute a cause of action are present. He concluded that the cause of action only accrued in 2013 after protracted negotiations between the parties failed, and the suit is therefore, not time barred.

- 6] **Section 5 of the Limitation Act Cap 80** provides that *“No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or her...”*

Further Section 20 provides that:-

“Subject to Section 19(1) (on trusts), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued “

- 7] It was held in the case of **Hajati Ziribagwa and Anor Vrs. Yakobo Ntate HCCS 102/09** by Justice Byamugisha (as she then was) that *“...since this was an action for recovery of land, the cause of action must have arisen at the date the defendant acquired the land...”* By inference, a cause of action relating to land should accrue on the date that the plaintiff claims it was wrongly appropriated. This seems to be supported by Section 11 of the Limitation Act

which states that, the right of action in land will not accrue unless there is adverse possession.

8] I would agree with plaintiff's counsel that for matters of time and rights to sue, the Court is bound to consider the pleadings of the plaintiffs alone. It may well be that the defendant has in their defence, raised facts that would support the argument that the case is time barred or has no cause of action but those are facts still in contention and subject to litigation. The authorities appear to strongly support the principle that the Court should only consider the pleadings and its attachments, and nothing more. Thus counsel Ngobi's submission that in the defence it was shown that the defendants have enjoyed quiet and uninterrupted possession of the suit land since 1953, would not be of consequence in his objections to the suit, especially at this preliminary stage.

9] That said, going by the above authorities, time to sue would begin running against the plaintiffs from the point when their rights to the suit land accrued. This being estate property, that would be at the point of the deceased's death, or, at the point that the defendants acquired adverse possession. I note that the deceased's demise date was not given. It is also not clear when Swaliki Ndinomu allowed Isreal Mukomba to use the suit land temporarily with instructions that the land belonged to the 1st plaintiff when he came of age. What is clear though (in paragraph 20), is that the defendants are in actual occupancy of the suit land. My understanding of the pleadings is that there was no contest against the defendants' occupation either by the deceased (in his lifetime) or by those that succeeded him. It is clear in paragraphs 21 to 23 of the pleadings that it is in 2013 when the plaintiff's as the administrators of the

deceased's estate, attempted to negotiate with the defendants, that the latter's occupation became contested. It is stated that the plaintiffs negotiated and the defendants agreed to take a portion of the suit land and a tour of the land was made. That the defendants later turned around and reneged on their earlier promise, after which, the plaintiffs regarded them as *'trespassers as at the time of the boycott'*

10] It follows therefore that the right to sue accrued to the plaintiffs as administrators of the deceased's estate in 2013 and not 1955 as claimed by defendant's counsel. This suit was filed on 11/3/2015, and thus could not be time barred.

11] The first objection thereby fails.

Issue 2 - whether the plaint was presented under the wrong law?

12] Secondly, Ngobi argued that the plaint was presented under S. 29(4) of the Land Act on a claim that the defendants were mere licensees on the suit land between 1953 and 2013 after which they were considered trespassers. He argued that that law is not applicable because a license is only recognized on registered, but not customary land.

13] Licenses have their origin in English Common law and not our Statutes. A license is defined to be *'...a permission given by the occupier of land which without creating any interest in land, allows the licensee to do some act which would otherwise be a trespass'*. See **Thomas Vrs Sorrell (1673) Vaugh. 330 at pg. 351** quoted in **Megarry's Manual of the Law of Real Property 6th Edition by David J. Hayton at pg. 370**. There appears to be no restriction that

the licensor must be a registered owner. It is enough that they are in occupation. Section 29(4) of the Land Act was making specific reference to a licence created on registered land, which is only one category of the type of licenses, that can be formed on land.

14] That said, there was no express statement in the plaint that the suit land was under license to the defendants between 1953 and 2013. It was only stated in paragraph 17 that the deceased approached Ndiomu (on an unspecified date), with a request that he uses the suit land for grazing his cattle. His request was granted on the understanding that his occupation would be temporary only, and he would hand over the land to the 1st plaintiff on his attainment of adulthood. At common law, this well may be a bare licence or one with limited interests. However, since no specifics were given on the terms of the licence or when it started, it is doubtful that it was the principle basis on which the claim was premised. It was clear in the plaint that the defendants' occupation before 2013 was not contested and the argument that the suit was brought under the stated sections of the Land Act, would be misplaced.

The second objection therefore, also fails.

Issue 3 - whether the plaint discloses a cause of action.

15] A cause of action was defined in the case of **Auto Garage & others Ltd vs. Motokov (No. 3) [1971] E.A 514**), where it was held that;

“For the plaint to disclose a cause of action it must demonstrate that; the plaintiff enjoyed a right, the right was violated and it is the defendant who is liable.”

16] Further in **Jeraj Sharif vs. Chotai Fancy [1960] EA 374 at 375 Windham J.A**, held that;

“The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact in it are true”.

17] Counsel Ngobi submitted that the plaintiffs have no cause of action against the defendants since they conceded in paragraphs 17-20 of the plaint, that save for the letters of administration granted to the 1st plaintiff, the plaintiffs have never been in possession of the suit land from 1955 to date. That neither the plaint nor any documents filed with it, indicate that the plaintiff ever enjoyed a right either by way of cultivation, occupation, grazing, habitation or hire to third parties. That since it has been the defendants in possession, they have not violated any rights accruing to the plaintiff. Further that the 1st defendant and the deceased occupied the suit land in the latter’s lifetime and beyond, therefore the defendants cannot be in trespass of land that they have occupied for the last 48 years. That no objection had been raised against the deceased either in his lifetime or after his death (a period of 53 years) by either Mukomba Hassan or the plaintiffs. Counsel thereby invited the Court to dismiss the case for failing to raise a cause of action and also for being an illegality.

18] In reply, counsel Ouma argued that the claim in the suit is for a declaration that the plaintiffs are the rightful owners of the suit land which is allowed

under 0.2 rr 9 CPR. That all that is needed under such circumstances, is for the plaintiff to prove their claim by evidence and the preliminary point would thus be premature at this point. He argued further the plaintiffs presented the claim as joint administrators and beneficiaries of the estate of the late Mukomba Hassan, the actual owner of the suit land, who was deprived use of the suit land by the defendants who are in occupation.

19] The above authorities strongly indicate that a cause of action is determined not by evidence during the proceedings but by the pleadings (and additional documentation) as filed. Save for the size of the land and the person from whom it was allegedly purchased, there is nothing in the plaint to show that the plaintiffs or their predecessor in title owned any interest in the suit land. It is stated that at the time of the deceased's demise, the land was bare and vacant. It is then stated that it is the defendants who are in currently occupation as a result of an understanding between them and one Ndiomu, which occupation was not contested until 2013.

19] No evidence was attached to the plaint to indicate that Mukomba Hassan ever purchased the suit land, occupied or utilized it before the entry of the defendants. I would also agree with counsel Ngobi that although declarations are sought, the cause of action is substantially one based on the alleged trespass of the defendants. It is now an established principle in our jurisprudence on land that, only a party in occupation of land can maintain a cause of action in trespass. This is because, trespass to land is committed not against the land, but against the person who is in actual or constructive possession of the land. See for example, **Justice E.M.N. Lutaaya Vs. Stirling**

Civil Engineering Company SCCA No. 11/2002. Such possession entails that the person suing should be entitled to immediate and exclusive possession. See **“Law of Tort” John Cooke. Pearson/Longman 7th Ed at pag. 293 and 296.** The plaint falls far short of showing that the plaintiffs are in actual or constructive possession of the suit land.

20] I would thus agree with counsel Ngobi that without pleading their right to the suit land, the plaintiffs could not show in their pleadings that that particular right had been violated by the defendants.

21] The third objection accordingly succeeds and the suit is dismissed with costs for not disclosing a cause of action against the defendants.

I so order.

Signed

EVA K. LUSWATA

JUDGE

DATED: 15/05/19