THE REPUBLIC OF UGANDA.

HIGH COURT OF UGANDA HOLDEN AT JINJA.

CIVIL APPEAL NO.044 OF 2017

(Arising from Iganga in Bugiri Civil Suit No.021 of 2009)

SUFI MURISHO JAMIL

KITUKULE JOSHUA

GILGAL HIGHWAY SHOPPING CENTRE::::::::::::::::::::APPELLANTS

VERSUS

ABED HUSSEIN ::RESPONDENT

JUDGMENT ON APPEAL

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Introduction.

The appellant represented by M/s Baraka Associated Advocates and M/s Mutembuli & Co., Advocates, filed this appeal against the judgment and decision of His Worship Komaketch Kenneth delivered on 19/4/2017. The respondent opposed the appeal through M/s AgumaKifunga & Co., Advocates.

Abed Hussein the respondent was the plaintiff in the C/s 21/2009 (hereinafter the suit) in which he claimed for the recovery of land measuring 100 by 200ft on Trikundas Street and another measuring 68 by 100ft on Grant Street, Nkusi in Bugiri Municipal Council (hereinafter collectively referred to as the suit land). The facts admitted by the lower Court are that the late Fresh Bin Hussein the respondent's father, bought the suit land for his three sons namely, Abed (the respondent), Said and Saleh Hussein in 1966. He then subsequently donated a portion of it to one Mugoya Bin Salim Musoga Wakandia who then sold to one Sowedi Musoga in 1975. It was also recorded that Sowedi Musoga also sold his portion to the late Sufi Ismail Murisho, the first

appellant's husband who after purchase, wrongfully took over possession of the suit land and alienated it. That the respondent's efforts to regain the suit land from the 1st appellant and Sufi Ismail Murisho failed. Further that during the pendance of the suit, the 2nd respondent fraudulently created a plot of the suit land which he then proceeded to register into the names of the 3rd appellant.

It was recorded in defence that the first appellant owned the suit land which was purchased by her late husband Sufi Ismail Murisho in 1991. On the other hand, the 2nd appellant contested the fact that he was in occupation of the suit land and contended that he purchased his land from one Haji Kagere Mohammed and that the 3rd appellant had gained ownership without any notice of any adverse claim. In his decision, the trial Magistrate found that the respondent owned the suit land and that all the respondents were all in trespass thereof. He then issued an order of vacant possession and that of a permanent injunction against them, an order to cancel the 3rd respondent's title, general damages, interest and costs. The appellants disagreed with that decision and accordingly filed this appeal on the following grounds:

i. **The learned trial magistrate did not have pecuniary jurisdiction to handle a matter for recovery of land whose value was over Ushs. 300,000,000.**
ii. **(1)The learned trial magistrate erred in law and fact when he assumed powers of the High Court and purported to order the cancellation of the 3rd appellant's entry on the certificate of tile for the suit land and further purporting to order the replacement of the 3rd appellant with the name of the respondent.**
iii. **(2)The learned trial magistrate erred in law and fact when he held that the appellants are trespassers of the respondent**
iv. **(3)The learned trial magistrate erred in law and fact when he proceeded to entertain a matter which is barred by statutory limitation of time**

v. **(4)The learned trial magistrate erred in law and fact when he failed to evaluate and appreciate the evidence thereby arriving at a very erroneous decision to the detriment of the appellants**

vi. **(5)The learned trial magistrate erred in law and fact when he ordered the appellants to pay general damages of 18,000,000 without any legal basis.**

Duty of the Court

Under Section 80 CPA, as an appellate court, I have the powers to determine a case finally. Also as a first appellant Court, I am mandated to subject the evidence of the lower court to fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions from it. In doing so, I will apply the law strictly and consider only the evidence adduced in the lower Court. Even so, I do bear in mind that I did not see or hear the witnesses and will therefore, make due allowance in that respect. See for example, **Pandya v. R [1967] EA, 336** and **Narsensio Begumisa& 3 Ors Vrs Eric Kibebaga SCCA No. 17/2002.**

Appellants' counsel abandoned the first ground. I will likewise make no finding on it and proceed with the other grounds. I find it prudent to begin with what is now the third ground which raised an objection based on limitation of actions

Ground three:

Appellants' counsel argued that the respondent's claim being grounded on recovery of land, it was filed beyond the 12 year cap provided for in Section 5 Limitation Act and that, no exception was pleaded. Counsel continued that the mere mention of fraud could not be the basis upon which to defeat the 3rd appellant's interests as a *bonafide* purchaser of the suit land for value. Respondent's counsel agreed that the claim was for recovery for land, but in addition for trespass. They contended that for as long as the appellants continued in occupation of the suit land, they were deemed to be in continuous trespass and a new cause of action could be founded on each and every

new act of trespass. They continued that fraud was discovered and raised against the 2nd and 3rd appellant after the suit was filed, which accordingly raised an exception to the general rule of limitation.

It is provided in Section 5 Limitation Act that:

"No action shall be brought to recover any land after the expiration of 12 years from the date on which the cause of action arose/accrued".

The provision is mandatory and any exemption can only be effective if expressly pleaded, and the Court is bound to restrict its conclusion from the pleadings and nothing more. It was held in **Murome Vrs Kuko (1985) HCB 68** that the plaintiff must plead facts from which a reasonable inference can be made that the suit is not statute bad. It is further provided in Section 25 (a) (b) & (c) Limitation Act that where a case is based on fraud, the limitation period shall not begin to run until the plaintiff has discovered the fraud or could have with reasonable diligence discovered it. There is a rider under Section 25 (d) that interests of those that purchased bona fide with no notice or being party to the fraud, are protected against actions of recovery of land.

Limitation has indeed been the subject of much dispute in our Courts. There is likewise a multitude ofdecisions. Respondent's counsel provided some that are relevant to the current objection. In the Supreme Court decision of **Hwang Sung Ltd Vrs M. & D. Timber Merchants & Transporters Ltd SCCA No. 2/2018**, the learned Justices followed their earlier decision in **E.M.N Lutaya & Sterling Civil Engineering Company Ltd SCCA No. 11/2002** (by Justice Mulenga) to hold that:

In a suit for tort, the date when the cause of action arose is particularly material in determining if the suit was instituted in time. The commencement date is also material where, in a continuing tort such as unlawful detention, the duration of the tort is a factor in the assessment of damages. In other continuing torts, that date is of little significance. If it is outside the time limit, such part of the continuing tort as is within the time limit, is severed and actionable alone. Trespass to land is a continuing tort,

when an unlawful entry on the land is followed by its continuous occupation or exploitation."

It was in addition held in **Hwang Sung Ltd (supra)** that where the right of action is based on a certificate of title, time is to run against the claimant from the date the defendant procured registration.

The initial claim is contained in the plaint filed against the 1st appellant in 2009. In the amendment thereto filed on 23/6/2010, the respondent claims to first have known about the 1st appellant's encroachment in 2005 and that the encroachment continued when the 1st appellant's husband wrongfully erected boundary marks in the suit land. It was stated in the 2nd amended plaint filed on 3/12/2013, that the 2nd appellant entered upon the suit land after hearing of the suit had commenced. It was likewise pleaded in the 3rd amended plaint filed on 27/4/2016 that the 2nd defendant processed a title in respect of the suit land and then procured registration in favour of the 3rd defendant on 23/4/2015. It is the latter entity that continues to occupy the suit land.

The respondent first pleaded fraud in the first amended plaint filed in 2010. He stated that he first came to know about the encroachment by the 1st appellant and her husband in 2005. The suit being filed 5 years later would be within the time allowed by statute. The exact date of the 2nd appellant's encroachment was not clear. What is clear in paragraph 12 of the plaint filed on 3/12/2013, is that he entered upon the suit land after the suit had been filed and was pending determination. That would make his encroachment a continuing tort at the time. Even then, it is stated in the amended plaint filed on 24/4/2016, that the 2nd appellant processed a title in respect of the suit land and then had it transferred into the name of the 3rd appellant while hearing of the suit was in progress. The registration date on the title (which was an exhibit in the lower Court) is 14/10/2014. It is apparent from the record that the 3rd appellant's ownership was discovered while the 2ndappellant was presenting part of his defence in

Court. That evidence prompted the final amendment to the plaint to enable inclusion of the 3rd appellant and their occupation would be considered a continuing tort. All those facts that were confirmed by the lower court indicate that the suit was filed in time and therefore exempt from laches.

The third ground of the appeal is accordingly dismissed

Ground 1

It is contended for the appellants that the trial Magistrate's order for the cancellation of the 3rd appellant's title and substitution for it of the respondent, was usurpation of the powers vested in the High Court. Counsel argued that the Magistrate could only make a finding of fraud against the appellants, after which he would forward the file to the High Court for consequential orders, because the High Court does not rubber stamp orders and decisions of Magistrates. Conversely, respondent's counsel argued that the trial magistrate only pronounced himself on the remedies open to the respondent in accordance with the pleadings, evidence and submissions made. That he then capped it with a specific order to forward the file to the High Court for it to be effected. That his orders are indicative that he was alive to the fact that he lacked jurisdiction to cancel the certificate of title.

Both counsel appear to be in agreement with the powers of the High Court under Section 177 RTA. It is provided that:
Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.

At page 20 of his judgment, the learned Magistrate found the respondent to be the lawful/rightful owner of the suit land. He then issued an order *"....cancelling the 3rd defendant (now 3rd appellant) name on the certificate of title and replacing it with the name of the plaintiff (now respondent) as the registered proprietor (the same be forwarded to the High Court of Uganda for the said purpose as per Section 177 of RTA Cap 230)".*

What I deduce from that decision is that the trial Magistrate was fully aware of the limitations of his jurisdiction in matters of cancellation of title. Thus, it was enough for him to make a finding that the appellants had dealt in the suit land fraudulently. He should then have restrained himself from making a specific order of cancellation of title or substitution of the 3rd appellant by the respondent, for as pointed out by the Supreme Court, a court that does not have jurisdiction to cancel a certificate of title can direct a competent authority to deal with the land. See **Paulo Kamya Vrs Kampla District Land Board SCCA No. 069/2001** cited with approval in **Kawuki Vrs Semaganyi (HCCS No. 19/2014).**

However as pointed out for the respondent, that decision caused no miscarriage of justice as it was in the same judgment qualified by the Magistrate. He made a specific order that the record be forwarded to the High Court for that Court to exercise its powers under Section 177 RTA. If there was any possibility that he had usurped the powers of the High Court in that regard, his qualification erased that ambiguity. The Magistrate's order could not and did not fetter the jurisdiction of the High Court to deal with the title, and as contended by respondent's counsel, would still have the power to set aside the offending part of the Magistrate's order. It will still be open to the respondent to present an application to the High court to consider the merits of the findings on fraud and whether there is ground for the 3rd appellant's title to be

cancelled and the respondent's name substituted on the certificate of title in respect of the suit land.

Some arguments were made for and against the finding by the Magistrate on issues of fraud. Appellants' counsel submitted that fraud was never raised as an issue for determination. In reply, it was submitted for the respondent that he followed the correct procedures while applying for formal registration only to be outpaced by the fraudulent acts of the 2nd and 3rd appellants. I fear that this particular issue was never raised as a particular ground of appeal. It offends the provisions of Order 43 rr 2 CPR. I will thus make no finding on it.

In summary, the trial magistrate made an order that was outside his jurisdiction but qualified it in the same order by ordering that the record be forwarded to the High Court for the appropriate orders. That way, he did not usurp the powers of the High Court and there was no miscarriage of justice. The first ground accordingly succeeds only in part.

Ground 4

I agree with respondent's counsel that the 4th ground was too general and thus in contravention of Order 43 rr 1(2) CPR. Appellate courts tend to discourage and have dismissed general grounds of appeal which are interpreted to be a "*fishing expedition"* by appellant to hazard what an appellate Court can grant. See for example, **Katumba & Byarunga Vrs Edward Kywalabye Musoke CACA No. 2/2998** quoted in (1999) Kalr 621. Indeed, submissions made for the appellants on this point brushed across the entire judgment and the Magistrate's evaluation of the evidence. My Court is unable to tell what part of the judgment is being attacked and cannot likewise make a specific finding on the Magistrate's mistakes. I deduce that some points raised here were also tackled in the second ground which was better drafted and will be entertained. I thus decline to make finding on the 4th ground, and it fails.

Ground 2

It is contended for the appellants that the learned Magistrate came to a wrong finding that they are in trespass of the suit land. Appellants' counsel submitted that no sufficient evidence was adduced to show that the respondent was, or had ever been in constructive occupation of the suit land. Specifically that he was not aware of the true measurements of the land that his father purchased in 1966,and was not present and therefore did not know 1st appellant's husband in 1991. Therefore that the portion purchased by Murisho remained a point of contention and the documents that the respondent tendered in court to prove his claim on this point were only submitted for identification, and as such, should not have been relied upon by the Magistrate.

Counsel argued further that the gist of a claim in trespass being one to address a violation of possession to land (and not necessarily challenge to title), and the respondent having failed to prove that he was in physical or constructive possession, or had better title than the appellants, then the claim in trespass should not have succeeded. They argued further that since the 1st appellant had legal possession, and the other respondents obtained registered interests in the suit land without any adverse claims of possession, then their interests were protected.

Respondent's counsel disagreed. They argued that by his testimony and that of his witnesses, the respondent proved that he was both in occupation and possession of the suit land. Specifically that before the appellants' unauthorized encroachment, his family's interest in the suit land was prolonged, and that although not physically present, he had caused its survey and being the heir, was in full control of it. The learned Magistrate agreed with the respondent, which calls for my re-evaluation of that evidence.

The undisputed evidence is that the late Hussein Bin Fresh owned land in the area, far and near to the suit land. No strong contest was raised against the fact

that he purchased land from Nambiro Bulaimu in 1966. Its size and boundaries were unclear but the respondent did indicate that he lived there as a child, and PW5 stated that the respondent's family used part of it for grazing animals up until they were stopped by the Bugiri Town Council. The witnesses for both parties were in agreement that part of the land changed ownership up to the time that Sufi Murisho, the 1st appellant' husband, obtained an interest in it. In particular, the respondent, and 1st appellant testified that Hussein Fresh gave part of his land to Mugoya Wangadya, who in turn sold that portion to Musoga in 1973, the latter who in turn sold to Murisho in 1992. The respondent's contention was that Musoga could only pass on the 50*100 ft that he originally purchased from Mugoya and nothing more. His contention that the 1st appellant and her husband overstepped their interest (by acquiring 150ft*300ft more) was never seriously challenged.

The 1st appellant admitted that she was not present when the agreement between Murisho and Musoga was made and thus her testimony would be unreliable on the facts of what Murisho actually purchased. Again as pointed by respondent's counsel, the learned Magistrate relied heavily on the evidence adduced at the locus visit which discredited much of the 1st appellant's testimony. In particular, she failed to show that her interest ever extended to cover the 150*300ft in dispute. The effect would then be that she and Murisho never had anything to sell to either Mwase or Walimbwa Masaba. Further, the uncontested evidence that Ben Mwase's lease had expired on 1/3/2006, before he transacted with the 2nd appellant, would mean that legally, Mwase had no interest in the land, and thus, the respondent's claim would be more legitimate.

The 2nd appellant claims to have purchased two plots (152 and 123) in 2012, which were then amalgamated and a lease offer made as one. He stated that prior to that purchase, he was not informed of any adverse interests and his

inspection of the land revealed none. That evidence was doubtful in light of the testimony of PW4 that at the material time, there was a sign post on the suit land as a warning against transactions in the land. Also, PW5 gave uncontested evidence that he did inform both the 2nd appellant and his wife about the respondent's interest prior to his purchase of the suit land. Conversely, the respondent was able to show that his family had a long standing interest in the suit land and long before the 2nd respondent purchased his interest, the respondent and his late brother Juma Hussein Londa, had had the land surveyed and were waiting upon a lease offer and for the lease to be registered. PW6 the Secretary of the Bugiri District Land Board, confirmed signing on the respondent's lease offer in 2011 well before that in favour of the 2nd and 3rd appellants was signed in 2015. The respondent's interest although unregistered, being first in time, was protected in law.

The entrenched principle in our land law is that one who procures registration of land, by defeating an unregistered interest, does so with fraud, and their title can be impeached. See for example **Sejjaaka Nalima Vrs Rebecca Musoke SCCA No. 12/1985.**As pointed out for the respondent, the 2nd appellant being the 3rd appellant's agent during the process through which the latter obtained registration, his notice (of the respondent's unregistered interest) can be imputed upon the 3rd appellant, and whose title could then be impeached thereby. See for example **Fredrick Zabwe Vrs Orient Bank & 5 Ors SCCA No. 4/2006.**

The above notwithstanding, the Magistrate's observation that the 2nd appellant had constructive notice of the respondent's interest had merit. The 2nd appellant claimed to have acquired his interest in plot 152 from Haji Kagere and Pascal Walimbwa Masaba. The respondent admitted that Kagere did at some point occupy the suit land, but that his developments were eventually halted and he

was ejected when he failed to fulfil certain terms laid down by the late Hussein Fresh's family. Further, the portion that the 2nd appellant purchased from Walimbwa Masaba was also contestable because it was part of the suit land that the 1st appellant and Murisho had trespassed into. They had no interest to transfer to Masaba, who likewise had no interest to transfer to the 2nd appellant.

Again, it was not shown that Kagere ever acquired his interest directly from Hussein Fresh before his death. Instead, it was claimed Kagere purchased his interest from the late Hussein Londa in 1969. The respondent contested Londa's participation in that transaction and the handwriting expert's report (PEX5) confirmed that Londa's signature on the relevant agreement dated 11/7/1969 was forged or at least, did not match Londa's other confirmed specimen signatures. I see no fault by the Magistrate to consider the identification documents interpreted by the hand writing expert who was a court witness. PEID2 was subsequently admitted as PE3 and PEID4 was admitted collectively with PE5 the expert report. Those documents were in issue, and both parties were given a chance to cross examine the court witness on them. Thus, it would have been unjust for the Court to have ignored those documents.

Thus having briefly re-evaluated the evidence, I find no fault in the learned Magistrate's decision on the rights of each party in the suit land. He came to the correct decision that the appellants are in trespass of the suit land. Ground two accordingly fails.

Ground 5

The powers of an appellant court to interfere with an award of general damages is quite limited. The authority provided by respondent's counsel gave a useful guide. It

was held by the Supreme Court in **Kampala Matiya Byabalema & Ors Vrs Uganda Transport Company (1975) Ltd., SCCA No. 10/1993** that:

"...an appellate court may only interfere with an award of damages when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately low.....General damages are compensatory. The person injured must receive a sum of money that would ut him as good but not in worse position before the wrong was committed...."

In making an award of Shs. 18,000,000, the trial Magistrate considered the loss and inconvenience the respondent suffered as a direct consequence of the appellants' acts. He reasoned that the respondent had been inconvenienced by unnecessary litigation in order to redeem his land, for which he had lost use since 2009. In addition, as pointed out by respondent's counsel, the respondents were all found to have acted fraudulently which would also impact on the damages they are to pay. In my view, the award was made on correct principle and with good reason. I would have no reason to interfere with it. On the other hand, the interest at 27%, a commercial rate, was imposed without good reason or on principle. I would set it aside for the lower rate of 12% per annum from the date of judgment until payment in full.

In summary, the appeal has succeeded only in part. The judgment and decree of the Magistrate Grade I is set aside in **PART**. In particular it is ordered that:

i. The judgment and order cancelling the name of the 3rd appellant and replacing it with that of the respondent is set aside. The respondent may formerly move the High Court for appropriate orders with regard to the certificate of title comprised in FRV JJA 121 Folio 17, Plot 152 Grant Street at Nkusi, now registered in the names of M/s Gilgal Highway Shopping Centre Ltd, the third appellant.

ii. The order of interest of 27% on general damages is set aside and replaced with an interest of 12% per annum from the date of judgment until payment in full.

iii. The respondent shall have one half of the costs of the appeal, and one half of the costs in the Court below.

iv. The rest of the judgment and orders of the lower court are maintained.

I so order.

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Eva K. Luswata

JUDGE

25/02/2021