THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL APPEAL NO. 130 OF 2008

(Arising from Kamuli District Civil Suit No. 0016 of 2005)

GAWUBIRA MANKUPIAS :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

KATWIITA STEPHEN :::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT ON APPEAL

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Introduction.

This is an appeal against the judgment and decision of Her Worship Nabafu Agnes Magistrate Grade 1 delivered on 15/12/2008, in Kamuli.

Back ground.

Stephen Katwiita's claim was filed in the Kamuli District Land Tribunal on 7/04/2005. He presented it as the administrator of the estate of late Laston Wabakamu (hereinafter the deceased) who died on 28/12/2001. He claimed that the deceased's estate was the customary owner of a piece of land located at Namuningi Village, Nabwigulu Sub County, Kamuli District (hereinafter the suit land). That during 1964, without any colour of right, the respondent, (now appellant) Mankupias Gawubira unlawfully entered upon the said land and started using the same. That despite the protestations and various actions first from the deceased, and subsequently Katwiita, Gawubira refused to vacate the suit land thereby denying Katwiita its use.

In his defence, Gawubira denied the claim that Katwiita was the sole owner of the suit land. He contended to have owned, occupied and utilized the suit land since 1964. He contended further that Kabi Yokosani from whom he had purchased the suit land had occupied it for about 20 years before that, and also pleaded identities of his other predecessors in title. He argued further that although Katwiita was the administrator of the deceased's estate, he failed to respect the boundaries separating his estate and that of his late father.

Grounds of appeal.

In her decision, the learned Magistrate found that there was no definite boundary between the deceased's estate and the portion claimed by Gawubira. She in addition found that there was no corroborative evidence to show how Kabi Yokosani, (stated to be Gawubira's predecessor in title,) acquired the suit land and that their purchase agreement was in doubt. She also found for a fact that Gawubira had constructive notice of Katwiita's interest and could thus not qualify to be a bonafide purchaser for value. She in addition noted that both parties did not dispute Gawubira's long occupation of the suit land but opined that that fact, *"....cannot benefit from the defence of limitatio*n". Gawubira being dissatisfied with that decision lodged this appeal.

In their letter dated 4/9/2012, Gawubira's counsel abandoned grounds **1, 3, 4, 6** and **7.** I will likewise not include them in my decision and instead concentrate on the two grounds, to wit:

1) **The respondent's claim was filed as an infringement of the limitation Act as appellant has possessed and utilized the status quo for over 40 years far beyond the stipulated 12 years thereby occasioning a miscarriage of justice.**

2) **That the learned trial magistrate erred in law and fact when she did not consider the weight of evidence thereby occasioning a miscarriage of justice.**

Duty of the first appellate court.

The duty of the first Appellate court has been reiterated in numerous cases. It is to re-evaluate and re- appraise the evidence on record and come to its own conclusion. **Hon. Justice A. Karokora** (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke versus Sam Galiwanga, SCCA No. 48/1995** held that;

"...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their verocity..." See also case of **Banco Arabe Espanol Vs Bank of Uganda, SCCA NO.8 OF 1998 Order JSC.**

I took over conduct of this appeal from my immediate predecessor. Once I perused the record, I saw nothing to indicate that the Court allowed written submissions. None the less, M/s Bamwite & Kakuba filed their submissions for Gawubira on 19/5/2014, but there was no indication that Katwiita's counsel was ever served. I therefore allowed them to file their submissions which they did on 22/2/2021.

Resolutions of grounds of appeal.

Ground 2

In his submissions, Counsel for the appellant referred court to the last paragraph at page 2 of the judgment, where the learned magistrate *stated that;*

"The defendant having been in disputed occupation of the suit land for a longtime as admitted by both parties in their evidence cannot benefit from the defence of limitation.''

Citing numerous authorities, he then submitted that the undisputed evidence was that Gawubira who purchased the suit land from Kabi had been in occupation and use of the suit land since 1964 unchallenged. That that being the case, the claim was filed 40 years late and therefore the learned Magistrate erred when she failed to find that the limitation Act applied to the case or that Gawubira had obtained his interest either through adverse possession, or as a bonafide occupant as provided for in the Land Act. He in addition attacked the Magistrate's evaluation of the evidence.

Respondent's counsel disagreed. They submitted that Katwiita's pleadings indicated that the appellant entered upon the suit land in 1964 and was still in occupation on the date the complaint was filed. Citing authority, they contended that the claim is a continuing tort which is not barred by limitation. They maintained what had been presented in the lower court that the suit land belonged to the late Laston Wabakamu and not the appellant who claimed to have acquired his interest from Kabi Yokosani. They dispelled Kabi Yokosani as a mere lincessee, with no interest in the suit land to sell.

My decision

In summary, Katwiita stated his claim to be; a declaration of ownership of the suit land, an eviction order, permanent injunction and general damages against Gawubira from trespassing upon or laying claim to the suit land. In her decision, the Magistrate

considered limitation as an issue and concluded that it was not available as a defence for Gawubira. I find her decision wrong, and the following are my reasons. I will consider the law first.

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…"

Section 20 of the same Act 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 ……..* "

In the case of **Ababiri Muhamood & Four Ors V Mukomba Anastansia & Another (Civil Suit No. 22 of 2015) [2019] UGHC 16 (15 May 2019)** court referred to the case of **Hajati Ziribagwa and Anor Vrs. Yakobo Ntate HCCS 102/09** where **Justice Byamugisha** (as she then was) held 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.

In the case Odyeki & Anor Vs Yokonani & 4 Ors (CIVIL APPEAL No. 0009 OF 2017) [2018] UGHCCD 50 (11 October 2018) it was held that;

"With regard to actions for recovery of land, there is a fixed limitation period stipulated by section 5 of The Limitation Act. This limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights".

Furthermore**, Section 11 (1)** of the same Act provides that;

No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession"), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue <u>until adverse possession is taken</u> of the land. (Emphasis added).

According to **section 6** of the same Act, *"the right of action is deemed to have accrued on the date of the dispossession."* Therefore, a cause of action accrues when the act of adverse possession occurs.

In **F.X. Miramago v. Attorney General [1979] HCB 24,** it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run against the plaintiff. One of the important principles of the law of limitation is that once time has begun to run, no subsequent disability or inability to sue stops it. I would emphasize that the claimant may only obtain protection, if they specifically plead disability.

The nature of rights Katwiita sought to enforce in the suit were of a proprietary, rather than of a possessory nature. Hence this was for all intents and purposes, an action for recovery of land, of which he contended he had been unlawfully deprived by Gawubira. It did not matter that Katwiita sought an injunction against Gawubira for trespass. The court will consider the essence of the action rather than the nomenclature adopted by the parties. The essence of his claim was recovery of land and not the tort of trespass to land.

As I have stated above, a litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred. The Court cannot grant the remedy or relief sought and must reject the claim. This disability must be pleaded as required by Order 18 rule 13 CPR, which was not done in the instant case. It is trite law that a plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law. Two major purposes underlie statutes of limitations; protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and secondly, requiring plaintiffs to diligently pursue their claims. Uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see **Perry v. Clissold [1907] AC 73, at 79**).

In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of *"extinctive prescription"* reflected in sections **5** and **16 Limitation Act**. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example **Rwajuma v. Jingo Mukasa, H.C. Civil Suit No. 508 of 2012**). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor, is vested with title thereto.

Section 16 of The Limitation Act provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. Thus the Supreme Court in her decision of **Masailabu Vs. Simon Mwanga SCCA**

No. 4/93 (reported in (1994) V KALR 156), found that a defendant who settled on land in 1964 acquired it by adverse possession and a plaintiff filed in 1986 to contest that possession could not succeed.

Katwiita stated in his claim that Gawubira entered upon the suit land and begun using it in 1964. The complaint was filed in 2005, a good 41 years later. Katwiita did not show in his pleadings the *"protestations* and actions" him or his predecessor took to challenge that occupation before 12 years elapsed or he also did not show that he was under disability to sue. Additionally, even if a disability had existed, section 21 (1) (c) of the Limitation Act places the cap at thirty years from the date on which the right of action accrued to that person. I would agree with Gawubira's counsel that by its pleadings, the suit was time barred. The court of Appeal in **Iga Vrs. Makerere University (197) EA 65** held that a plaint barred by limitation must be rejected.

The trial magistrate was therefore wrong in finding that Gawubira could not benefit from the statute of limitation. I find that Katwiita's action in the lower court was time barred and Gawubira the appellant acquired ownership by adverse possession. It was the duty of the Magistrate to have rejected the claim at the earliest opportunity in the proceedings because under Order 7 rr 11(d) CPR, a plaint shall be rejected, where the suit appears from the statement in the plaint, to be barred by limitation.

Accordingly the first ground succeeds.

In my view, the first ground would dispose of the appeal. There is no necessity for me to consider the second ground. Once a court determines that a claim is time barred, the weight of evidence adduced by the parties or its evaluation by the trial Magistrate, would be of no consequence.

In conclusion, this appeal succeeds and Gawubira the appellant shall have the costs of the appeal and of the Court below.

I so order

Eva K. Luswata
Judge
1/3/2021