THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. 0032 OF 2021

(Arising From Civil Suit No. 0028 of 2018 Holden at the Chief Magistrates Court of Kiryandongo at Kiryandongo)

1. **UMA NERIKO**
2. **DAMONY OPEYO …… APPELLANTS**

VERSUS

1. **DOMINIC TAMALE**
2. **ODUBUKER PICHO EPIPHANY …… RESPONDENTS**

BEFORE: Hon. Justice Isah Serunkuma

JUDGEMENT

BACKGROUND

This is an appeal against the decision of His Worship Alule Augustine Koma in Civil Suit No. 0028 of 2015 Uma Neriko & Damony Opeyo v. Venansio Kyotembo, Franswa Ringe, Dominic Tamale and Odubuker Picho Epiphany in which the Plaintiffs sought therein for orders that the suit land situated at Kanungu Village, Kichwambungingo Parish, Kiryandongo Sub Country in Kiryandongo District (hereinafter referred to as the suit land/ property) is owned by the plaintiffs, a declaration that the 3rd and 4th defendants(hereinafter referred to as the Appellants) are trespassers, order for vacant possession of the suit property, a permanent injunction restraining the defendants , their servants, legal representatives or assigns from interference with the quiet possession of the suit land, mesne profits , general damages, interest and costs of the suit.

The Appellants' case in the trial court briefly was that; The Appellants were the lawful owners of the suit land, which they hold under customary tenure having inherited it from their late father, Makenor Owinyi following his demise in 1990. The Appellants contend that their father occupied the land when it was still a vacant and virgin land at an unnamed date. The Appellants contend that they have since been living on the suit land and their several relatives have been buried there without any interference. The 1st Appellant contended that he begun the process of registering the land so as to get a title deed and the application was signed off by his neighbours and they have hired out the land to other people without interference from the Respondents.

The Appellants contend that their father had given 10 acres of the suit land to a one Odubu Michael who used the land for cultivation of beans and vacated the land in 1995 when he was challenged in the LC Courts. That the Respondents were now trespassing on the land thus the filing of the suit in the magistrate's court.

In their Defence, the Respondents submitted that they purchased the suit land from Non-Performing Assets Recovery Trust (hereinafter NPART) on 27th January, 2003 following an advertisement of the land which was identified as Leasehold Register Volume 1734 Folio 10 Plot 15 Kibanda Block 6 at Karungu, Kibanda Kiryandongo comprising of 164 acres. The said land was said to have been mortgaged by a one Odubu Michael to Uganda Commercial Bank, who had defaulted on settlement of his loan obligation thus resulting into the auction and sale of the suit property.

The issues for determination at trial were who owns the suit land; whether the 3rd and 4th Defendants are trespassers and were there any remedies available to the parties.

The suit in the trial court was determined in favour of the Respondents. The Magistrate begun by discrediting the allegations of fraud that were raised by the Appellants in their submissions. It was held that since fraud was not introduced in the pleadings, bringing

it at the submissions level amounted to a departure by the Appellants. It was held that irrespective of that, the Appellants had not presented any evidence to support the fraud allegations and they did not attribute any fraud directly to the defendants save for the claim that the suit land was registered without their consent or knowledge. The trial magistrate noted that the land was registered in the name of Odubu before their father's death but he didn't contest the said registration and even if it was fraudulently registered, the Respondents were bonafide purchasers for value and had exhibited due diligence by carrying out a search before the sale, which showed Michael Odubu, the mortgagor, as the registered proprietor.

Regarding the 1st issue, the trial magistrate held that the suit land being registered land and pursuant to Section 59 of the Registration of Titles Act, the title deed is conclusive proof of proprietorship and it shall be indefeasible on any account of informality or irregularity in the application. Further, that pursuant to Section 64 of the Registration of Titles Act, the estate of the registered person is paramount save for the instances of fraud. Accordingly, it was held that the 2nd Respondent who is registered on the title deed, is the rightful owner of the property.

Regarding the 2nd issue, the trial magistrate held that having established the 2nd Respondent as the owner of the suit land, the 1st appellant and all the people he let to the land for settlement and cultivation were trespassers. The suit was dismissed and the Appellants were ordered to pay UGX. 10,000,000 in general damages, to grant vacant possession of the suit land to the Respondents and a permanent injunction was issued against them, or any other person claiming title under them.

The Appellants being dissatisfied with the decision of the trial court, appealed against the decision of the trial magistrate on the following grounds that;

1. Had the trial Magistrate properly addressed his mind to the 2nd Respondent's testimony that; he did not first visit the suit land before purchasing the same, he did not know the boundaries of the suit land, he did not know any neighbours, he would not have come to the conclusion that the suit land was the same as LRV 1734 Folio Plot 15 Kibanda Block 6, Karungu measuring 164 hectares.
2. Had the trial Magistrate properly addressed his mind to the law on trespass he would not have come to the conclusion that the Appellants were trespassers when the Respondents were not in possession of the suit land.
3. The learned Magistrate erred in law and fact when he awarded general damages to the Respondents when they did not lead evidence to show how they had been inconvenienced or suffered by the Plaintiffs' possession and usage of the suit land.
4. That even if the 2nd Respondent was the owner of the suit land which is denied, had the Magistrate addressed his mind to the longevity and possession of the suit land by the Appellants, he would have found that they were adverse possessors and therefore the owners.

Representation;

The Appellants were represented by Counsel Jude Ogik of **M/S Ogik & Co. Advocates** while the Respondents was represented by Counsel Peter Jogo Tabu of **M/S Jogo Tabu & Co. Advocates.** Both parties filed their submissions which have been taken into consideration in determination of this appeal.

The duty of the 1st Appellant Court

Section 220(1) of the Magistrate's Courts Act, **Section 76 of the Civil Procedure Act and Order 44 rule 1(3) of the Civil Procedure Rules** make provision for appeals from the Magistrates' courts to be filed in the High Court. The appeals arising from final orders of

the Magistrate's Court such as the ones in the instant case are filed in the High Court and thus, it is the first appellate court in this case.

The 1st appellate court has the duty to re-evaluate the evidence led at the trial court to come up with its own conclusion by subjecting the evidence on record to exhaustive scrutiny, re-evaluating it and coming to its own conclusion. This duty was espoused in the case of **Selle & Anor vs. Associated Motor Boats Co. Limited & Ors (1968) E.A 1968,** where it was held that;

> ***"Briefly put…. this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. "***

<u>The determination of the preliminary objection</u>

The Respondent raised a preliminary objection that the appeal of the Appellant was extinguished by the operation of law. The Respondents submitted that the Respondent served them with the Memorandum of Appeal out of the statutory period for service. They were served with the Memorandum of Appeal on 30th March, 2022 while it was received by the Registry at the High Court of Masindi on 24th May, 2021. This means that it was served 10 months and 7 days after filing. It is the Respondents' contention that Order 43 of the Civil Procedure Rules that provides for appeals does not provide for the procedure of service of an appeal. However, Order 49 rule 2 of the Civil Procedure Rules provides that all orders, notices and documents by the Act required to be given or served

on any person shall be served in a manner provided for services of summons. That accordingly, Order 49 rule 2 imports the application of Order 5 of the Civil Procedure Rules which is to the effect that service of summons shall be affected within a period of 21 days from the date of issue; except where time may be extended on application to the court, within the fifteen days after the expiration of the twenty one days, showing sufficient reasons for the extension. It was submitted that in the absence of an application for extension of time within which to serve, the Memorandum of Appeal expired for lack of service.

In response, the Appellant submitted that Order 43 rules 10 and 11 of the Civil Procedure Rules provide for notices and service on parties for an appeal. It was submitted that Order 43 rule 10(1) provides that when a memorandum of appeal is lodged, the High Court shall send a notice of appeal to the court from whose court the appeal is preferred. Rule 2 requires the court upon receiving the notice to send with all practicable dispatch all material papers in the suit, or such papers as may be specifically called for by High Court. And finally, Rule 3 provides that either party may apply to court for a copy of the document they need at their own expense. They then referred to Order 43 rule 11 to the effect that notice of the day fixed for hearing of the appeal shall be served on the respondent or his or her advocate in the manner provided for service on a defendant of summons to enter appearance, and all the provisions applicable to that summons, and to proceedings with reference to service of summons, shall apply to the service of this notice. The Appellants' submission is that service in respect to appeals is governed by Order 43 rule 11 and not Order 5 and that accordingly, it is the notice of service for the hearing which is dealt with in the provisions of the hearing and this covers service of summons and not memoranda of appeal.

In the alternative, they submitted that they filed the Memorandum of Appeal in 2021, around the time when the second national lockdown occurred and that due to the

lockdown, the Respondent lost contact with their lawyers until their current lawyers took over and they took initiative to serve the Memorandum of Appeal on the Respondents. The Appellants also invoked **Article 126(2) of the Constitution of the Republic of Uganda** which calls for the courts to uphold substance over technicalities in dispensing justice.

In rejoinder, the Respondents submitted that Order 43 rule 11 is in respect to service for hearing and not of the memorandum of appeal and therefore, the Appellants are seeking to mislead this honorable court by representing that it is the service in issue. Regarding the national lock down, it was submitted that by the day of lockdown on 18th June, 2021, the days within which to carry out service had already expired as the same had ended on 14th June, 2021.

Lastly, regarding the issue of Article 126(2)(e), it was submitted that the issue of service is not a mere technicality but rather, an issue of substance in law and cannot be dismissed as a mere technicality.

Order 6 rule 28 of the Civil Procedure Rules provides that any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing. Thus, a party may raise a preliminary objection any time before hearing.

According to **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited [1969] EA 696**, it was held that a preliminary objection consists of an error on the face of the pleadings of a case which arises by clear implication out of pleadings and which if they are argued, would dismiss the suit.

The preliminary objection to be determined is whether the service of the Memorandum of Appeal on 30th March, 2022 after the same was filed on 24th May, 2021 rendered the entire appeal incompetent for non service.

Appeals from the Magistrates' court to the High Court are provided for, as has been rightly provided for in **Order 43 of the Civil Procedure Rules. Order 43 rule 1** provides that every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to court or such officer as it shall appoint for such a purpose.

As has been rightly submitted by Counsel for the Appellant, this section does not particularly provide for the service of the memorandum of appeal upon the Respondent. However, it should be noted that it is incumbent upon the Appellant to serve the Respondent with the pleadings relating to an appeal where the other party is interested in the same, in default of which, the subsequent pleadings would be rendered null and void. In establishing this position, we refer to the case of **Enhas Limited v. Henry Magino; Court of Appeal Civil Application No. 0026 of 2004** in which the Court of Appeal, while considering an issue of service of an application for record of proceedings, court held that, ***"The rule does not stipulate the time within which service of the copy ought to be effected on the respondent. The service is however, mandatory".*** It is this court's opinion that service is not only mandatory as a requirement to ensure that an adverse party is aware of proceedings arising against it but is also a duty imposed on any vigilant litigant.

As was held in the case of **Sulaiti Dungu v. Kateera G. Kaguzibwe; Civil Appeal No. 0044 of 2015** where the Court of Appeal was considering service of a memorandum of appeal that had been filed over 7 months late**,** it is incumbent upon the appellant to act diligently and legal business should be conducted with expedience and efficiency. Dilatory conduct will defeat a party's right to be heard. It is therefore this court's finding

that the memorandum of appeal ought to have not only been served but service ought to have been done in a timely manner.

The question now to be determined is whether the service was timely. **Order 43 of the Civil Procedure Rules** which governs appeals to the High Court is silent on the period of service of a Memorandum of Appeal. However, as was submitted by Counsel for the Respondent**, Order 49 rule 2 of the Civil Procedure Rules** provides that all orders, notices and documents required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons. I concur with the Respondent's submission that resultantly, the Memorandum of appeal ought to have been served within the 21 days provided for in **Order 5 rule 2 of the Civil Procedure Rules** and in the event that service was not done, for the extension of the 15 days' period within which to file to have been applied for.

The Court takes cognizance of the Appellant's submission that the failure to serve the memorandum was due to the 2nd lock down of Covid 19. The court further takes cognizance of the fact that the lock down begun only four days after the effluxion of time within which to serve, and therefore, the Appellant did not have the opportunity to file an application for extension of time. It was expected that before any other action was taken by the Appellants, they ought to have regularized the same by filing an application to enable them serve the memorandum of appeal out of time.

Regarding the Application of **Article 126(2) (e) of the Constitution**, it should be noted that the issue of service is not a technicality but rather, a matter of substance in determination of issues. However, it should be noted that the purpose of service is to let the other party know about the proceedings and the Respondent herein has represented that he was well aware of the pleadings and has not represented that they suffered any injury from the service out of time. Accordingly, as the purpose for service was fulfilled, court shall proceed to determine the appeal on its merits.

Ground 1;

The Appellants submitted that the trial magistrate erred when he got convinced with the lawyers' search that confirmed that the suit land belonged to the Odubu Michael, however, in cross examination, DW2, did not know the lawyer who did the search and neither did he tender the search report in as evidence and this shows the extent to which he did not do any due diligence. It is contended that had he done the due diligence, he would have known that the Appellants were in actual possession of the suit land which they were cultivating on and hiring out to people. The Respondents represented that they did not have knowledge of the boundaries of the land and as no survey was carried out, it cannot be confidently claimed that the land being claimed by the Respondents is indeed the one with the Appellants. The trial magistrate also ignored the evidence of DW1 and DW2 who are staying on the land and acknowledged that the land belongs to the 1st Appellant and they used to work for Odubu Michael and finally, that the proceedings in locus quo were not carried out in accordance with Practice Direction No. 1 of 2007. The trial magistrate neglected the Appellant's evidence at locus.

The Respondents rejoined that from the Appellant's submissions, he demonstrated that he knew the boundaries of the land as they testified as to the size of the land and that they had allowed some people to stay on the land pending its development.

It is a well settled principle of law that the purchaser has a duty to carry out due diligence before purchase of a property. The law relating to land purchases places a duty on the purchaser to carry out due diligence on the land to establish ownership before purchase of any piece of land. As has been rightly referred to by the Appellants in their submissions, the Court in **Sir John Bageire v. Ausi Matovu; CACA No. 007 of 1996** held that,

"Land is not vegetables bought from unknown sellers. There must be thorough investigation not only of the land but of the seller before purchase. "

The trial magistrate premised his finding for the Respondent on the basis of the search that was carried out at the registry that reflected Odubu Michael as the registered proprietor of the suit land. However, it should be noted that the vendor as a prudent buyer is required to carry out a physical search in addition to the registry search. In the case of **Jumbe Kiwe Sebunya v. Mukuye Isaac & 5 Others; HCCS No. 0063 of 2013,** the court held that ***"the duty of due diligence is not only by searching of the registry, but also conducting a physical visit and inquire from the occupants as to their interest on the land and other third-party claims."***

The issue of surveying also forms part of the requirement for due diligence so as to enable the party not only to know the limits of the property being purchased but to also establish who was in possession of the land. Had the Respondents made the attempt to visit the suit land, the contesting interests of the other parties would have been known at the time of purchase and a survey carried out to establish whether the suit land is the same as the registered land herein.

Whereas it is trite that the certificate of title is conclusive proof of ownership as per Section 59 of the Registration Act, it is also true that prior equitable interest shall only be defeated by a bonafide purchaser for value without notice of the said interests. See: **Hanbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977 at page 27.** The Respondents willfully neglected making a physical visit to the suit land before purchase of the suit land therefore, were unable to establish other claims on the property. In the absence of due diligence on the side of the vendors, the court agrees with the Appellants that the Respondents did not carry out the necessary due diligence that would have established if the registered property being purchased was the same as the suit land and in any case, their interest thereon on the property.

Grounds 2 and 4

The Appellants submitted that they inherited the land as customary owners and have since been in possession of the same. The Appellants submitted that they have not only been on the suit land for a long period before the Respondents laid their claim but also, it took more than 12 years for the Respondents to lay any adverse claim on the property. The trial magistrate did not address his mind to the issue of adverse possession by the Respondents which is basically to the effect that having been in possession for over twelve years, their right to title took precedence over the registered title. They referred to Section 64 and 78 of the Registration of Titles Act which recognizes that after some time, adverse possession would supersede the registered title. The trial magistrate should have started counting the period running against the Respondent on 27th January, 2003 and by 2015, their right lapsed. They referred also to the Limitation Act and the protection it offers to adverse possession of land.

The Respondents submitted that their title is indefeasible save for fraud as per Section 59 and Section 176(2) of the RTA and that their title is not extinguishable until the expiry of 12 years from when they became aware of the intending adverse possessor's actions on their land. The Respondents didn't know of the activities of the Appellants because they assumed on their prior visits that the people tilling on the land were workers of the former owner. It is in 2016 that they became aware of the Appellants' activities and therefore the effluxion time would be in 2026 for the 12-year period. The Respondents also claimed that they allowed the former workers of Obudu to continue working on the property because they did not have ability to develop the land so they were constructively in possession of the suit land. Accordingly, it was submitted that the doctrine of adverse possession did not apply.

The doctrine of adverse possession;

Section 5 of the Limitation Act provide for limitation of actions for the recovery of land. It stipulates as follows;

> ***"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."***

Further**, 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 until adverse possession is taken of the land."***

Section 16 of the Limitation Act further provides that;

> ***"Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished."***

Section 29 also provides that;

> ***"Without prejudice to the operation of section 187 of the Registration of Titles Act, (which contains certain provisions relating to the limitation of actions), this Act shall apply to land registered under the Registration of Titles Act in the same manner and to the same extent as it applies to land not so registered, except that where, if the land were not registered, the estate of the person registered as***

proprietor would be extinguished, that estate shall not be extinguished but shall be deemed to be held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by this Act."

The provisions in the Limitation Act are all in respect to the limitation of the time within which a person may file for recovery of land. The Appellants herein have submitted that they acquired the suit land customarily from their father and were in possession in 2003 when the Respondents bought the land. The Respondents did not make any attempt to take possession of this land till 2022 when they sued them for trespass. The time limit of 12 years within which to recover the land run out in 2015.

The question to be determined is whether the Appellant have a title by possession that overrides the registered proprietor. Whereas a registered proprietor of land is protected and his or her title is in absence of fraud and other infirmities indefeasible under **Section 59 and 176(2) of the Registration of Titles Act,** adverse possession is another exception to the principle of indefeasibility of the title. **Section 78 of the Registration of Titles Act** thereof recognizes adverse possession as a basis upon which a person in use and occupation of land can claim title that already belongs to the registered owner and it provides therein that;

"A person who claims that he or she has acquired a title by possession to land registered under this Act may apply to the registrar for an order vesting the land in him or her for an estate in fee simple or the other estate claimed."

The rationale of adverse possession was discussed in an Indian authority, **P.T. Munichikkanna Reddy & O'rs vs. Revamma & O'rs, (2007) AIR (SC) 1753 P.T.** where it was provided that it is premised on the theory or presumption that the owner has

abandoned the property to the adverse possessor or on acquiescence of the owner to the hostile acts and claims of the person in possession. The owner of the property is expected to protect their interest and is not expected to just look on when his or her rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land.

Adverse possession is defined in the case of **Jandu vs. Kirpal & A'nor [1975] EA 225 at 323** wherein it was held that;

> ***"By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner."***

The definition is what is incorporated in **Section 16 of the Limitation Act** to the effect that at the expiration of the period of twelve years prescribed under **Section 5, for** any person to bring an action to recover land the title of that person to the land shall be extinguished.

In another Indian case, **AIR 2008 SC 346 Annakili vs. A. Vedanayagam & Ors,** the elements of adverse possession were set out as follows;

> ***"Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to***

exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title."

The principles stated in the above are what is set out in **Section 5 and 16 of the Limitation Act** and summarily mean that; firstly; that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued; which is the date of dispossession. Secondly; after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly; the person in adverse possession is entitled to a title by possession. **Section 29 of the Limitation Act** then provides for the effect of adverse possession being that the registered owner ceases to hold the title to land in his own right but in trust of one in adverse possession.

The Appellants contention as set out above has already been discussed and as to why they have title by possession. The Respondents however have submitted that they did not know about the Appellant's possession until when they visited the land in 2019. It is this court's consideration that abandonment of a property that one purchased in 2003 until 2019 is a representation of one not having interest in their property, which as discussed above, is the rationale for adverse possession. By the extinction of time in 2015, the Respondents had not even made an effort to establish the sort of activities taking place on the land and so the Appellants continued to possess the land unencumbered. Accordingly, the Appellants acquired title by possession and cannot be said to be trespassers on a property they rightfully occupy.

Ground 3.

The Appellants submitted that general damages are discretionary and awarded to a party that has been aggrieved by the occasion resulting to the damages. It is their submission

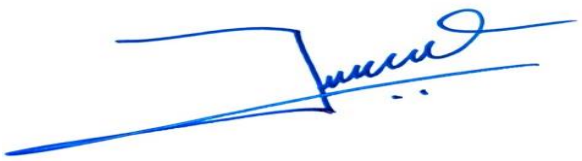
that damages in the lower court did not take into consideration whether the Appellants were aggrieved or not before they were awarded and therefore, that this award be reversed.

The Respondents submitted that the damages were justified in light of the fact that the Respondent trespassed on their land.

In view of the court's finding that the Appellants acquired adverse possession of the property and were accordingly, not trespassers, this ground too succeeds as there is no justification for the damages.

Appeal succeeds with costs to the Appellants both here and below.

Dated and delivered this 22nd Day of December 2023.



Isah Serunkuma

JUDGE