THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI.
CIVIL APPEAL NO. 0010 OF 2015

(Appeal from the judgment of His Worship Byaruhanga Jesse in the Chief Magistrates court of Masindi)

1. JOSHUA KISEMBO
2. ALICE BIINGI
3. KATUSIIME ROSEMARY
4. JOSEPH MUHUMUZA :: APPELLANTS

VERSUS

1. DR. MAITEKI ROBERET
2. MR. JOSEPH MAITEKI
3. MR. BAITERA MAITEKI
4. MR. BAITERA PETER :: RESPONDENTS

The plaintiffs sued the defendants for a declaration that the disputed piece of land situated at Kisunga village, Kiryandongo belongs to the plaintiffs, an eviction order, a permanent injunction restraining the defendants from continued trespass, mesne profits, general damages and costs of the suit.

Brief Facts.

It is alleged that the late Dr. Baitera acquired customary land measuring approximately 500 acres having inherited the same from his grandfather a one Zakariya. That during his lifetime Dr. Baitera attempted to get lease on all the land however he only succeeded to register 100 acres. That the 1st defendant being a nephew to the late was given temporary permission by Dr. B.M Baitera to stay on part of the 500 acres with an understanding that he would vacate the same after acquiring his own land.

That further the 1st defendant committed himself to vacate the suit land which he later failed or refused to do. That the family of the 1st defendant has continued to use the suit land thus this suit to stop the continued trespass on their land as beneficiaries to the estate of the late Dr. B.M. Baitera.

The defendants generally contended that the suit land does not form part of the estate of the late Dr. B.M Baitera since the 1st defendant vacated the customary land of his

grandfather Zakariya and acquired a separate distinct piece of land where he constructed his own house and established his own home.

Three issues were raised for determination by the trial court that is to say;

1) *Whether the suit land forms part of the estate of the late Barnabas Maiteki Baitera?*
2) *Whether the defendants are trespassers on the suit land?*
3) *What remedies are available to the parties?*

Court found that the suit land was part of the estate of the late Dr. Baitera Maiteki and that the defendants are trespassers on the suit land thus ordering the defendants to vacate the suit land within three months and pay general damages to a tune of UGX 15,000,000/= (Uganda shillings Fifteen Million).

Being dissatisfied with the above orders the defendants appealed the decisions of the trial magistrate on grounds that;

1. *The learned trial Magistrate erred in law and fact when he failed to rule that the respondents' suit was time barred.*
2. *The learned trial magistrate erred in law and fact when he decided that the first appellant had never shifted.*
3. *The learned trial Magistrate erred in law and fact when he failed to realize that 100 acres offered to the late Dr.Baitera Maiteki was different from the land in dispute with clear boundaries.*
4. *The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and came to a wrong conclusion that the suit land belonged to the respondent.*
5. *The learned trial Magistrate erred in law and fact when he exhibited bias during the trial and at locus in quo.*
6. *The learned trial Magistrate erred in law and fact when he ignored all the evidence adduced in favor of the appellants and thus came to a wrong conclusion that the appellants record …*

Representation

Counsel Lubega Willy of M/S Lubega, Babu & Co. Advocates represented the Appellants and Counsel Tugume Moses of M/S Tugume – Byensi & Co. Advocates represented the Respondents.

Submissions

Counsel proceeded by oral submissions in court.

Appellants' submissions

Counsel urged grounds 3,4 and 6 together and 1,2, and 5 separately.

In regards to ground one that is to say that the trial magistrate erred in law and fact when he failed to rule that the suit was time barred, counsel submitted that on record there is no evidence to show that the respondents attempted to file any suit in regard to the suit land from 1982 to 2008. That Section 5 of the Limitations Act bars suits to recover land if brought after expiry of 12 years from the date when the cause of action arose. That the respondents sued in respect of the estate of the late Baitera.

Counsel submitted that according to decided cases the right to sue in respect of the deceased persons begins from the time of death. That there was no suit brought against the appellants from 1988 when the father of the respondents passed on until 2008 which period is way beyond the period of recovery. Counsel referred court to the case of *Hadijah Khayiyi versus Wanambwa S/O Shinyale; High Court Civil Suit No.0064 of 2012* and other authorities discussing the time within which a suit should be brought and when the limitation should begin. He further submitted that in this particular suit the limitation period started to run in 1982 but since no suit was filed by the father of the respondents then time limitation started to run after his death in 1988. That by failing to find that this suit was time barred was erroneous on the part of the chief magistrate.

Counsel further urged that the respondents' cause of action in the head suit was not for trespass since they were not in possession of the suit land and that their claim for trespass would not stand. He referred this court to the case of ***James Kayimbye versus Hon. Paul Semogerere & Anor; HCCS No. 0957 of 1993*** and prayed that court finds this ground in favor of the appellants.

In opposition to this ground of appeal counsel for the respondents replied that the cause of action in this matter was trespass and that the trial judge was alive to this point while giving his judgment at pages 8 - 9. Counsel referred court to the case of **Oola Lalobo Versus Okema Jakeo Akech; Civil Appeal No. 0106** ***of 2008*** in which the gist is that trespass being a continuos tort only becomes time barred from the point when the trespasser has ceased trespassing.

Ground two

That the trial magistrate erred in law and fact when he held that the appellants had not shifted. That according to the evidence of PW1, PW2 & PW3 on record, it shows that the appellants shifted from where they were staying on the 1st defendant's grandfather's land to the new establishment which is on the suit land. That both the appellants and the respondents in their evidence at trial concede that the appellants shifted thus it was erroneous for the trial chief magistrate not to find so.

In regard to the last set of grounds, counsel for the appellant submitted that save for ground 5 the rest are in regard to evaluation of evidence. That there is evidence that the respondents' father applied for a lease of 500 acres and that before the same was offered he paid for 100 acres. That the land which the respondents' father accepted was that that belonged to his late father.

Counsel further submitted that there was bias on the part of the trial magistrate. That the trial magistrate made locus focal points before the locus visit. That the magistrate did not mention some points that were raised and identified. That one witness was harassed and the other witness never gave evidence yet he was present at locus. Counsel concluded by praying that court re-evaluates the evidence and comes up with its own conclusions and that the appeal is allowed with costs.

In response to the second set of grounds, counsel for the respondents submitted that actually while addressing these grounds, counsel for the appellants emphasized that appellants never left the suit land and as such have continued to trespass on the same to date. For possession counsel referred this court to the case of *Busiro coffee farmers and dealers ltd Versus Tom Kayongo & 2others; HCCS No.0532 of 1992.* Counsel submitted that no evidence was produced to show that appellants were entitled to be in possession of the suit land yet on the contrary the respondents adduced evidence that they are entitled to benefit from the suit land as it forms part of the estate of the Late Maiteki. Counsel prayed that this court finds that the cause of action in this case was of trespass which is a continuous tort and that the trial magistrate rightly came to a conclusion that limitation was not applicable.

In rejoinder to the above grounds counsel for the appellants still emphasized his earlier submissions and prayers that this court should allow the appeal.

Court's Analysis

Duty of court

It is the duty of this court as the first appellate court to rehear the case by subjecting the evidence presented to the trial court to a fresh scrutiny and re-appraisal before coming to its own conclusion. (*See; Kifamunte Henry Vs Uganda; SC. Criminal Appeal No.010 of 1997*). In case of conflicting evidence, the court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the evidence and make its own inference and conclusions (*See; Lovinsa Nankya v Nsibambi [1980 HCB 81*]).

The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. This court is not necessarily bound by the findings of the trial court.

I will handle the grounds as per counsel's submissions as follows;

Ground One;

The learned trial Magistrate erred in law and fact when he failed to rule that the respondents' suit was time barred.

The *Black's law dictionary 4th edition at page 2716* defines limitation as a statutory period after which a lawsuit cannot be brought in court.

Section 5 of the limitation Act provides that:

> *"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".*

This time starts running from the time the right accrued. The limitation under this section is applicable to all suits in which the claim is for possession of land based on title or ownership. *(See Kasya Justine & Anor Vs William Kaija & 3 Ors; Civil Suit No. 0006 of 2015).*

Further *Section 11(1) of the Limitation 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 limitation period can run (hereafter in this section referred to as adverse possession) and where under sections*

6 to 10 any such right is deemed to accrue on a certain date and no person in adverse possession on that date the right of action shall not be deemed to accrue until adverse possession is taken of the land".

From the reading of the above sections of the law therefore the period of limitation starts to run from the time the person is dispossessed of his or her land. For an action for recovery of land, a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

The importance of laws concerning limitation is to protect defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and requiring plaintiffs to diligently pursue their claims. The purpose of the law of limitation was well considered in the case of *Odyek Alex & Another Vs Yokanani & 4 Ors; Civil Appeal No. 009 of 2017* where Justice Stephen Mubiru stated that;

> "*Two major purposes underlie the 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 requiring plaintiff to diligently pursue their claims. Statutes of limitation are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. Once the time period limited by The Limitation Act* expires, *the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred. Moreover, uninterrupted and uncontested possession of land for a specific period of time ,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 vs Clissold [1907]AC at 79). In respect to 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 6 of the Limitations Act. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land. (see Rwajuma Vs Jingo Mukasa; HCCS No. 0508 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;"*

Further in relation to possession Justice Mubiru noted that*;*

"The fact of possession for purposes of an action in trespass to land is proved by evidence establishing physical control over the land by way of sufficient steps taken to deny others from accessing the land. Actual possession therefore is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others. In order to disclose a cause of action of the tort of trespass to land, the plaintiff had to plead facts to show that; (a) he was in possession at the time of the entry complained of; (b) there was an unlawful or unauthorized entry by the respondents; and (c) the entry occasioned him damage. Whereas the tort of trespass to land is a continuing tort, such that the law of limitation does not apply to it in the strict sense (See Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10) maintenance of that action is available to a person in possession. In Nakagiri Nakabega & 2 Ors v. Masaka District Growers [1985] HCB 38, it was held that only a party in possession is entitled to sue for trespass".

From the evidence on record the respondents claim ownership as beneficiaries of the estate of their father who inherited the suit land from his father Zakaliya. That the 1st appellant came onto the suit land and after being taken to the authorities he made an undertaking to vacate the land in 1986 which he did not do. However, from that period to the time of death Dr. Baitera did not take any action to remove the appellant and his family from the suit land.

Following the principle that when one is in possession of land, he or she will not allow any other persons to interfere with the land. Indeed Dr. Baitera took the steps but then one will wonder why he did not go back for rescue from the authorities in 1986 when the respondents' father did not fulfill his undertaking. This can only be since he had gotten redress as the respondents' father had vacated the land as per the undertaking. The defence that the respondent's father had joined a youth political wing thus become strong to me does not hold. On record there is not any evidence to show that after there was any step taken by Dr. Baitera to ensure that the undertaking had been fulfilled yet the authorities before whom the undertaking was taken were still in existence. The circumstances only bring me to a conclusion that the respondent's father had shifted and was no longer on his grandfather's land that the late Dr. Baitera was in control of thus there was no trespass. As such the claim for the respondents is right placed under specifically recovery of land which is regulated by the provisions of section 6 of the Limitation Act as discussed earlier.

In the case of *Madhivani International versus Attorney General; CACA NO.48 OF 2004;* it was stated that in considering whether a suit is barred by any law, a court looks at the pleadings alone.

In looking at the pleadings court has to identify what cause of action was pleaded for. For a proper guide one has to specifically look at the prayers by the plaintiffs in their plaint. Paragraph 3 of the amended plaint on record states as follows;

> *"The plaintiffs' cause of action against the defendants is for a declaration that the disputed land belongs to the plaintiffs, an order of eviction, permanent injunction restraining the defendants from continued trespass in particular their trespassing activities which the plaintiffs discovered on or about 14th March, 2004 on the plaintiff's land, general damages in particular from 14th march until they vacate the suit land and costs of the suit.*

From comprehension of this paragraph, one can only conclude that at the time the plaintiffs/respondents were not in control of the said suit land as such their claim lies under recovery of land and not trespass to land. Further in their prayers as per their amended plaint the respondents confess that they only became aware that the suit land was part and parcel of their late father's estate in 2004. I therefore find that the trial magistrate failed to declare that the suit was time barred as such this ground succeeds.

Ground Two;

The learned trial magistrate erred in law and fact when he decided that the first appellant had never shifted.

Counsel for the appellant submitted that the 1st appellant shifted from his grandfather's land to land given to him by tsetse fly control and that it was erroneous for the trial court not to find so.

In reply to this, counsel for the respondent highlighted that counsel is making contradictions that according to the evidence of the 1st appellant at page 24 he states that he got the land from a local chief and shifted from the land of his grandfather.

According to the evidence of the 1st appellant he stated that he got his land from the local chief and part from tsetse fly control. However from my analysis at first the 1st appellant shifted from one part of the land to another but still all on the land of the

late Dr. Baitera and later left the land completely. This is inferred from the fact that when Dr. Baitera brought building materials and put them on the purported new land of the 1st appellant, mediations between him and the 1st appellant by the village elders were held, and thereafter Dr. Baitera built his house. This shows that the appellants' father gave up the land and still went and settled on another piece of land where he is with his family to date. As such I find it erroneous for the trial magistrate to conclude that the appellants' father did not shift.

On the last set of grounds, the appellants fault the trial magistrate for bias thus failing to analyze the evidence on record thus coming to a wrong conclusion.

According to my analysis of counsel's submissions on this last set of grounds, he does not drive any point home. He was arguing for the sake of arguing. In the first place he faults the trial magistrate for his failure to evaluate the evidence on record that is to say that the trial magistrate failed to find that the respondents' father was not in occupation of the whole 500 acres of land. Then he submits that the respondent's father was not given lease for the whole 500 because there was dispute on the rest.

According to the record specifically the inspection report, the respondent's father was not given any reason as to why the rest of the 400 acres were not offered to him to lease why then does counsel want court to find as per his thinking without any evidence to support his argument. The trial magistrate well explained in his judgment on record that it is a known practice that once there is a likelihood of success for an application for lease the applicant is requested to go ahead and pay for the land leased before even the offer letter is issued thus the reason why the respondent's father paid for the 100 acres earlier before he received the offer letter.

Counsel for the appellant also argued that the trial magistrate was biased. This is a serious issue as it goes to the character of the judicial officer, as such one has to bring proof to support his argument. According to the ***Black's Law Dictionary 9th Edition at page 183*** bias is defined as inclination, prejudice or predilection. Bias may be either actual or implied. A person alleging bias must prove it. See; the case of ***Shell & 9 Ors vs Muwema & Mugerwa Advocates & Solicitors and URA; Civil Appeal No. 002 of 2013 (SCU).***

The test for bias was considered in the case of G.M ***Combined Detergents (U) Ltd vs AK Detergents (U) Ltd Civil Appeal No. 009 of 1998*** where court cited with approval

Ex parte Barusley and District Licensed Valuers Association (1960) 2QB 169 where it was observed that;

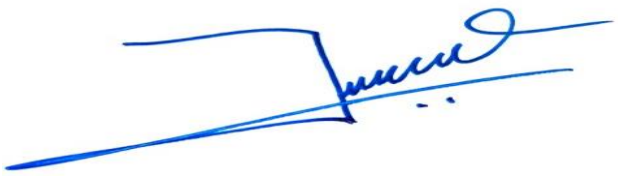
> *"In considering whether there was a likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he should not sit. If he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstance from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would think it likely or probable that the court will not inquire whether he did in fact favour one side unfairly. Suffice is that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away from thinking: the judge was biased."*

According to counsel for the submissions counsel for the appellants I don't find that the above test is explicated anywhere as per the record. Not all evidence on record should be mentioned by a trial magistrate in his finding. Secondly on the issue of focal points in the locus report is not an issue. Where the magistrate places them in his report is a matter of design and not bias.

With my above findings this appeal succeeds. However, since the litigants are relatives, I will not award costs.

I so order.

Dated and delivered on this 22nd day of December 2023.



Isah Serunkuma

JUDGE