

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO 5 OF 2020

MPALANYI JULIUS-----APPELLANT

VERSUS

JULIUS KAMWESIGE-----RESPONDENT

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

The Appellant, Mr. Mpalanyi Julius, being dissatisfied with the ruling and orders of Her Worship Christine Nantege made on the 26th day of September, 2019 in Civil Suit No.28 of 2015 lodged an appeal to this court.

GROUND OF APPEAL

1. The learned trial Magistrate, erred in law when she held that the plaintiff does not show that the Plaintiff is in possession of the suit land.
2. The learned trial Magistrate erred in law when she held that the plaintiff does not disclose material facts to constitute a cause of action.
3. The learned trial Magistrate erred in law when she dismissed the suit without a full hearing.

BACKGROUND TO THE APPEAL

The plaint in Civil Suit No. 28 of 2015, describes the Plaintiff, now Appellant, as the son and customary heir of the late Fred Mpalanyi, registered proprietor of land comprised in Plot 1293, Block 397 land at Bweya. It was averred by the Plaintiff that the Defendants

were trespassers on the suit land and he therefore brought the claim to recover the land, in addition to other remedies sought.

In a preliminary objection raised before the learned trial Magistrate, Counsel for the 1st Defendant submitted that the plaint was defective, since it did not state the particulars of trespass, as required under Order 6 r 30, Order 6 r 6 (1) and (3) of the CPR, and therefore the material facts on which the claim was based were omitted. Secondly, the Plaintiff had brought a claim of trespass when he was not in actual possession of the suit land, leaving him with no cause of action against the 1st Defendant.

By way of reply, Counsel for the Plaintiff submitted that the suit land formed part of the estate of the deceased and the Plaintiff was in the process of acquiring letters of administration. Counsel added that paragraph 4 of the Plaint discloses the facts of the claim. He therefore prayed that the preliminary objection be overruled.

The learned trial Magistrate, in her ruling dated 26th September 2019, found that the Plaint did not indicate when the Plaintiff entered on the suit land or that he was in possession of it and that possession was being interfered with by the Defendants. She agreed with Counsel for the 1st Defendant and struck out the suit under Order 7 r. 1(e) of the CPR. in favour of the Respondent and dismissed the Appellant's suit.

REPRESENTATION

The Appellant was represented by M/S Nambale, Nerima and Co. Advocates while the Respondent was represented by M/S Avrax Advocates. Both Counsel filed written submissions that I shall not reproduce, but have duly considered.

It is the duty of the first appellate court to give the evidence led by the trial court, a thorough reevaluation and draw its own conclusion. See Kifamunte Henry v Uganda (Criminal Appeal-1997/10) [1998] UGSC 20 (15 May 1998) where it was held that;

'The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make

up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.’

RESOLUTION

5 **Grounds 1, 2, & 3**

Counsel for the Appellant submitted that the Appellant had the right to bring the suit for recovery of the suit property since he was the customary heir and had stated so in his plaint.

10 It is a fact that according to the Plaint, the Appellant is the customary heir of the late Fred Mpalanyi, the registered proprietor of the suit land. And my understanding is that he brought the suit to protect the estate of his late father against the acts of trespass by the Defendants.

15 From the Plaint, two facts are apparent. Firstly, the suit property does not belong to the Plaintiff, it forms part of his late father’s estate. And secondly, he is not in physical possession of it.

Section 191 of the Succession Act Cap 162 as amended provides that;

20 *191. Right to intestate’s property, when established*
Except as hereafter provided, but subject to section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.

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Counsel for the Appellant submitted that the fact that the Appellant was a customary heir clothed him with a cause of action and whether or not he was in physical possession was irrelevant. I disagree. The facts before the lower court are distinguishable from the facts in the case of **Israel Kabwa v Martin Banoba Musiga**

30 **Supreme Court Civil Appeal No. 52 of 1995**, where the respondent, who was a Customary Heir, had developments on the suit land, pointing his individual right to bring

the suit against the appellant without letters of administration. And therefore the court concluded that he had locus standi in the suit.

In the case of **Justine E. M N. Lutaaya v Stirling Civil Engineering Company Limited SCCA No. 11 of 2002** Mulenga JSC, held that

5 *‘Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person’s lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has*
10 *capacity to sue in trespass. Thus, the owner of an unencumbered land has capacity to sue...’ (the underlining of the phrase is for emphasis)*

According to the Cornell Law School Legal Information Institute; *constructive possession is the legal possession of an object that is not in the person’s direct physical control. In*
15 *property law, establishing constructive possession grants the owner the right to obtain physical control and/or a variety of rights over someone else’s physical control of that property. Actual possession on the other hand is also called possession in fact, is used to describe immediate physical contact.*

20 In my view, under **section 191 of the Succession Act**, without letters of administration, was not in lawful possession of the suit land, neither was he in actual or constructive possession of the land, and he therefore had no right to bring an action to recover the suit land comprising his father’s estate, as he sought to do under paragraph 3 (b) and 10(b) of the Plaintiff. It was of no value that the particulars of trespass are well articulated in the
25 Plaintiff under paragraph 4, as I find they were, since the Appellant had no legal right to bring the claim.

In conclusion, I find that since the Plaintiff is not a holder of letters of administration, it follows that he has no cause of action against the defendants in

trespass. And the learned trial magistrate rightly struck out the plaint under order 7 rule 11(a) of the Civil Procedure Rules.

This appeal fails on all grounds and is accordingly dismissed with costs.

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Olive Kazaarwe Mukwaya

JUDGE

31st January 2023

10 Delivered by email to Counsel for the parties.

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