

FILE COPY

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT TORORO
CIVIL APPEAL NO 0013 OF 2023

BARASA STEPHEN KWoba:::::::::::::::::::::::::::::::::APPELLANT
VERSUS

1. OPIO JOHN BARASA MARIKO
2. OMITTA DOMINIC
3. WERE ALFRED
4. MUKESWA KALORI :::::::::::::::::::::::::::::::::::RESPONDENTS

JUDGMENT

BEFORE: HON DR. JUSTICE HENRY 1. KAWESA

This appeal arises from the judgment of Her Worship Adelo Suzan, a Magistrate Grade One at the Chief Magistrate' s Court of Busia at Busia delivered on the 23rd of September, 2022 in favour of the Respondents.

Background

The Appellant instituted a suit against the Respondents for a declaration that he is the rightful customary owner of a piece of land measuring 35 acres in Buhera Village (hereinafter the suit land), an order of vacant possession against the Respondents, a permanent injunction, general damages, and costs of the suit.

In the suit, the Appellant claimed that he inherited the suit land from his late father, the late Muchanja Vincent who died in 2004. That in 1984, his father sold what constituted part of the suit land to the late Mariko Okongo, who happens to be the father to the 1st and 2nd Respondents.

Further, that in 1985, the Appellant's father migrated to Kenya and left a one Wanyama Shadrack to care take the suit land. That the Appellant returned in 2012 to occupy the suit land and found that the 1st and 2nd Defendants had disposed it off to the 3rd and 4th Respondents without his knowledge and consent.

The Respondents filed a joint written statement of defence in which they denied all the Appellant's allegations hence putting them in issue. They pleaded that the 1st and 2nd Respondents inherited the suit land under customary succession from their father, the late Mariko Okongo; and that the late Mariko Okongo purchased the suit land from the Appellant's father in 1984, a period more than 30 years since. That the 3rd and 4th Respondent are bonafide owners of the suit land having purchased it from the 1st and 2nd Respondents. Further, that upon acquisition of the suit land, the Appellant and his parent yielded vacant possession to the 1st and 2nd Respondents' late father. They also denied knowledge of the caretaking of the suit land by Wanyama Shadrack; and also pleaded that the 1st and 2nd Respondents did not need the Appellant's authority in order to dispose of the suit land to the 3rd and 4th Respondents.

At trial, the Appellant called five witnesses, and the Respondents called four witnesses. The Appellant's witnesses were Stephen Barasa Kwoba (PW I), Sisya John (PW2), Sifuna Akisoferi a.k.a Sifuna Falouk (PW3), Mary Naswa (PW4), and Ouma Milton (PW5); and the Respondents' witnesses were Opio Mariko (DWI), Mukeswa Kalori (DW2), Dominic Omitta (DW3), and SDA Were Alfred (DW4).

The learned trial Magistrate visited *locus*; and thereafter delivered judgment dismissing the Appellant's suit with costs and issued a permanent injunction against him hence this appeal.

Representation

The Appellant is represented by M/S Rock Advocates; and the Respondents are represented by M/S Nagemi & Co. Advocates & Commissioners for Oaths. Counsel

for the parties filed written submissions which the Court has perused and shall consider in resolving the appeal.

However, before Court delves the merits of the appeal, it shall address the preliminary objection raised by the Counsel for the Respondents where he prayed that the appeal be dismissed on ground that it was filed out of time and contrary to **Section 79(1)(a) of the Civil Procedure Act Cap.71**.

It is a fact that the judgment and order of the lower Court appealed against were respectively issued on the 22nd of September, and 1st of December, 2022.

The record bears a letter requesting for certified copy of the record of proceedings; and this was filed by the Appellant on the 26th of September, 2022. It is a fact also that the lower Court certified the record of proceedings on the 24th of March, 2023, as Counsel for the Respondents argued. The memorandum of appeal (or appeal itself) was filed on the 6th of June, 2023.

It is, therefore, the Court's observation that the appeal was lodged after about 73 days from the date the record of proceedings was certified.

According **Section 79(1)(a) of the Civil Procedure Act Cap. 71**, every appeal to the High Court shall be entered "within thirty days of the date of the decree or order of Court.... but the appellate Court may for good cause admit and appeal through the period of limitations prescribed by this section has elapsed. " It is also the law that the time only begins to run against the intending Appellant when the record of proceedings is availed (**Section 79(2) of the Civil Procedure Act Cap.71; Sekabira Herbert vs. Suuna Mulema & Anor HCMA No. 186 of 2022**).

In this case, the appeal was filed after thirty days (30) from the date the record of proceedings became available to the Appellant. No leave was sought by the Appellant for extension of time within which to file the instant appeal out of time.

According to the Supreme Court, "where leave is required to file an appeal (and)

such leave is not obtained, the appeal filed is incompetent and cannot even be withdrawn as an appeal. See **Makhangu vs. Kibwana [1995-1998] 1 EA 175'' (Supreme Court Civil Appeal No. 11 of 2010 Dr. Sheikh Ahmed Muhammed Kisuule vs. Greenland Bank (In Liquidation).**

In this case, the Court finds *that the appeal is incompetent, and should be dismissed as argued by the Respondents' Counsel. For that cause, the preliminary objection is upheld.*

In conclusion, the appeal is hereby dismissed summarily, with costs to the Respondents.

Delivered at Tororo this 6th Day of March 2024


HON. JUDGE

In the presence of:

- 1...Mr. Peter Nagemu CSI for the Respondent
- 2...Mr. Barasa Stephen - Appellant
- 3...Mr. OPIO John ~~Barasa~~ ^{Mariko} - 1st respondent.

Sgd:

Edimu Hellen

AG. ASST. REGISTRAR

6/03/2024