

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA**  
**CIVIL APPEAL NO. 069 OF 2022**  
**(ARISING FROM LAND CIVIL SUIT NO.046 OF 2020)**

**NAMUKASA BETTY ..... APPELLANT/DEFENDANT**  
**VERSUS**  
**DEOGRATIOUS KAKEETO .....RESPONDENT/PLAINTIFF**

**Before: HON JUSTICE LAWRENCE TWEYANZE**

**JUDGMENT.**

**Introduction.**

1. The Appellant/Defendant being dissatisfied with the Judgement and Orders of the Chief Magistrate, Her Worship Nvanungi Sylvia in the Chief Magistrate's Court of Masaka in Civil Land Suit No. 046 of 2020, Judgment is dated 26<sup>th</sup> September 2022, brought this Appeal seeking Orders that the Judgment and Orders arising from Land Civil Suit No. 046 of 2020 be set aside, and that the Appeal be allowed with costs borne by the Respondent/Plaintiff.

**Brief Background to the Appeal.**

2. The Respondent/Plaintiff/Plaintiff sued the Appellant/Defendant/Defendant) in Civil Suit No. 046 of 2020 for trespass to land, good use of land agreement and a declaration that land measuring 2.52591 Acres forming part of land comprised in Buddu Block 321 Plot 227 belongs to the Plaintiff/Respondent/Plaintiff.
3. The Plaintiff/Respondent/Plaintiff claimed that he owned a vast piece of land situate at Kasijagirwa in Masaka City and was desirous of selling off the whole of his piece of land to the Appellant/Defendant/Defendant through her mother (Nalongo Dezi). Although the parties initially intended at contracting on the whole piece of land, the Appellant/Defendant/Defendant through her mother (Nalongo Dezi) were skeptical fearing that there could be persons with third party claims on the land.
4. The Appellant/Defendant/Defendant as such demanded that the Respondent/Plaintiff/Plaintiff fences off the whole of the intended purchase property to confirm that there were no people with third party claims, which the Respondent/Plaintiff/Plaintiff did. At the time, the Appellant/Defendant/Defendant made an initial payment of Ugx 2,000,000 (Uganda Shillings Two Millions) and an agreement was executed.




5. That when the said land was fenced off, a one Jjumba, Mayanja Moses and Bwanika Bbaale put up claims of part of the said land measuring 3 Acres. The said Jjumba removed the fence on the part of the land he claimed. That with these events, the Appellant/Defendant/Defendant refused to buy the said land until a surveyor was brought to measure the size of the remaining land off the contested part. That's how a final agreement came to be executed before the Appellant/Defendant/Defendant's lawyers of Kawanga & Kasule Advocates now after a survey and with actual measurements of 40 Acres known and certain.
6. In defence, the Appellant/Defendant/Defendant stated that the Respondent/Plaintiff/Plaintiff sold to the Appellant/Defendant/Defendant a farm situate at Kasijagirwa village at a consideration of 41,000,000/=. The Respondent/Plaintiff/Plaintiff demarcated the suit land with a fence before selling the same to the Appellant/Defendant/Defendant. The said payments were made in installments i.e. 29<sup>th</sup>/ 10/2004 and 6<sup>th</sup>/02/2005 with the sale agreements describing the suit property as a farm and the agreement dated the 19<sup>th</sup>/01/2005 approximated the suit property (which is the farm) to 40 Acres situate at Block 321 Plot 227.
7. That the Appellant/Defendant/Defendant took possession of the suit land immediately after the purchase and started utilizing the same for rearing cattle, cultivation and constructed a house thereon. That the Appellant/Defendant/Defendant enjoyed quiet possession of the suit land until 2020 when the Respondent/Plaintiff/Plaintiff filed Civil Suit No. 046 of 2020. The Appellant/Defendant/Defendant in her defence pleaded that the Respondent/Plaintiff/Plaintiff's suit was barred by the law of limitation and that she bought a farm which was approximated to 40 Acres since at the time of the sale it was not surveyed to know the exact acreage.
8. The Learned Trial Chief Magistrate found that the suit was not barred in law and that the Appellant/Defendant/Defendant exceeded the size of land she bought way back in 2005. The Learned Trial Chief Magistrate granted the orders as sought by the Respondent/Plaintiff/Plaintiff. The Appellant/Defendant/Defendant was dissatisfied with the said Judgment and Orders hence this Appeal.

#### **Representation and hearing.**

9. The Appellant/Defendant/Defendant was represented by Xander Advocates. The Respondent/Plaintiff/Plaintiff was represented by Kitimbo Associated Advocates. Both Counsel filed written submissions that have been considered herein.

#### **The Grounds of Appeal.**



10. The Appellant/Defendant/Defendant raised four (4) grounds of Appeal in her Memorandum of Appeal namely that;

1. *The Learned Trial Magistrate erred in law and fact when she held that the Plaintiff/Respondent/Plaintiff's suit was not barred by the law of limitation hence occasioning a miscarriage of justice.*
2. *The Learned Trial Magistrate erred in law and fact when she ignored the fact that the Respondent/Plaintiff/Plaintiff sold the Appellant/Defendant/Defendant a farm whose acreage was approximated to 40 Acres at the time of the sale, and hence came to a wrong conclusion that 2.52591 Acres of the Appellant/Defendant/Defendant's land belonged to the Respondent/Plaintiff/Plaintiff which occasioned a miscarriage of justice.*
3. *The Learned Trial Magistrate erred in law and fact when she ignored the fact that the portion which was claimed by the Respondent/Plaintiff/Plaintiff was a subject of a pending suit Vide Civil Suit No. 08 of 2008 in Division Court Kimaanya-Kyabakuza in another Court.*
4. *The Learned Trial Magistrate erred in law and fact when she interpreted the sale agreement dated the 19<sup>th</sup> /1/2005 isolative of the earlier agreements.*

#### **Duty of the First Appellate Court.**

11. The duty of a first Appellate Court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. **See: Section 80 of the Civil Procedure Act Cap 71.** This position has also been re-stated in a number of decided cases including *J.F. Zaabwe v Orient Bank Ltd CACA No. 4 of 2006*; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

*"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

#### **Consideration of the Grounds of Appeal**

12. Counsel for the Appellant/Defendant started his arguments with ground 1 separately, argued grounds 2 & 4 together and then ground 3 separately and did



Counsel for the Respondent/Plaintiff; I will adopt the same order in resolving these grounds of Appeal.

### **Ground 1**

**That the Learned Trial Magistrate erred in law and fact when she held that the Plaintiff/Respondent/Plaintiff's suit was not barred by the law of limitation hence occasioning a miscarriage of justice.**

### **Submissions by Counsel for Appellant/Defendant.**

13. Counsel for the Appellant/Defendant/Defendant submitted that Civil Suit No. 046 of 2020 was filed by the Respondent/Plaintiff/Plaintiff after a period of 15 years from the date when the cause of action arose and that he did not plead any disability as to why he failed to file his case within 12 years, the stipulated limitation time. That from the Respondent/Plaintiff/Plaintiff's Plea, he was seeking to recover land of 2.52591 Acres comprised in Block 321 Plot 227. That a preliminary point of law was raised by Counsel for the Defendant/ Appellant/Defendant at the trial Court in regards to the suit being barred by law of limitation and the same was overruled, which Counsel considers as an error and an illegality.

14. Counsel referred to paragraph 14 of the Respondent/Plaintiff/Plaintiff's witness statement when he testified at Examination - in -chief that he entered into a sale agreement with the Appellant/Defendant/Defendant in respect of land in dispute measuring approximately 40 Acres on the 19<sup>th</sup> day of January 2005 for a consideration of UGX 41,000,000/=. That at page 7 paragraph 9 of the proceedings, the Respondent/Plaintiff/Plaintiff during cross - examination confirmed to the trial Court that it's the Appellant/Defendant/Defendant who has been in possession of the suit land since 2005 utilizing the same for grazing her cattle. Counsel averred that this was evidence enough for the trial Court, not to look anywhere else but dismiss the matter for being brought out of time. That it was the duty of the Magistrate to have rejected the claim at the earliest opportunity in the proceedings, under Order 7 rule 11 (d) of the Civil Procedure Rules SI-71, which provides that a Plea shall be rejected, where the suit appears from the statement in the plea, to be barred by limitation.

### **Submissions by Counsel for the Respondent/Plaintiff.**

15. The Respondent/Plaintiff/Plaintiff's Counsel submitted that limitation does not apply to the facts before this Court. That firstly, the suit land measuring 2.5291 Acres was subject to a pending litigation in the Division Court between the Respondent/Plaintiff/Plaintiff and a one Mayanja Moses and Bwanika Bbaale vide



Civil Suit No. 8 of 2008. That this fact is admitted by the Appellant/Defendant who even raises it as one of the grounds of Appeal. That it follows that no adverse right or interest that can be derived from the property which is the subject of litigation. Counsel referred to the case of **Gorrepati Srinivasa Reddy Versus Grant Thornton Management High Court Miscellaneous Application No. 0418 Of 2023**, where Hon Justice Stephen Mubiru in at page 17 held that; *“During the pendency of any suit related to the title of the property, no new interest can be created or added on the particular property which is the subject matter to the suit.* Counsel submitted that no adverse rights could rightly flow to the Appellant/Defendant/Defendant by whichever way not even by way of limitation most especially not from the Appellant/Defendant/Defendant who was well aware and even admits to the existence of a pending suit in regard to the disputed land.

16. Counsel for the Respondent/Plaintiff/Plaintiff submitted that, Secondly, the Appellant/Defendant/Defendant's occupation of the suit land was with the consent of the Respondent/Plaintiff/Plaintiff. Counsel referred to page 7 paragraph 9 of the record of proceedings in which the Respondent/Plaintiff/Plaintiff while under cross-examination stated that *“This portion I had asked the communities to leave it under barbed wire fence to keep it on part I had sold”*. That the Respondent/Plaintiff/Plaintiff further gave evidence in chief that *“We further agreed that after I would sale my other remaining land in dispute after regaining it through a Court process”*.
17. That throughout the record of proceedings the Respondent/Plaintiff maintained that it was the Appellant/Defendant in possession of the Suit land. That this was on an understanding between both parties and the Respondent/Plaintiff was even to sale the Suit land to the Appellant/Defendant after the disputes had been settled. That the Respondent/Plaintiff although fully aware that the Appellant/Defendant was in occupation of the Suit land, he was not aggrieved until he recently learnt that the Appellant/Defendant had processed a Certificate of Title including the disputed land contrary to their agreement that she immediately protested and even followed the proceedings in Civil Suit No. 8 of 2008 instituted at the Division Court.
18. That the only truth is that the Appellant/Defendant occupied the disputed land as a bare licensee and under the consent of the Respondent/Plaintiff on a promise that she could purchase it after the settlement of the case/dispute between the Respondent/Plaintiff and third parties. That limitation does not apply to possession which was as a result of a license. That adverse possession presupposes occupation of the land without the permission of its owner. That however long the occupancy may



be, possession of land under a license is not adverse to the interests of the land owner. Counsel referred to the case of **Okot Patrick v. Abodo Mary (supra), and Ocen Renaldo Vs Okot Justine High Court Civil Appeal No. 006 of 2013.**

19. Respondent/Plaintiff's Counsel submitted that the possession by the Appellant/Defendant was not adverse until 2015 when the Respondent/Plaintiff found out that the Appellant/Defendant had processed a Certificate of Title covering the disputed land contrary to their agreement and demanded that Appellant/Defendant hands over vacant possession of his excess of 2.5291 Acres of land that she had dishonestly included in her land title.

20. It was submitted by the Respondent/Plaintiff's Counsel that the Appellant/Defendant's cause of action was premised on trespass to land, a declaration that 2.5291 Acres of land from land comprised in Buddu Block 321 Plot 227 belongs to the Plaintiff/Respondent. Counsel submitted that trespass to land is a possessory action where if remedies are to be awarded, the Plaintiff must prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. That trespass to land is a continuing tort and is not affected by law of limitation as long as the adverse party remains in trespass. Counsel referred to the Supreme Court in the case of **Justine E.M.N. Lutaya Versus Stirling Civil Engineering Company Ltd Supreme Court Civil Appeal No.11 Of 2002.**

21. Counsel for the Respondent/Plaintiff concluded that given the fact that a cause of action for trespass is based on possessory rights, the Learned trial Magistrate rightly found that the Suit was not time barred.

#### **Determination by the Court.**

22. The major contention under this ground of Appeal is that the Learned trial Magistrate erred in law and in his evaluation of the evidence on limitation of actions and ruled in favour of the Respondent/Plaintiff when Civil Suit No. 046 of 2020 was filed by the Respondent/Plaintiff after a period of 15 years from the date when the cause of action arose and that the Respondent/Plaintiff did not plead any disability as to why he failed to file his case within 12 years.



23. The position of the law is that time limitations are substantive provisions of the law and limitation of actions is not concerned with merits of the case. Limitation of actions for the recovery of land is governed by **Section 5 of the Limitation Act cap 80** which provides 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."*

24. Counsel for the Appellant/Defendant submitted that the Respondent/Plaintiff did not plead any disability as to why he failed to file his case within 12 years. On the otherhand, Counsel for the Respondent/Plaintiff submitted that the Suit land measuring 2.5291 Acres was subject to a pending litigation in the Division Court between the Respondent/Plaintiff and a one Mayanja Moses and Bwanika Bbaale vide Civil Suit No. 8 of 2008. That this fact is admitted by the Appellant/Defendant who even raise it as one of the grounds of Appeal. This point of argument by the Respondent/Plaintiff is misguided and clearly, the said suit was instituted by different parties thus Mayanja Moses and Bwanika Bbaale who were not a party in the Lower Court nor a party to this Appeal. I am not satisfied by the Counsel for the Respondent/Plaintiff's reason override the limitation period.

25. Another reason raised by the Appellant/Defendant to fault the decision of the trial Magistrate is that the Learned Trial Magistrate came to a conclusion that the Respondent/Plaintiff was not claiming proprietary interest, he sought to recover possessory rights in line with the sale agreement of 2005. Counsel sought to distinguish the two terms of possessory rights and proprietary rights.

26. It was the argument by Counsel for the Respondent/Plaintiff that trespass to land is a continuing tort and is not affected by law of limitation as long as adverse party remains in trespass. This argument for purposes of extricating trespass from the scope of application of the Limitation Act is without any valid legal basis. The Limitation Act in Sections 5 to 17 provides for periods of limitation for what it terms "actions to recover land and rents".

27. Further, the Limitation Act provides in Section 1(6) that *"references in this Act to a right of action to recover land shall include references to a right to enter into possession of the land..."* (Emphasis added).



28. From the above, it is my finding that since the tort of trespass to land deals with possessory rights to land, an action for trespass to land falls squarely within the scope of "actions to recover land" whose limitation period is prescribed by the Limitation Act. For clarity, the Limitation Act applies to actions in trespass to land. (See *Kiwanuka Fredrick Kakumutwe versus Kibirige Edward CA NO. 272 of 2017, Court of Appeal Decision of 7<sup>th</sup> October 2022*).

29. I have also carefully read the Supreme Court cases of *Justine E.M.N. Lutaya Vs Sterling Civil Engineering Company (supra)* and *Eridad Otabong Waimo Vs Attorney General SCCA NO* which the Counsel for the Respondent/Plaintiff relied upon in support of his argument that the tort of trespass to land, being a continuing trespass, is not subject to the limitation period of 12 years provided by Section 5 of the Limitation Act. In the lead judgment of Justice Mulenga, JSC in the above case *Lutaya Vs Stirling Civil Engineering Company Ltd, (supra)* with which the other Justices concurred, he stated the legal position about a right of action based on a continuous trespass to land thus:

*"Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land."* [Emphasis added]

30. The above decision is still good law and binding on this Court under the doctrine of Stare decisis. Accordingly, I would reject the argument by the Respondent/Plaintiff's Counsel that the Limitation Act does not apply to the tort of trespass to land.

31. When dealing with the issue of limitation of the Plaintiff's claim, the trial Magistrate in the Judgment stated at page 2-3 that:

*"The issue to be determined now is whether the suit is time barred in law?"*

*The defence lawyer in his submission argues that the land sale agreement was executed in the year 2005. Immediately the Defendant took possession and became a registered proprietor in the very year. But the suit was filed in 2020 about 15 years later after the cause of action arose way back in 2005. And that therefore the Plaintiff is caught under Section 5 of the Limitation Act Cap 80; which is to the effect that no action can be brought by any person to recover land after the expiry of 12 years from the date on which the right of action accrued*

*The Plaintiff's lawyer filed no submission in rejoinder to explain this position.*

*However, this Honourable Court while looking at Section 5 of the Limitation Act Cap 80 considered the interpretation put forth in *Odyeki & Anor. Vs. Yokorani & 4 Others**





*Civil Appeal No. 009 of 2017 reported in (2018) UG HCCD 50; where it was held that, with regard to action for recovery of land, there is a fixed limitation period stipulated by Section 5 of Cap 80. The Limitation Act 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 right.*

*Section 11 emphasizes the same to the effect that the claimant to enjoy this provision now should have adverse possession as reflected in Section 6 of Cap 80.*

*The term adverse possession has been defined in Rwajuma.Vs. Jingo Mukasa Civil Suit No. 508 of 2012 (2015) UGHCLD 26 to mean; possession by a person holding that land on his own behalf or on behalf of some person other than the true owner having immediate possession.*

*If by this adverse possession the statute is set in motion (running) and it continues to run for 12 years, then the title of the owner is extinguished and the person in possession becomes the owner.*

*In the case at hand the portion claimed is not under adverse possession by the Plaintiff.*

*As per the Plaintiff's evidence on record he is not claiming proprietary interest, he seeks to recovery possessory rights in line with the sale agreement of 2005; where the Defendant allegedly transferred more than what was sold by the Plaintiff.*

*Under such circumstance the Plaintiff is not caught by limitation as per Section 5, 6 and 11 of Cap 80. And therefore the suit is not time barred."*

32. In the facts giving raise to this Appeal, The Appellant/Defendant and the Respondent/Plaintiff entered into a land sale agreement on the 19<sup>th</sup> day of January 2005. The suit in Civil Suit No. 046 of 2020 was filed on the 10<sup>th</sup> day of August 2020, which was about 15 years later after the right of action to sue accrued to the Respondent/Plaintiff. The Appellant/Defendant became the registered proprietor on the suit land on the 19<sup>th</sup> day of September 2005 and took possession of the same in 2005. The Respondent/Plaintiff's suit was time barred in the first place and had the Trial Magistrate addressed her mind to these issues and evaluated her evidence sufficiently, she ought to have dismissed the Respondent/Plaintiff's suit.

33. Another argument by Counsel for the Respondent/Plaintiff is that the Appellant/Defendant occupied the disputed land as a bare licensee and under the consent of the Respondent/Plaintiff on a promise that she could purchase it after the settlement of the case/dispute between the Respondent/Plaintiff and third parties. That limitation does not apply to possession which was as a result of a license. That



adverse possession presupposes occupation of the land without the permission of its owner.

34. I have reviewed all the pleadings and the evidence in the trial Court. There is nowhere was it mentioned that the Defendant was a mere licensee and the Respondent/Plaintiff never led any evidence to this argument. For all purposes and intents, the relationship between the parties was one of seller and buyer of land, but not one of owner and licensee. This argument of a bare licensee is misguided. After the Defendant/Appellant had continuously occupied the suit land for 12 years unchallenged, whether his original entry into possession of the suit land had been lawful or unlawful became irrelevant.
35. In the circumstances, the Respondent/Plaintiff cannot be allowed to set up the issue of "bare licensee" which was not part of his pleadings. The Supreme Court held in a *Fangmin Vs Belex Tours and Travel Ltd, Supreme Court Civil Appeal No. 6 of 2013*, that a person is not allowed to succeed on a case not set up in their pleadings.
36. From the evidence on record, 2005 was the year the Appellant/Defendant purchased the suit land from the Respondent/Plaintiff, obtained a Certificate of Title and started possession of the same as its owner, which fact was not disputed by the Respondent/Plaintiff. For the Respondent/Plaintiff to commence the suit in 2020, the action was clearly outside the 12-year period prescribed by Section 5 of the Limitation Act for instituting the land action.

Section 16 provides thus:

*"16. Extinction of title after expiration of period*

*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."*

37. Accordingly, at the time the Respondent/Plaintiff commenced court action in 2020, his title to the suit land had long been extinguished by operation of law and in law he no longer had any interest or estate or title in the suit land upon which to base the action seeking the remedies sought from Court.



38. In all, I would reject all the reasons advanced by the Respondent/Plaintiff on the issue of limitation. The Respondent/Plaintiff's suit was time barred in the first place and had the Trial Magistrate addressed her mind to these issues and evaluated her evidence sufficiently, she ought to have dismissed the Respondent/Plaintiff's (Plaintiffs) suit. This ground 1 of the appeal succeeds.

39. Having held that the Respondent/Plaintiff's (Plaintiff's) suit was barred by limitation, I do not find it necessary to resolve grounds 2, 3 and 4 of the Appeal.

40. All in all, this Appeal succeeds and the judgment and Orders of the Court below are set aside. The costs of this Court and the Court below to the Appellant/Defendant against the Respondent/Plaintiff.

41. It so ordered.

Judgment signed and delivered by email this 3<sup>rd</sup> day of April, 2024



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LAWRENCE TWEYANZE  
JUDGE.

3<sup>rd</sup> April, 2024.