

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 058 OF 2007

5 (Arising from Kamuli Civil Suit No. 017/2004)

MRS. MUGWERI MARY ::
APPELLANT

10 **VERSUS**

SERUWAGI MWIZEBE ::
RESPONDENT

15 **BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

JUDGMENT

20 This is an Appeal against the Judgment of the Magistrate Grade 1, Her Worship Nabafu Agnes sitting at Kamuli Grade 1 Court.

25 Therein she gave Judgment in favour of the Plaintiff and gave orders for vacant possession of the suit land in favour of the Plaintiff.

The Appellant cited three grounds of Appeal but only
30 decided to argue Grounds No. 1 and No. 2 abandoning Ground No.3.

The two Grounds are:

1. That the trial magistrate erred in law and fact in reaching its Judgment and orders when it failed to properly evaluate the evidence on record and entered Judgment against the Appellant which occasioned miscarriage of justice.
2. The trial Court erred in law and fact in reaching Judgment and Orders when the Plaintiff's suit is barred in law and entered Judgment and Orders against the Appellant which occasioned miscarriage of justice.

It is pertinent to deal with Ground No. 2 first for reasons which will become clear shortly.

Learned Counsel Mr. Ewatu for the Appellant has submitted that the Appellant had been using the land since 1988 which her husband was utilizing although he had not built a house on it. (This was according to the evidence of PW1 and that of the Defendant herself, and DW4). That she had accordingly been on the land for over 15 years before the Plaintiff/Respondent surfaced. That this is a matter that would be barred by operation of Section 5 of the Limitation Act.

For the Respondent, Counsel Shaban Muziransa submitted that:

5 1. The suit in the Magistrate's Court was founded on trespass, a continuing tort which would not be affected by the law cited.

10 2. That the issue of limitation never featured in the proceedings before the lower Court, and cannot therefore be raised as an issue/ground in the appeal.

I must agree with Counsel Muziransa on both legs of his arguments.

15 Firstly, the record of the trial Court shows that this was a suit based on trespass, the Defendant allegedly having entered upon the suit land without any claim of right.

In the case of **Polyfibre Ltd Vrs. Matovu Paul & others; Civil Suit No. 412/2010.** It was observed that limitation
20 would not apply in a case for trespass, a continuing tort.

It was also held that when considering whether a suit is barred by any law, the Court will look at the pleadings which should be self-evident.

25

In the instant case, the issue of limitation never featured in the pleadings. It was never an issue for trial or determination. It cannot therefore be raised as a ground in the appeal.

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Ground No. 2 must accordingly fail and is disallowed.

In respect of Ground No. 1 of the appeal, it is submitted that the Appellant is entitled to the suit land having been in
10 occupation right from her marriage to her husband from whom she derives rights over the suit land as the widow.

Her husband was handed over the land by Kasenke who had been caretaking it, having acquired the same from his father
15 Isingoma.

Further that the defence witnesses were consistent in their claims that the land had been kept in trust for her husband and was returned to him.

20

For the Respondent, it was submitted that the trial magistrate pointed out the consistencies in the Plaintiff's case while the case for the Defendant had irreconcilable inconsistencies. She claimed her husband was using the
25 land in 1988 and yet it was handed back to him in 1994 by

Kasenke. How could he be using it before it was handed to him?

The neighbour, it is submitted bought his own adjacent piece
5 when the suit land was bushy and vacant. He did not know
the owner and did not know how Mugweri came to use it.

DW2 MUKISA claimed the land was handed over in 1985.

10 The Appellant did not even know the size of the land and yet
claimed she was using it. She claimed it had graves but at
locus denied the same.

It is submitted that as a result of the inconsistencies, the
15 magistrate was right to decide as she did.

I have looked at the record and the Judgment by the trial
magistrate. The magistrate indeed pointed out the
inconsistencies and contradictions in the Appellant's case.
20 Her version does not add up.

What was under investigation was the original ownership of
the suit land. The evidence of PW2 was that he had ever
litigated and recovered part of the land from the Appellant's
25 husband.

This meant that the Respondent was entitled to also recover his part, the Appellant's husband having trespassed on it.

5 I find that the Appellant has only tried to recycle the same evidence and arguments before the trial Court which the said Court carefully evaluated and reached the decision it did based on the evidence for the Plaintiff and the evidence/lack thereof by the Defendant. Ground 1 fails accordingly.

10

This appeal has no merits. It is dismissed and the Judgment and Orders of the lower Court are upheld. Costs to the Respondent.

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Godfrey Namundi

JUDGE

10/04/2015

10/04/2015:

Parties in Court

5 Court: Judgment delivered.

Godfrey Namundi

JUDGE

10 **10/04/2015**