

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0025 OF 2014
(Arising from Nebbi Chief Magistrates Court Civil Suit No. 0004 of 2013)

OTHONDE SANTINO **APPELLANT**

VERSUS

OPIO KERALI **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, in a suit filed on 15th February 2013, the appellant sued the respondent for trespass to land seeking an order of vacant possession, eviction, a permanent injunction, general and exemplary damages and costs. His claim was premised on the contention that in 1971, the appellant obtained the land in dispute from his late father Yoawana Anenwa and was using it until 1974 when the respondent's late father Kaludio Kerali trespassed on it by establishing thereon a cattle farm. The appellant's brother instituted a suit against the respondent's father during 1982 but it was never disposed of due to war that broke out soon thereafter. The respondent's father instead went ahead to acquire a lease over 220.7 acres comprising a part of the disputed land, from the Uganda Land Commission.

He further contended that during the year 2000, the respondent trespassed on what was left of the disputed land, falling outside the 220.7 acres that his father had leased, by renting it out to diverse people for valuable consideration. The appellant found twenty five such people cultivating various parts of that land and upon inquiring from them the derivation of their right to do so, they told him it was the respondent who had hired the land to them. The appellant therefore sued the respondent on account of that trespass but the respondent denied liability, contending that he was not the right party to be sued since he was not the administrator of the estate of his deceased father.

In his written statement of defence dated 21st June 2013 and filed in court on 24th June 2013, the respondent denied liability for trespass to the land in dispute. He disputed suit allegedly filed against his deceased father in 1982 as fictitious since there was no Magistrate Grade One Court in Pakwach in 1982. He contended that the estate of his father had enjoyed peaceful, uninterrupted possession of the disputed land since 1974 and therefore the appellant's action was time barred. Lastly, that he was not the proper person to be sued since the land in question belonged to his late father and he was not the administrator of the estate of his late father.

When the suit came up for hearing on 10th June 2014, the then counsel for the defendant, Mr. Samuel Ondoma raised a preliminary objection arguing that the suit was barred by limitation, since the defendant's family had obtained a leasehold title to the land in 1974 and had occupied the land undisturbed since then. He further argued that the suit was *res judicata* since in 2007 the appellant had filed a suit against the respondent which had been dismissed for being time barred, failure to disclose any cause of action and for being filed against a wrong party. In reply, the appellant appearing in person responded that the respondent was the right party to be sued since the people he found cultivating his land said it was the respondent who had rented it to them. He argued further that since those acts of trespass had been committed in 2007, the suit was not time barred. Lastly, that since he was not claiming land which belonged to the respondent's father, his suit was not *res judicata*.

In his ruling, the trial magistrate found that the land in dispute had been the subject matter of the earlier suit filed in 2007, between parties in respect of whom the current parties to the suit before him were claiming under, which suit had been finally decided in favour of the respondent. Since the appellant had not challenged that decision on appeal, he could not file the current suit on account of *res judicata*. He upheld the preliminary objections and dismissed the suit with costs to the respondent

Being dissatisfied by that decision, the appellant appealed on the following grounds contained in his memorandum of appeal, namely;

1. The trial magistrate erred in law and fact to hold that the plaintiff's suit is *res judicata* yet the subject matter in Civil Suit No. NEB 00 CV CS 0004 / 2013 is not the same as in case No. 0040/2007.
2. The learned trial magistrate erred in law and fact to hold that the appellant's suit is time barred in total disregard of the appellant's evidence on record.
3. The trial magistrate erred in law and fact to hold that the suit belongs to the estate of the respondent's father without ascertaining the boundaries to which the certificate of title produced relates thereby making a wrong decision.

At the hearing of the appeal, counsel for the appellant Mr. Komakech Dennis Atine sought and was granted leave to amend the memorandum of appeal by introducing a fourth ground of appeal as follows;

4. The trial magistrate erred in law and in fact in holding that the plaintiff sued the wrong party in total disregard of the appellant's evidence on record.

Submitting in support of the appeal, counsel for the appellant argued that since the appellant had stated in his plaint that it is the respondent who rented part of the appellant's land to the twenty five people he found cultivating on his land, the respondent was a proper party to be sued since the persons on the appellant's land were in law, his agents. He argued further that the plaint clearly indicated that the land trespassed upon was outside the 220.7 acres leased to the father of the deceased and therefore was not the subject of the suit that had been filed in 2007 which related to the 220.7 acres. Lastly, that the 2007 civil suit having been decided on basis of preliminary points of law, the subsequent suit could not have been *res judicata* since the earlier suit had not been decided on its merits. He cited *Maniraguha v Nkundiye C.A Civil Appeal No. 23 of 2005*; *Ponsiano Semakula v Susane Magala and others, (1993) KALR.213* in support of his submissions.

In reply to those submissions, counsel for the respondent, Mr. Samuel Ondoma, supported the decision of the court below and stated that it was consistent with the decisions in the case of; - where it was decided that a matter is *res judicata* where it was decided earlier by a court of competent jurisdiction, between the same parties or those claiming under them. The issues raised in the suit were the same as those which had been raised in the earlier suit of 2007 before the same court and in respect of the same land. He prayed that the appeal be dismissed with costs.

The nature of the duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and in a case of conflicting evidence, remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, 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.

Ground one of the appeal raises the issue whether the trial magistrate was right to dismiss the suit for being *res judicata*. Section 7 of *The Civil Procedure Act* provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under

the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.”

The Court of Appeal in *Ponsiano Semakula v Susane Magala and others* (1993) KALR 213 explained the doctrine of *res-judicata* as follows; -

The doctrine of *res-judicata*, embodied in s 7 of the *Civil Procedure Act*, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: ‘*nemo debet bis vexari pro una et eadem causa*’ (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by *res-judicata* appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *res-judicata* applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time”.

The minimum requirements under that provision were stated by the Supreme Court in *Karia and another v Attorney General and others* [2005] 1 EA 83 to be that; (a) there has to be a former suit or issue decided by a competent court (b) the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar and (c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

In *Boutique Shazim Limited v Norattam Bhatia and another*, C.A. Civil Appeal No.36 of 2007, it was held that essentially the test to be applied by court to determine the question of *res judicata* is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he / she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject

matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time (See further *Greenhalgh v Mallard* [1947] 2ALL ER 255).

Therefore, to succeed in alleging *res judicata*, a party must show that (a) the matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) that the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned (see *DSV Silo v The Owners of Sennar* [1985] 2 All ER 104).

However, to give effect to the plea of *res judicata*, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit (see the case of *Lt David Kabarebe v Major Prossy Nalweyiso C.A Civil Appeal No.34 of 2003*). For the doctrine to apply there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be *res judicata* (see *Bukondo Yeremiya v E. Rwananenyere* [1978] HCB 96). Therefore in *Busulwa Isaac Bob v Kakinda Ibrahim* [1979]HCB 179, where the earlier suit had been dismissed on a preliminary point, such a dismissal was found not to be a bar to a subsequent suit between the same parties on the same subject matter. According to the decision in *Kerchand v Jan Mohamed* (1919 – 21) EAPLR 64, where a suit is dismissed on a preliminary point of law and the plaintiff did not have opportunity to be heard on merits, a new suit on the same matter cannot be *res judicata*. Similarly in *Isaac Bob Busulwa v Ibrahim Kakinda* [1979] HCB 179, it was held that the dismissal of a suit on a preliminary point, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties.

In the instant case, the suit which was filed in 2007 was not decided on merit but on a preliminary objection which challenged the capacity in which the defendant had been sued, raised the question of limitation and *res judicata* on account of an earlier suit that had been filed in 1982 but was never heard. In his decision of 11th June 2014, the Chief Magistrate of Nebbi erroneously found that the suit was time barred by *res judicata* since none of the suits filed prior had been decided on their merits. The doctrine is inapplicable except where the earlier suit was decided on merit. Ground one of the appeal therefore succeeds.

The second ground is essentially as to whether the plaint as filed disclosed a cause of action against the respondent. The learned Chief Magistrate upheld the objection to the effect that the appellant had sued the wrong party. He only made a sweeping statement at the conclusion of his ruling that all three objections had been upheld but the body of the ruling does not disclose his reasons for arriving at that conclusion.

The appellant's cause of action against the respondent was pleaded in paragraph 3 of the plaint and more particularly in (e) where he averred that the respondent was being sued for having entered onto the appellant's land, "falling outside the leased land and rented out the same and continues to rent or hire out the same to other people...." What in essence the appellant pleaded is that the respondent is a joint tortfeasor together with the divers people he is letting out the appellant's claimed land without his consent.

Black's Law Dictionary (10th ed. 2014) defines joint tortfeasors as "two or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit." These are two or more persons whose conduct combines to produce a single injury. A person becomes a joint tortfeasor if he or she participates in or gives assistance or encouragement to the commission of a tort by another, therefore more than one tortfeasor may be involved in contributing to a tort. Participants in what may be called a common enterprise with a concerted design and with a common end in view will be jointly and severally liable for the end result of their long as all such conduct was operative or active or a proximate cause of the harm suffered. They will be deemed to have acted together to produce the damage and it probably does not matter that one causes more harm than the other(s). They are liable for the common wrong resulting in the damage caused as a result of their acts is the same. As joint tortfeasors they are deemed to have committed only one wrongful act and therefore only one legal action could be brought, and one judgment delivered, in respect of it. The plaintiff has a choice of which joint tortfeasor to sue and need not sue all of them.

For example in *Brooke v Bool* [1928] 2 KB 578 the first defendant was a landlord who smelt gas in the plaintiff's shop. He went to investigate with the second defendant, his lodger. Both the

landlord and the lodger used naked lights to look for leaks and an explosion occurred, causing great damage to the plaintiff's shop. The two were held to be jointly liable, that is, each was answerable not only for his own negligence but for that of the other and so it made no difference that it was probably the lodger's match which set off the explosion; the landlord was the person whom the plaintiff had chosen to sue and, since he was a joint tortfeasor, he had to pay for the whole of the damage. If the plaintiff had preferred to sue the lodger, then the lodger would have had to pay. As joint tortfeasors they are deemed to have committed only one wrongful act and therefore only one legal action can be brought, and one judgment delivered, in respect of it. So while the plaintiff had the choice of which joint tortfeasor to sue, once he had sued one, he could not sue the other.

In the instant appeal, the respondent was sued as one of the approximately twenty five other joint tortfeasors with whom he is alleged to have participated, by way of giving them assistance or encouragement to the commission of a tort trespass on land the appellant claims to belong to him. Therefore, he is accused of having contributed to the tort by entering on the land in person and hiring out parts of it to the rest of the twenty five or so others, in what may be called a common enterprise with a concerted design and with a common end of taking possession of parts of the land the appellant claims to be his, without his consent. The pleaded act of renting out the land if proved, would constitute an operative or active or a proximate cause to the trespass for which he would legally be jointly and severally liable with them. Paragraph 3 (e) of the plaint therefore discloses a cause of action against the respondent and the learned Chief Magistrate erred when he found that the respondent was not a proper party to the suit. Ground four of the appeal therefore succeeds.

The law on striking out of pleadings was explained by the Court of Appeal of Kenya in the case of *D.T Dobie and Company Ltd v Muchina and Another* [1982] KLR 1 in the finding of Madan, Miller and Potter, JJA wherein the court stated:-

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to

be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.

For that reason, in *Letang v Cooper* [1965] Q.B. 232 it was decided that if a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and / or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures.

In the instant case, the appellant's claim was founded on trespass to land. The plain meaning of trespass as per *Halsbury's Laws of England Vol. 38 page 734* is: - "(a) is a wrongful act (b), done in disturbance of the possession of property of another against his will." According to the Court of Appeal in its decision of *Departed Asians Property Custodian Board v Issa Bukanya*, S.C. Civil Appeal No.26 of 1992,

If allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court is to hear evidence which proves the facts and hear submissions of law that the remedies are justified. Care must of course be taken that the distinction between general and special damages is satisfactorily pleaded. It must be understood that the evidence led is such, that without contradiction by the Defendant, it is sufficient to prove the claim. It is not necessary that the facts alleged should be queried, but the facts alleged must be full and accurate enough to support the plaint. A Judge may assist the Plaintiff in pointing out that the evidence so far adduced is not sufficiently full and accurate, and that other evidence, documentary or oral, may be needed to support the claim. What cannot be done is that remedies are granted as prayed, which are not supported by the pleadings. It is of course open to the Plaintiff to amend his pleadings. But if that is done, the amendment must be served upon the Defendant, who may then have the right to appear and defend the case.

In the instant case, it was unnecessary for the appellant to plead matters related to the 220.7 acres land that were leased by the respondent's late father since he stated clearly in paragraph 3 (e) of his plaint that his claim was in respect of land "falling outside the leased land." The remedy for such superfluity is not to dismiss the suit but to order amendment of the plaint or that the

unnecessary aspects to be struck out under the provisions of O 6 r 18 of *The Civil Procedure Rules* which provides as follows;

18. Striking out unnecessary matter, etc.

The court may, at any stage of the proceedings, order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if it thinks fit, order the costs of the application to be paid as between advocate and client

Lastly, it was argued that the appellant's claim was time barred under the law of limitation. Some of the aims of *The Limitation Act* are to prevent persons from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so on. The time limits prescribed by *The Limitation Act* are generally reckoned from "the date of the accrual of a cause of action. The Act does not attempt to define this expression but *Halsbury's Laws of England* (4th ed reissue, Butterworths, London, 1997) vol 28, under "Limitation of Actions", para 820 defines it thus;

Apart from any special provision, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed accrual of the cause of action takes effect from the date.

"Cause of Action" has also been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court (see *Read v Brown (1888) 22 QBD 128 at 131* and *Central Electricity Generating Board v Halifax Corporation [1963] AC 785, at 800, 806*).

In tort, the cause of action accrues when the damage is first sustained. It arises regardless of whether or not the Claimant could have known about the damage. In the case of *Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1*, the House of Lords decided that the owner of a building had a cause of action against his consulting engineer for negligent design, which accrued from the date upon which the physical damage to the building first occurred. Under section 11 (1) of *The Limitation Act*, a cause of action in respect of land accrues with adverse possession by another. In paragraph 3 (e) of the plaint, the appellant averred that the

respondent's acts of trespass began in the year 2000. Since the suit was filed on 15th February 2013, it was not barred by limitation which according to s 5 of *The Limitation Act* is twelve years in relation to actions for recovery of land and according to s 3 of the Act, six years in respect of torts.

On the other hand, being an action in trespass to land by cultivation without the consent of the appellant, where there is a continuing series of events that infringe the rights of a claimant, there is a separate accrual for each event and a separate limitation period applies to each event. In such cases, the limitation period acts not as a bar to action but as a limit on recovery, as damages (and interest) will normally only be available back to the six years preceding the commencement of the litigation. It was therefore erroneous for the learned Chief Magistrate to hold that the appellant's action was barred by limitation. Ground 2 of the appeal too succeeds. The suit not having been decided on its merits, the third ground of appeal is misconceived and is hereby dismissed.

In the final result, the appeal is allowed. It is hereby ordered that the order of the Chief Magistrate dismissing the suit in the court below be set aside and it is hereby set aside. The suit is hereby reinstated with directions that it should be tried by another magistrate with competent jurisdiction.

The costs of this appeal are awarded to the appellant. I so order.

Dated at Arua this 13th day of October 2016.

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Stephen Mubiru
Judge