

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0017 OF 2016
(Arising from Adjumani Grade One Magistrate’s Court Civil Suit No. 0041 of 2015)

5

DIMA DOMNIC PORO **APPELLANT**

VERSUS

10 **1. INYANI GODFREY }
2. APIKU MARTIN } RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

15

The appellant sued the respondents jointly and severally for recovery of land, general damages for trespass to land, a permanent injunction and costs. His claim was that he is the customary owner of approximately one acre of land situate at Mireyi Central village, Illinyi Parish, Ofua sub-county, Adjumani District. Sometime during the year 1990 while he was away teaching at
20 Openzizi Primary School, he was notified by his family that the first respondent had deposited building material on the land and was preparing to construct a building on the land. The matter was taken before the L.C1. and the elders who in a joint meeting which resolved the dispute in the appellant's favour although the first respondent had pleaded that it is the second respondent who had permitted him to construct on the land. The respondents having refused to vacate the
25 land, the appellant filed a case at the sub-county court which too decided in his favour. Execution of the resultant judgment was reversed when the respondents involved the police.

In similarly worded and structured written statements of defence filed separately, the respondents refuted the claim made against them by the appellant. They contended that they acquired the land
30 in dispute during 1960. The second respondent constructed the first commercial building on the land in 1970 without any protest from the appellant, but the building collapsed during the 1979

war. They both have crops, trees and graves of deceased relatives on the land. In 1990, the second respondent constructed a new commercial building on the land. When he the L.C.III Court decided in favour of the appellant, the second respondent appealed the decision before the Chief Magistrate's Court of Moyo. They subsequently filed a joint amended written statement of
5 defence in which the maintained the same position. It is after their return from exile in 1986 and repossession of the land that the appellant began interfering with their possession in 2012. Their appeal to the Chief Magistrate's Court of Moyo was decided in their favour when that court set aside the decision of the L.C.II Court.

10 When the suit came up for hearing, counsel for the respondents raised two preliminary objections; first that the appellant did not have *locus standi* to sue in respect of property forming part of the estate of a deceased person yet he had no letters of administrations, and secondly contending that the suit was barred by limitation in so far as has he had not take any action against the respondents despite of the acts he complains of having taken place in 1990. Counsel
15 for the appellant responded that by virtue of the Supreme Court Decision in *Israel Kabwa v. Martin Banoba, S.C. Civil Appeal No. 52 of 1995*, a beneficiary to an estate of a deceased person has the capacity to sue. Regarding the belated suit, counsel submitted that the intrusion occurred in 1997 and moreover trespass is a continuing trespass.

20 In his ruling, the trial magistrate held that time had began to run against the appellant in 1990 but since the question as to whether at the material time the appellant was in possession of the land or not, as to form the basis of an action in trespass, this was a question of fact requiring evidence and not determinable as a preliminary point of law. Regarding the issue of *locus standi*, he found that the Supreme Court decision applied to situations where the beneficiary had taken a step
25 towards the acquisition of letters of administration, by way of acquiring a letter of no objection, which was not the case here where the appellant had sued on ground that he was the customary owner of the land in dispute, having acquired it by inheritance. The appellant therefore had no *locus standi* to sue. He dismissed with costs to the respondents.

30 Being dissatisfied with the decision the appellant appeals on the following grounds, namely;

1. The trial magistrate erred in law and fact when she held that the appellant had no *locus standi* to sue without letters of administration.
2. The trial magistrate erred in law and fact when she held that the appellant's suit is time barred.
3. The trial magistrate erred in law and fact when she held that the actions taken by the appellant to stop the limitation period from running against him were not actions in law.

10

Submitting in support of the appeal, counsel for the appellant Mr. Bundu Richard argued that The trial magistrate erred on the issue of locus. The appellant had *locus standi* since he sued as beneficiary of the estate of his late father. He is the biological son and heir to the deceased as per paragraph 5 (a) of the plaint. In *Israel Kabwa v. Martin Banobwa S.C C.A. No. 52 of 1997* it was held that a beneficiary of an intestate does not need letters of administration.

15

On the second and third grounds, he submitted that the cause of action had two alternative claims. In the plaint it was indicated that it arose in the 1990s, the annexure indicated it arose in 1997 where the respondents trespassed on the suit by construction of houses. Paras 5 (b) and (c) of the plaint, and a complaint was lodged before the LC letter dated 26th march 1997. The respondents were invited for a hearing. Annexure "B" dated 14th April 1997. The annexure indicates steps taken. The suit was then filed. The decision is wrong on limitation. Limitation for recovery of land because the L.C.1 Court had jurisdiction. The Resistance Council Statue of 1986, that was repealed later and then finally in 2006. Under both laws the LCs in 1997 had jurisdiction. Timely action was taken before the twelve years elapsed. The proceedings in the L.C ended in 2012 and that is when time began to run once again an action filed three years after is within time. The action was not time barred.

25

The action of trespass to land was mentioned. The appellant pleaded possession, unlawful entry and damage. In paragraph 5 (b) he pleaded possession and read together with the annexure to the plaint, especially the sketch, constitutes an action in trespass. Trespass is a continuous tort, each

30

day the trespasser remains on the land there is trespass and therefore the issue of limitation does not arise. The trial magistrate agreed with the respondents on basis of the *Rubaramira Case, Cons. Pet. 1 of 2006* and the decision is not about the L.C.1s and IIs. It had nothing to do with L.C.IIIIs. It referred only to L.C.1 and L.C.II. It had nothing to do with the LC.IIIIs it declared the law from the date of 2001 and had nothing to do with the actions of L.C.s prior to 2005. He concluded that the appeal should therefore be allowed, with orders setting aside that the decision of the Grade One Magistrate and re-instating the suit for hearing inter parties, and that the costs of the appeal as well be awarded to the appellant.

10 In response, counsel for the respondents Mr. Ahmed Kassim submitted that although the facts and circumstances in the Supreme Court decision of *Rubaramira Case* are different from the one at hand, in that case, s. 191 of *The succession Act* was found to be inapplicable because the litigant was protecting his own interests under a customary tenure. In the instant case there is nothing to show that the appellant was in possession. The beneficiary must also have personal interest. The plaintiff in that case had a certificate of no objection, he had taken some steps to protect the estate. In the decision of Justice Stephen Musota in *Solo David and Mutoto Moses v. Bagali Abdu and Tukei Anthony, H. C. Application No. 27 2009* arising from Mbale Civil suit No. 33 of 2008, he said it was imperative that a person who has interest in an estate takes steps to protect the estate even before grant. A grant validates all intermediate actions relating to the estate. Here there is no evidence that he took any steps towards acquisition of a grant. The requirement of a grant is intended to prevent multiple persons filing suits in respect of estates of intestates. The applicant lacked *locus standi* in this suit.

On the issue of limitation, he submitted that it is clearly pleaded by the appellants in para 5 (b) that the cause of action accrued in the 1990s and it was for recovery of land disguised as trespass. S. 5 of *The limitation Act*, actions for recovery of land is twelve years. The annexure to the plaint is irrelevant since the proceedings were declared a nullity by the Chief Magistrate of Moyo on 4th May 2015. This was before the suit was filed in September 2015. The trial court mentioned L.C.IIIIs on ground that its decision arose from the proceedings of courts which were non-existent at the time. They ceased to have jurisdiction. The *Ruranga decision* was properly applied. Section 5 has been applied in *Ssemusanmbwa James v. Muklira Rebecca, [1992 -93]*

HCB 177 and *Kintu Nambalu v. Ephraim Kamila [1975] HCB 222*, a suit for a claim of right to land cannot be instituted after the expiration of 12 years from the date the right of action accrued. In *F.X Miramago v. AG [1979] HCB 24*, it was held that the period of limitation begins to run as against the plaintiff from the time the cause of action accrued until when the suit is actually filed.

5 The action should be before an appropriate forum. If it is before such a forum the action should be revived. It was filed in a period of over twenty years after accrual of the cause of action. The action is therefore time barred.

On the issue of possession, he submitted that at common law only a person in possession has capacity to sue in trespass. This was applied in *Nakagiri Nakabega and two others v. Masaka District Growers [1985] HCB 38*, Justice Manyindo stated that only a party in possession is entitled to sue for trespass. The amended plaintiff shows the appellant has never been in possession of the land and therefore had no capacity to sue for trespass. Possession cannot be construed from the pleadings but should be pleaded specifically. The half acre in dispute is entirely in possession of the respondent to-date. The appeal should therefore be dismissed with costs to the respondents.

In reply, counsel for the appellant submitted that the distinction of the case of *Ruranga* on beneficiaries is inappropriate. By virtue of that status alone, one can sue. The comments made by court on steps taken towards acquisition of letters of administration were obiter. *Locus standi* is not rooted in having taken steps but by virtue of status. On possession, the plaintiff discloses it. The *Ruranga* decision which was cited by the advocate for the respondents did not affect the actions of LCs prior to 2005.

25 This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236* thus;

30 It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the

fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences
5 and conclusions in order to come to its own decision on issues of fact as well as of law and 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
10 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. In particular this court is not bound necessarily to follow the trial magistrate'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 demeanour of a witness is inconsistent with the evidence
15 in the case generally.

The first ground of appeal raises the issue as to whether a beneficiary of an estate of a deceased intestate has *locus standi* to sue in respect of that estate before acquisition of a grant of letters of administration. Firstly, the issue of *locus standi* is a pure point of law that can properly be raised
20 as a preliminary objection. In determining such a point, the court is perfectly entitled to look at the pleadings and other relevant matter in its records (see *Mukisa Biscuit v. West End Distributors* [1969] EA 696 and *Omondi v. National Bank of Kenya Ltd and others*, [2001] 1 EA 177). The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to
25 appear or be heard in a specified proceeding. (see *Njau and others v. City Council of Nairobi* [1976–1985] 1 EA 397 at 407). To say that a person has no *locus standi* means the person cannot be heard, even on whether or not he has a case worth listening to.

It is trite that save in public interest litigation or except where the law expressly states otherwise,
30 such as article 50 (2) of *The Constitution of the Republic of Uganda, 1995* which confers on any person or organisation the right to bring an action against the violation of another person's or

group's human rights, for any person to otherwise have *locus standi*, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one in the subject matter of the suit; the interest must not be too far removed (or remote); the interest must be actual, not abstract or academic; and the
5 interest must be current, not hypothetical. The requirement of sufficient interest is an important safe-guard to prevent having "busy-bodies" in litigation, with misguided or trivial complaints. If the requirement did not exist, the courts would be flooded and persons harassed by irresponsible suits.

10

When considering a similar issue before, in *Magbwi Erikulano v. MTN (U) Limited and another, H. C. Civil Appeal No. 27 of 2012*, I expressed the view, which I still hold, that the provisions of section 191 of *The Succession Act* were never meant to abolish customary inheritance of land or proscribe the enforcement of proprietary rights so accruing under that legal regime. According to
15 section 14 (2) (b) (ii) of *The Judicature Act*, the jurisdiction of the High Court is to be exercised subject to any written law and insofar as the written law does not extend or apply, in conformity with any established and current custom or usage. At the same time, section 15 (1) of that Act confers on the High Court the right to observe or enforce the observance of, and not to deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice,
20 equity and good conscience and is not incompatible either directly or by necessary implication with any written law. Similar provisions are found in section 10 of *The Magistrates Courts Act*.

By those provisions, customary law and common law are placed on equal footing, with both systems being subordinate to the Constitution and any statutory law. By effect, these provisions
25 allow for legal pluralism, being the recognition within any society that more than one legal system exists to govern the society and to maintain the social order, but without the guarantee that each system will be treated equally. Customary laws and institutions are not completely eliminated although their reach is greatly diminished as their application is relegated to instances where the formal, state-sanctioned laws permit.

30

Although, their role has been significantly diminished, customary laws and institutions continue to play a significant role in the lives of large segments of the population in Uganda, in matters that impact greatly on their day-to-day lives, such as inheritance to land. Significantly, for large segments of the rural population, customary laws and institutions are the only available means of acquisitions of land. Therefore although section 1 of *The Succession Act, Cap 162* stipulates that except as provided by the “Act, or by any other law for the time being in force,” the provisions in the Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession, and despite the fact that this Act sought to provide a uniform testate and intestate succession law that is applicable throughout Uganda, it could never have been the intention of Parliament to abolish customary law of inheritance. This view is further supported by the fact that section 2 (1) of *The Succession Act (Exemption) Order*, Statutory Instrument 139-3 made under the provisions of section 334 of *The Succession Act*, which provided that all Africans of Uganda were exempted from the operation of the Act (see also for comparison *Benjawa Jembe v. Priscilla Nyondo (1912)*, 4 EACA 160, 161 and *Miney Frances v. Samuel Bartholomew Kuri as Administrator of the Estate of Samuel Nelson Bartholomew deceased (1951)*, 24 KLR 1). The phrase “or by any other law for the time being in force” should therefore be interpreted to include existing custom, which is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with *The Succession Act* (see also *The Administrator General v. George Mwesigwa Sharp C. A. Civil Appeal No. 6 of 1997*).

20

The fact that the Act recognises and makes provision for “customary heirs” as persons recognised by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person and thus entitled to share in the property of the deceased as such, notwithstanding that in *Law Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions Nos. 13 of 2005 and 5 of 2006*, it was held that section 27 of *The Succession Act* is inconsistent with and contravenes Articles 21 (1) (2) (3) 31, 33(6) of *The Constitution of the Republic of Uganda, 1995* and is thus null and void for being discriminatory in so far as it does not provide for equal treatment in the division of property of intestate of male and female, it creates room for a liberal and harmonious application of both the legislative and customary law regimes in matters of intestate succession to land by the enforcement of customary inheritance practices which are not incompatible with the constitutional guarantee of equality. Customary

30

law in this context influences the application and implementation of legal rules regarding rights to land of a deceased intestate.

On the other hand, Article 37 of *The Constitution of the Republic of Uganda, 1995*, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. Moreover, Article 247 of *The Constitution of the Republic of Uganda, 1995* requires courts to construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution bearing in mind as well that Article 126 (1) thereof too requires such application to be in conformity with law and with the values, norms and aspirations of the people. Customary laws and protocols are central to the very identity of many local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters.

Customary practices of inheritance impact directly on the right to culture (of course excluding rules which treat people unequally or which limit other rights in a way which is unreasonable and goes against the spirit of the rest of the fundamental rights). In many traditional communities in a rural setting, a majority of the people identify with customary laws of inheritance and conduct their lives in conformity with them. When the determination of rights in land, which in the lifetime of the deceased were governed by local customary rules generally regulating transactions in such land, individual, household, communal and traditional institutional ownership, use, management and occupation thereof, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land, and suddenly upon death the rights of successors to the land are instead considered in accordance with the strict application of provisions in legislative enactments, such strict application of the legislative regime creates deficiencies in inheritance rights resulting from the non-recognition of those customary inheritance practices. The crucial consequence of such strict

application is that it creates tensions between the legal and customary transmission of rights in land, in respect of land governed by customary law.

5 In the rural traditional community setting, interwoven into all interactions between family and community members are the dual concepts of shame and respect. Shame and respect create the parameters for interactions and create the framework for customary law. One reason that customary law is more often used than written law in relation to family and community relations is that it embodies the notions of shame and respect. Where conflicts exist between customary law and written law, customary law generally prevails in the villages because written law often
10 fails to reflect the reality of the villagers' lives. Enactments which disregard the value and strength of these cultural norms are barely embraced. Without an understanding of these fundamental norms of behaviour, such enactments and the decisions based on them quickly become irrelevant. In the result, legal rules do not automatically change or override customary law. Rather, legal rules support change and the desire for change, but real change only occurs
15 when it is no longer shameful or disrespectful to behave in the manner mandated by the legal rule. The better option therefore is to make determinations of transmission of rights to land held customarily within a framework of interdependence between customary law and statutory law rather than exclusively on the basis of statutory law.

20 The struggle of maintaining customary law as a legal system while adhering to the expectations of statutory law and developments in the modern world reflects another battle: that between an idyllic world and the reality of traditional societies. For example in the instant case, section 191 of *The Succession Act* provides that 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
25 been granted by a court of competent jurisdiction. These formal conscripts of ownership and inheritance stand in stark contrast to the patterns of descent-based succession and family property arrangements in the countryside characterised by local normative conventions. It may be appropriate for the court to adopt a narrow, restrictive interpretation that limits the application of this provision to disputes involving distribution of an estate of a deceased person among
30 persons claiming entitlement thereto, where the dispute is over who the beneficiaries are and their shares, rather than in resolving disputes involving third parties to the estate of the deceased

where a less restrictive definition is more appropriate if the ideal of justice administered in conformity with law and with the values, norms and aspirations of the people is to be realised.

5 The appellant claims ownership of the land in dispute through customary inheritance against a person alleged to have encroached upon and taken over part of that estate. To resolve their dispute by reference to the fact that the appellant has never taken out letters of administration as required by section 191 of *The Succession Act* and applying the narrow restrictive interpretation of that section leads inevitably to a decision based on technicality, which would in the circumstances of this case be a failure on the part of the court to deliver and administer
10 substantive justice in what for all intents and purposes would be undue regard to technicalities in the law of succession. It is better for the resolution of their dispute that the claim to customary inheritance be resolved by harmonious application of the relevant customary law and statutory law principles rather than exclusively on the basis of statutory law.

15 Since the requirement of sufficient interest in the subject matter of litigation is the determinant of the existence or otherwise of *locus standi*, with the consequence that a person without sufficient interest in the subject matter of litigation cannot be heard, then section 191 of *The Succession Act* is procedural and merely enabling, rather than a jurisdictional provision. It is not intended to disenfranchise beneficiaries as persons lacking in *locus standi* but it is rather designed;- to have
20 the estate administered under the guidance and protection of the Court; to facilitate the determination of the persons entitled to share in the estate and the extent of the shares to which they are entitled; to facilitate collection of debts by identifiable persons who succeed to the estate of the deceased creditor; to protect debtors against rival claimants and provide an identifiable person who can give them complete discharge of the debts by requiring that moneys forming part
25 of the estate are paid to a person who has been considered suitable for the grant; and to prevent the courts from being flooded with litigation from multiple beneficiaries coming one by one. Section 191 of *The Succession Act* only acts as a bar to the establishment of rights under intestacy unless letters of administration have been granted. Because does not concern who are to be the beneficiaries but the appointments of administrators, that provision deals with procedure and not
30 with devolution of property, which is a matter of personal law, but rather with the transmission

of property which is a matter of general law, and forms part of the machinery under the general law for the transmission of the property of the deceased.

That being the case, by virtue of their status only, beneficiaries of an intestate cannot be said to
5 lack sufficient interest in the subject matter, at least as persons who have suffered a legal grievance, where the issue at hand is an alleged intermeddling or deprivation of any part of the estate by third parties, or as persons directly and wrongfully deprived or likely to be deprived of their legal interest in the estate or whose title to the estate is wrongfully affected, especially when
10 persons adversely affected by the impugned conduct of the defendant / respondent. The beneficiaries as interested persons, either directly or through their customary heir or legal representative, are the best litigants since their interest in the estate ensures that they present the case as well as it can be presented. Disputes between third parties and beneficiaries of an intestate cannot be side-stepped by clinging to a narrow technical view of *locus standi*.

15

It has been argued that under section 191 of *The Succession Act*, a person can only sue on behalf of the estate of a deceased person, if he or she has obtained letters of administration. This argument sounds attractive in light of sections 180 and 192 of *The Succession Act*, by virtue of which an administrator has no title to the property of a deceased intestate until he or she obtains
20 letters of administration, and the moment such letters are granted, all rights belonging to the intestate vest in the administrator as effectively as if administration had been granted at the moment after his death. However, until this happens, the law cannot tolerate an interval between the testator's death and the vesting of the property. Rights in property cannot, even for a fraction of a second, remain in abeyance. It is the reason why, save for intermediate acts tending to the
25 diminution or damage of the intestate's estate, section 192 deems a grant to operate "as if the administration has been granted at the moment after his or her death." The title of the administrator, though it cannot exist until the grant of administration, relates back to the time of the death of the person in respect of whose estate the administration has been granted.

30 Nobody can dispute the fact that letters of administration, if granted to an administrator, are advantageous from many points of view, but that of itself is not enough to deprive beneficiaries

of an intestate of *locus standi* in taking legal action intended to protect and preserve the estate before grant. On closer examination of the plain phraseology of section 191 of *The Succession Act*, it would appear that the only category of suits whose pursuit necessitates prior issuance of a grant of letters of administration are suits involving establishment of a "right to any part of the property of a person who has died intestate," in light of the fact that its primary intention is to have the estate administered under the guidance and protection of the Court. From that perspective, this provision is directed to persons who "claim a share" in the estate, i.e. persons claiming to inherit or succeed to the property of a person intestate, upon his or her death, where the dispute concerns the apportionment of the estate or any part thereof or disputes as to the persons to whom or by whom debts are payable. This is because a beneficiary cannot be said to have any well-defined share in the estate at any moment upon death of the intestate, until such estate is distributed. But even in those types of claims in which a grant is required, there well may be exceptional situations where a suit ought to proceed before the grant is obtained, save that no decree should be passed before a grant has been produced.

15

As a matter of principle, a beneficiary has standing to sue in his or her own right provided the interests which such beneficiary seeks to protect are germane to the estate and the claim nor the relief sought requires individual participation of the rest of the beneficiaries. The scope of section 191 of *The Succession Act* is limited to an action in which a party seeks to establish a right to any part of the property of the intestate. It does not deal with recovery, preservation and protection of the estate. Absence of a prior grant would not debar the maintenance of a suit whose purpose is to claim, preserve and protect the estate of the deceased, wherever it may be lying. It appears to me that there is no such impediment on the rights of beneficiaries.

25 Whereas section 180 of *The Succession Act* provides that an administrator of a deceased person is his or her legal representative for all purposes, suggesting therefore that a legal representative is a person to whom a grant of letters of administration has been made under *The Succession Act*, section 2 (k) of *The Civil Procedure Act* on the other hand defines a "Legal Representative" as a person who in law represents the estate of a deceased person. The latter definition is inclusive in character and its scope is wide. It is not confined to administrators but includes persons who may or may not be the administrator of the estate, representing the estate of the deceased person. It

30

includes persons who would be entitled to succeed to the personal or real estate of the deceased. It should also be noted that where a judgment debtor dies before the decree has been fully satisfied, it is possible to execute the decree against any person who has intermeddled with the estate of the deceased (see section 37 (1) of *The Civil procedure Act*). It therefore is not a surprise that in *Panayotis Nicolaus Catravas v. Khanubhai Mohamed Ali Harji Bhanji* [1957] EA 234 the Court while dealing with a provision similar to section 2 (k) in the Tanzania Civil Procedure Code, it stated: "under section 2 (11) of *The code of Civil Procedure* "Legal representative" means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. The expression therefore is not limited to administrators but includes persons, who without title as administrator, are *de facto* possessors of the estate of the deceased or otherwise, depending on the context, in law regarded as representing the estate of a deceased.

For the foregoing reasons, when the Supreme Court in its decision in the case of *Israel Kabwa v. Martin Banoba Musiga*, S. C. Civil Appeal No. 52 of 1995 upheld the view that the respondent's *locus standi*, founded only on his being the heir and son of his late father was valid, it must be understood to have recognised that the respondent being entitled as beneficiary to more than three quarters of the estate of his late father, and that that fact alone created an interest in the estate that conferred upon him *locus standi* to sue as a way of defending his interest, even without a prior grant of letters of administration. The appellant in that case had been sued by the respondent who sought to recover land that had been purchased by his deceased father from that of the appellant, before his death. Therefore the trial magistrate misconstrued the decision when she found that its basis was the fact that the respondent had obtained a certificate of no objection.

In the instant case, the appellant claimed the land in dispute by customary inheritance, just as it was in the case cited to the trial magistrate. Had she properly directed herself as regards that binding authority, the trial magistrate would not have distinguished it on the grounds that she did. Even without a prior grant of letters of administration, the appellant in the case before her had sufficient interest in the land in dispute to confer upon him *locus standi* to protect his claimed interest in the land by suit. The first ground of appeal therefore succeeds.

The second and third grounds of appeal will be considered concurrently since they both relate to the issue of limitation. In paragraph 4 of the plaint, the appellant stated his claim as "trespass to land, declaration of ownership and / or vacant possession, permanent injunction to restrain the defendants and their agents from trespassing..." By way of the salient factual background to his claim, he stated that;- he is the lawful customary owner of the land in dispute having inherited the same from his father; he was away teaching at Openzinzi Primary School during the 1990s when the defendants encroached on the land; the defendants ignored interventions by the L.Cs and the elders; he sued the defendants before the L.C.III Court which decided in his favour and still the defendants refused to vacate the land, hence the suit. Counsel for the appellants contends that the claim both in trespass to land as well as for recovery of land.

Whereas an action for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of the land, an action of trespass to land as a claim in tort is perceived as a wrong against possession, not ownership, of the land. In the latter case only the person who has exclusive possession or an immediate right to possession of the land in question can sue.

Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). It 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. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any right to enter into plaintiff's land.

An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of his property. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful

interference. An action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of an action for trespass is violation of possession, not challenge to title. To sustain an action for trespass, the plaintiff must be in actual physical possession.

5

The fact of possession for purposes of an action in trespass to land is proved by evidence establishing physical control over the land by way of sufficient steps taken to deny others from accessing the land. Actual possession therefore is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others.

10

When the claim is in the nature of the tort of trespass to land rather than an action for recovery of land, it will be deemed a continuous tort and the continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the Law of Limitation.

15

According to Order 7 rule 1 (e) of *The Civil procedure Rules*, a plaintiff must disclose the facts constituting the cause of action and when it arose. Consequently, by virtue of rule 11 (a) and (d) thereof, a plaintiff will be rejected where it does not disclose a cause of action or where the suit appears from the statement in the plaintiff to be barred by any law. The purpose behind the requirement that the plaintiff should disclose the material facts and when the cause of action arose is to help the court in ascertaining whether the plaintiff discloses the cause of action and whether the suit is not barred by limitation.

25

In order to disclose a cause of action of the tort of trespass to land, the plaintiff had to plead facts to show that; (a) he was in possession at the time of the entry complained of; (b) there was an unlawful or unauthorised entry by the respondents; and (c) the entry occasioned him damage. The appellant pleaded in paragraph 5 (b) of the plaintiff that at the time of the entry complained of, he was a teacher at Openzizi Primary School and that it is members of his family who took steps to stop the entry. Actual possession, also sometimes called possession in fact, is used to describe

30

immediate physical contact. It means that appellant should have had immediate and direct physical control over the land. The facts pleaded in the plaint do not disclose that the appellant was in such possession at the material time and if so, when his possession began. He asserts title by way of inheritance rather than actual physical possession of the land at the time of entry, which as well he did not plead with any sufficient particularity, having chosen only to state that it occurred sometime during the 1990s. Although he insinuates that the respondents' entry was unauthorised, since he did not plead that he was in possession of the land in question on the date of encroachment, then no question arises of the tort of trespass by the respondents over the land in question. The trial court would consequently be justified by the provisions of Order 7 rule 11 (a) of *The Civil procedure Rules* to find that the plaint did not disclose a cause of action of the tort of trespass to land.

As regards an action for recovery of land, this is maintained by an out-of-possession property owner who then may on the basis of constructive possession, even if the person has no physical contact with the land, recover for an injury to the land by a trespasser which damages the ownership interest. To plead trespass as the basis of this cause of action, the plaintiff must have either be in actual physical possession or constructive possession, usually through holding legal title. There must have been either an actual possession by the plaintiff at the time when the trespass was committed, either by himself or by his authorised representative, or a constructive possession with the lands unoccupied and no adverse possession. In essence, an action for recovery of land is founded on a special form of trespass based upon a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of land could sue for the specific restitution of that land in an action of ejectment. An action for the recovery of land is the modern equivalent of the old action of ejectment (see *Bramwell v. Bramwell*, [1942] 1 K.B. 370). It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

In paragraphs 5 (a) and (b) of the plaint the appellant pleaded that (on an unspecified date) he inherited the land in dispute from his father Poro and while he was away teaching at Openzizi Primary School during the 1990s, the respondents wrongfully entered onto and occupied his

land. Therefore he was not a person in possession of the time of the intrusion complained of. The nature of rights the appellant sought to enforce in the action were of a proprietary nature rather than of a possessory nature, hence this was for all intents and purposes an action for recovery of land, of which he contended he had been unlawfully deprived by the respondents. It would not
5 have mattered had he named the action trespass to land instead of recovery of land. The court will consider the essence of the action rather than the nomenclature adopted by the parties. The essence of his claim was recovery of land and not the tort of trespass to land.

With the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass
10 for which an action lays for each day that passes (see *Konskier v. Goodman Ltd [1928] 1 KB 421*), subject only to recovery of damages for the period falling within the upper limit of six years, provided for by section 3 (1) (a) of *The Limitation Act*, reckoning backwards from the time action is initiated, if the unlawful possession has continued for more than six years (see *Polyfibre Ltd v. Matovu Paul and others, H.C. Civil Suit No. 412 of 2010; Justine E.M.N Lutaaya v.*
15 *Sterling Civil Engineering Company Ltd. S. C. Civil Appeal No. 11 of 2002 and A.K.P.M. Lutaaya v. Uganda Posts and Telecommunications Corporation, (1994) KALR 372*). In such event the Plaintiff can recover for such portion of the tort as lays within the time allotted by the statute of Limitation although the first commission of the tort occurred outside the period prescribed by the statute of limitation (see *Winfield and Jolowicz on Tort 12th Ed. Page 649*).

20

However, with actions for recovery of land, there is a fixed limitation period stipulated by section 5 of *The Limitation Act*, provides that;

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
25 first accrued to some person through whom he or she claims, to that person.

This limitation 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 rights. Furthermore, Section 11 (1) of the same Act provides that;

30 No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter

in this section referred to as “adverse possession”), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land. (Emphasis added).

5

According to section 6 of the same Act, “the right of action is deemed to have accrued on the date of the dispossession.” A cause of action accrues when the act of adverse possession occurs. In *F.X. Miramago v. Attorney General [1979] HCB 24*, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff.

In paragraph 5 (b) of the plaint, the appellant pleaded that the trespass occurred during the 1990s and he was duly informed by members of his family. He therefore became aware of the wrongful entry onto the land in dispute during or around that time. When the suit was eventually filed as it was on 6th January 2015, approximately 25 years had elapsed. The suit for recovery of land was clearly out of time. It is by contended counsel for the appellant that when the

If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. This disability though must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*, which was not done in the instant case. A litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim (see *Iga v. Makerere University [1972] EA 65*). It is trite law that a plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law.

The appellant contends that he took timely action by filing a timely suit before the Mirieyi village L.C.1 Court sometime during March 1997. The law in force at the time was *The Resistance Committees (Judicial Powers) Statute, 1 of 1988*. According to section 10 thereof, suits would be instituted by stating to the chairperson orally or in writing the nature of the claim

against the defendant and the relief sought by the claimant. Every such claim had to be signed by the claimant, but if made orally it had to be reduced into writing by the chairperson or a person appointed by him or her for that purpose, and when so reduced in writing to be read to the claimant and to be signed by the claimant and countersigned by the chairperson. Section 11
5 required service of summons on the defendant and section 17 the maintenance of a record of proceedings by such courts.

The appellant therefore would be expected to adduce documentary proof of his having filed such a suit, which documentary evidence he never furnished. Attached to the plaint as annexures "A"
10 to "C" are correspondences from the said L.C.1; - summoning the respondents to meetings intended to resolve the dispute (dated 26th March, 1997), then referring the dispute to the Magistrate in Adjumani (dated 14th April, 1997) and thereafter notifying the respondents that the attempt to resolve the dispute would be revived by the L.C.1 on 23rd August, 2004, (dated 2nd August, 2004). There is no evidence attached, of; - a formal statement of the nature of the claim
15 made against the respondents and the relief sought by the appellant, signed by the appellant and countersigned by the chairperson. Furthermore, there is no record of proceedings, if any were conducted by that court. Although the dispute was prima facie triable by the L.C. 1 Court, there is no evidence whatsoever therefore that the respondent ever filed a suit before that court.

20 Instead, the appellant attached as an annexure to the plaint, the record of proceedings and resultant judgment of the L.C.III Court of Ofua Sub-county, dated 13th March, 2012 (annexure "E"). The record of proceedings reveals that the L.C.III Court proceeded as a court of first instance. It began recording *viva voce* witness testimony on 14th February, 2012 which included statements from; Matthias Pon, Apiku Martine, Drani Peter, and Dima Domnic. It continued with
25 the hearing on 13th March, 2012 and delivered its decision immediately thereafter.

At the time of these proceedings, the law in force was *The Local Council Courts Act, 2006* which under section 11 (1) provided as follows;

(1) Every suit shall be instituted in the first instance in a village local council
30 court if that court has jurisdiction in the matter.....”

The implication of that provision was that the proceedings ought to have begun at the L.C.1 Court level. However, section 76A of *The Land Act* (introduced by section 30 of *The Land (Amendment) Act, 2004*), divested L.C. I Courts of primary jurisdiction over disputes in land, providing instead that “the Parish or Ward Executive Committee Courts shall be the courts of first instance in respect of land disputes.” The impact of that amendment was considered in *Busingye Jamia v. Mwebaze Abdu and another, H. C. Civil Revision No. 33 of 2011*, which was cited with approval by the Court of Appeal in *Nalongo Burashe v. Kekitiibwa, C. A. Civil Appeal No. 89 of 2011* where it was held that as a result of that amendment, the L.C.II Court had original jurisdiction to hear and determine disputes over land.

10

According to section 32 (2) (b) of *The Local Council Courts Act, 2006*, appeals lay from the judgment and orders of a Parish Local Council Court, to a Sub-county Council Court. Although under section 34 of the Act, in exercise of its appellate jurisdiction an L.C.III Court had the power, at the instance of the parties or on its own motion, to call witnesses and receive additional evidence as it may in its discretion determine, or to hear the case afresh, this could only be done in exercise of its appellate jurisdiction. Since there is no evidence of proceedings before any L.C.II Court prior to the intervention of the Ofua Sub-county L.C.111 Court, the proceedings in that court were not in exercise of its appellate jurisdiction but it instead proceeded as a court of first instance, which jurisdiction it did not have.

20

It is trite law that the jurisdiction of courts is a creature of statute. A court cannot exercise a jurisdiction that is not conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a nullity *ab initio*. It is settled law that a judgment of a court without jurisdiction is a nullity and a person affected by it is entitled to have it set aside *ex debito jedititiae* (See *Karoli Mubiru and 21 Others v. Edmond Kayiwa [1979] HCB 212; Peter Mugoya v. James Gidudu and another [1991] HCB 63*). Where there has not been a trial by a court of first instance, all subsequent proceedings by an appellate court lack the necessary legal foundation and legitimacy and cannot stand on their own. The decision of the magistrate in the court below in disregarding those proceedings as evidence of a step taken within the period of limitation cannot therefore be assailed.

30

It is further argued that the trial magistrate misconstrued and misapplied the decision in *Rubaramira Ruranga v. Electoral Commission and Another, Constitutional Petition No. 21 of 2006* to the facts of this case. In that petition, the Constitutional Court held that by virtue of the fact that membership of Local Council 1 is a matter of law and not by choice, conscripting
5 persons into membership of these bodies is contrary to Article 29 (e) of *The Constitution*. Accordingly, section 46 (l) (c) of The Local Governments Act, which stipulates that all persons of eighteen years of age and above residing in a village shall be members of the village council, was declared unconstitutional. Provisions of the law that require election of the executive committees of those bodies under structures that compel people into membership of an
10 organisation were consequently found to be incompatible with Article 38 (2) of *The Constitution*.

The Constitutional Court has the power to declare that statutes which have been in force are unconstitutional and invalid. This function has the potential to create serious problems in unwinding actions taken when the statute was thought to be lawful. It so happens that at the time
15 these provisions were declared unconstitutional, the then existing Local Council One Executive Committees had been constituted under that law. It has nevertheless since been decided, pursuant to that decision, that L.C.I Courts established under that law are incompetent for being illegal (see *Wambewo Simoon v. Mazelele Silvester, H. C. Civil Application No. 128 of 2013* and *Ocitti Bwomono v. Okello Ocen, H. C. Civil Application No. 054 of 2014*). The question of
20 retrospective effect though does not arise in the instant case. The decision in *Rubaramira's case* was delivered on 3rd April, 2007 while that of the L.C.III Court of Ofua Sub-county, now impugned, was delivered five years later on 13th March, 2012. In any event at common law, the role of the court is to discover and declare what the law already is such that judicial decisions as to what the law is apply retrospectively to facts which have already occurred (see *Kleinwort*
25 *Benson v. Lincoln City Council, [1996] 4 All ER 733* and *A v. Governor of Arbour Hill Prison [2006] 4 IR 99*). The trial magistrate therefore cannot be faulted in following that binding precedent when she took the decision she did. The authority of precedent is vertical and lower courts are bound by decisions of higher courts.

30 Two major purposes underlie statutes of limitations; protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and requiring

plaintiffs to diligently pursue their claims. The general rule governing statutes of limitation is that the time for commencing an action continues to tick away so long as the proposed defendant can be sued and a judgment obtained against him or her. However, in an attempt to avoid unjust application of statutes of limitation, where circumstances effectively render timely commencement of an action impossible or virtually impossible, a statute of limitation may be tolled, i.e., its operation temporarily suspended during the pendency of a particular condition specified by statute or judicial decision. Once the condition is lifted, the statute of limitations will continue to run.

10 Save for continuous torts and claims based on contract for the recovery of a debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in it, in which cases there may be fresh accrual of a cause action on basis of acknowledgment or part payment (see section 22 of *The Limitation Act*), a cause of action barred by the statute of limitations may not be revived. Although an equitable estoppel argument based on justifiable reliance of settlement negotiations can, in a proper case, prevent a defendant from relying on a time-barred defence (see *Collins v. Yellow Freight Sys., Inc.*, 590 F. Supp. 1023, 1028 (N.D. Ill. 1984) where it was held that equitable estoppel will only be invoked, however, where a defendant made statements during the course of settlement negotiations which were calculated to lull the plaintiff into inaction and to induce a reasonable belief that the claim would be settled without suit), generally speaking, not even time spent negotiating a settlement will stop the clock of limitation from turning. It may only be stopped where the negotiations are combined with promises or actions that induce the relying party not to file a suit. Then the opposing party may be estopped from claiming a statute of limitations defence.

25 In the instant case, the appellant contends that the steps he took of filing proceedings, which turned out to be incompetent for having been filed in a wrong forum, should be discounted so as to revive the cause of action after expiry of the period of limitation. By this argument, he seeks to have the eighteen (18) year period between 1997 - 2015 discounted. Unfortunately for the appellant, circumstances of this nature are not one of the conditions specified by statute or any judicial decision. It is not clear to me how his decision to file his claim in an incompetent court rendered timely commencement of an action impossible or virtually impossible, when competent

courts and the respondents were available at all material time during that period. Time ceases to run only when the plaintiff commences legal proceedings before a court of competent jurisdiction in respect of the cause of action in question (see *Lefevre v. White* [1990] 1 *Lloyds Rep* 569 and *Alhaji Haruna Kassim t/a cash stores v. Herman Ebert* (1966-69) *NNLR* 75). It is
5 only in such cases that computation of time during the pendency of the action will remain frozen from the filing of the action until it is determined or abates. Even supposing that since annexure "A" to the plaint indicates that by 26th March, 1997 the appellant was aware of the facts giving rise to his cause of action, filing the suit sometime before the L.C.III Court of Ofua Sub-county sometime during February 2012 implies that it was filed in that court fifteen (15) years after the
10 fact, hence still three years outside the period of limitation.

Statutes of limitation are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. A plaintiff who chooses a wrong forum and persists in that forum for over a decade and a half, cannot fit the description of a diligent plaintiff. Once the time period limited
15 by *The Limitation Act* expires, the plaintiff's right of action will be extinguished and become unenforceable against a defendant. It will be referred to as having become statute barred.

Section 16 of *The Limitation Act* provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is
20 extinguished. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. This means that since the appellant, by allowing his right to be extinguished by his inaction, he could not recover the land from the respondents as persons in adverse possession. When his title to the land was extinguished, if it
25 existed at all in the first place, his ownership of the land passed on to the respondents and their adverse possessory right got transformed into ownership by operation of the law.

Statutes of limitation are in their nature strict and inflexible enactments. Their over-riding purpose is *interest reipublicae ut sit finis litium*, i.e. litigation shall be automatically stifled after fixed length of time, irrespective of the merits of the particular case. "...the statute of limitations
30 is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on

his strict rights,” (see *Hilton v. Sutton Steam Laundry* [1946] 1 KB 61 at 81). The trial magistrate therefore was right in finding the appellant’s action to be time barred. Consequently, grounds two and three of the appeal fail.

- 5 In the final result, since the appellant has succeeded on only one ground and failed on two grounds which constitute the gravamen of the case, the appeal stands dismissed. The costs of this appeal and those of the trial are awarded to the appellants

Dated at Arua this 30th day of November, 2017.

10

.....
Stephen Mubiru
Judge
30th November, 2017