The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Civil Appeal No. 001 of 2022

(Arising from Katakwi Civil Suit No. 13 of 2016)

1. Alemu Patrick
2. Ijala Martin :: Appellants

Versus

Ilepot Claudia :: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Judgment

1. Background:

This is an appeal against the judgment and orders of His Worship Owino Paul Abdonson, Magistrate Grade 1 of Katakwi dated 20th December2021 in Katakwi Civil Suit No. 13 of 2016.

The background of this appeal is that Ilepot Claudia, the respondent/plaintiff sued Alemu Patrick and Ijala Martin, appellants/ defendants before the Chief magistrate's court presided by a magistrate grade one for declaratory orders that land measuring approximately 12 gardens situated at Ochorimong village, Katakwi Sub county, Katakwi District belonged to the family of the late Ileper, general damages and costs.

The defendants denied the plaintiffs claim maintaining that they were the lawful and beneficial owners of the suit land having inherited the same from their father one Lemunyang.

The first trial magistrate was His Worship Awachnedi Fred Magistrate Grade One. He was transferred after concluding the hearing of the case. He was replaced by His Worship Owino Paul Abdonson Magistrate Grade One 2021who delivered the judgment in this matter in the favour of the plaintiff /respondent as against the defendants/ appellants.

The defendants were dissatisfied with the decision of the lower court hence this appeal.

2. Grounds of Appeal:

The grounds of the appeal as set out in the Memorandum of appeal are;

a) The learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record as a whole in regards to ownership of the suit land when he relied on hearsay evidence and came to a wrong conclusion that the Respondent is the rightful owner of the suit land.

b) The trial magistrate erred in law and fact when he failed to find that the respondent's suit was barred by limitation.

c) The trial magistrate erred in law and fact when he failed to conduct proper visit of locus

d) The learned trial magistrate erred in law and fact when eh awarded excessive damages of Ten million shillings Uganda shillings only without any justifiable reason.

e) That the decision of the learned trial magistrate occasioned a miscarriage of justice.

3. Duty of the 1st appellate court:

This is the first appeal from the decision of the learned lower trial court magistrate.

The duty of the appellate court has since been well established. It is to scrutinize and re-evaluate all the evidence on record in order to arrive at a fair and just decision. This is the position as was held in ***Baguma Fred***

vs Uganda SCC Appeal No. 7 of 2004 where the Supreme Court of Uganda pointed out that;

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

See also: ***Banco Arab Espanol versus Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998*** and ***Byaruhanga Yozefu vs Kahemura Patrick HCCS No. 19 of 2016.***

The above position in ***Baguma Fred (supra)*** was similarly reechoed in ***Chepteka Samuel vs Mangusho Shadrick Civil Appeal No. 06 of 2016*** with the court while referring to the case of ***Fr. Narsensio Begumisa and Three Others vs Eric Kibebaga SCCA No. 17 of 2002 (unreported)*** went on to reemphasize the duty of a first appellate court that:

> ***"The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st 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 case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses."***

The duty of the 1st appellate thus as laid down above is taken into consideration while handling this appeal.

4. Representation:

In this appeal, the appellants were represented by M/s Okanyum, Namusana & Co Advocates while the respondent was represented by M/s Atigo & Co Advocates. Counsels representing the parties argued this appeal by way of written submissions which are on record. The submissions are considered together with the pleadings, proceedings and judgment of the lower court in addition to the authorities cited in determining this appeal.

5. Submissions and Conclusions of Court:

Before I consider the merits of this appeal, I am obliged to resolve two preliminary points of law raised by counsel for the respondent. The two preliminary objections are considered and determined thus.

a) Whether the appeal is competent before this court?

The 1st preliminary point of law raised was in respect of whether this appeal was competent before this Honourable Court. In arguing this contention, it was submitted that the Appellant lodged a memorandum of appeal on the 17th of January 2022 but served the respondent on the 1st day of March, 2022 without any certified decree, record of proceedings and judgment contrary to the provisions of the law before the filing the appeal which was a defect which goes to the root of the jurisdiction of this court to handle the appeal as the decree appealed against must be filed with the memorandum of appeal because that is what is being appealed against and that in the absence of such a decree, there would be no basis of the appeal.

This assertion by learned counsel for the respondent was grounded on the basis of the decision in the case of ***Mbambu Stella Vs. Monday Nicholas HCCS No. 10 of 2016*** where court stated that: -

"It is a requirement of the law that the documents namely (decree or order and memorandum of appeal) must be filed together when the Appeal is lodged. A decree or order form which an Appeal is lodged must be extracted and filed together with the memorandum of appeal. Failure to do so renders the appeal incompetent."

That in addition to the above, an appellant as was held in the case of ***Onyango Ochola & Others v Hannington Wasswa [1996] HCB 43*** and that of ***Tight Security Ltd Vs Chanis Uganda Insurance Company Ltd & Another Civil Appeal No. 14 of 2014***, needed to formally and specifically request for a certified copy of the proceedings in order to benefit from the exemption of the law under ***Section 79 (2) of the Civil Procedure Act.***

Therefore, according to learned counsel for the respondent, since that there was no evidence on the record of appeal that the Magistrates Court of Katakwi had completed and availed certified copies of proceedings to the Appellant then this appeal should be found incompetent as there was no lodging of it after the lower trial court had availed certified copies of the proceedings and judgment to the appellant.

Accordingly, the respondent invited this court to adopt the holding of Justice Egonda-Ntende in ***James Motoigo t/a Juris Office vs Shell (U) Ltd Miscellaneous Application Number 0068 of 2007*** cited in ***Tiger Securities Ltd (Supra)*** where it was held that the computation of the 30 days prescribed by law for within which to file an appeal can only be calculated from the date the registrar of the court notifies the litigant that the court record to be used for appeal was ready for collection which action entrenches the right to a fair hearing under ***Article 28 (1) of the Constitution*** only if the necessary records were availed by a registrar to the litigant.

While Justice Christopher Madrama ***Tight Securities Ltd (Supra)*** notes that in the Court of Appeal an application for the record of proceedings of the High Court is specifically provided for under the **Judicature (Court of Appeal) Directions** with **Rule 83 (2) of the Judicature (Court of Appeal) Directions** specifically providing that an application for the record of proceedings from the High Court to be made within 30 days from the date of judgment/decree for a party to exclude the period of time necessary for preparation of the record of appeal in the computation of the limitation period of 60 days within which an appeal is to be lodged, there is, however, no similar provision under the Civil Procedure Act and the Civil Procedure Rules governing appeals from the Chief Magistrates Court to the High Court.

From the holding in the two decisions above, it was the contention of counsel for the respondent that the said decisions seem to suggest that the application for a record of proceedings may be necessary meaning that a failure of an appellant from extracting a certified copy of the judgment and record of proceedings from the lower court would prevent a respondent from ably responding to an appeal through submissions.

In respect of this instant appeal, the above conclusion is stated to be so with the respondent is wandering how the appellant could have arrived at the grounds of appeal without first securing the required documents therefore ending up ambushing the respondent with this appeal thus making this appeal fatally defective and that on this basis alone this appeal should be struck out with costs.

In relations to the 2nd preliminary objection, it was submitted for the respondent that the appellants filed their memorandum of appeal using the names of M/s Oyoit & Co. Advocates on the 17th January 2022 with the notice of instructions by the firm and a copy of a memorandum of appeal served on the respondent on the 1st of March 2022. But that,

however, upon parties being given a schedule to file submissions by the Registrar of this Honourable Court on the 3rd of March 2022for which the appellants were to file their submissions on the 17th March 2022, the appellants ended up filing their submissions under the names of M/s Okanyum, Namusana & Co Advocates and served the notice of instructions on the respondent yet they proceeded to make submissions based on the memorandum which had been filed by M/S Oyoit & Co. Advocates.

That this deed constituted two irregularities the non informing of the respondent of the change of advocates from M/s Oyoit & Co. Advocates to that of M/s. Okanyum Namusana & Co. Advocates making the non notice of change of advocates to be irregular.

Secondly, in respect of this point, it was submitted that M/s Okanyum Namusana & Co. Advocates merely just filed their submissions without making any reference or attaching any memorandum of appeal leading to the questioning as to where their submissions were arising from, for while under **Regulation 21 (2) (a) & (b) of the Advocates (Professional Conduct) Regulations SI 267-2,** it is provided for instances where an advocate may act for another, the conduct of M/s Okanyum Namusana & Co. Advocates of hijacking instructions from M/s. Oyoit & Co. Advocates without any due notice of withdrawal of instructions and further a change of advocates for purposes of court and the respondent contravened the duty of advocate as officers of court and was a breach of professional conduct.

On the basis of the two preliminary points of law and objections, it was the respondent's submission that this Honourable Court should subsequently sustain the two points of law raised and after doing so should be pleased to dismiss with costs this appeal.

In response to the preliminary objections raised by the respondent, the appellants through their counsel submitted that the contention by the respondent as raised in the preliminary objections were based on erroneous legal basis for firstly on whether the appeal was competent before this court based on the fact that a naked memorandum was filed without any record of proceedings and judgment which the appellant was appealing against with no formally extracted decree, it was submit for the appellants that the filing of the requirement of having the record of proceedings, judgment and the extraction of decree had long since been held to be not mandatory before an appeal can be filed as was held by the Court of Appeal in ***Banco Arabe Espanol Vs. Bank of Uganda Civil Appeal No. 42 of 1998*** that such a requirement was a mere technicality which the old municipal law had put in the way of intending appellants which was a roadblock intended to prevent intending appellants from having their cases heard on merits.

That such a law was in contravention of **Article 126 (2) of the Constitution** which position was maintained by the Court of Appeal in ***Standard Chartered Bank (U) Ltd Vs Grand Hotel (U) Ltd Civil Appeal No. 13 of 1999.***

Further, it was pointed by counsel for the appellants that when this matter was before the Registrar of this Honourable Court on the 3rd of March 2022 on summons for directions, counsel in personal conduct of this matter was present with the directions agreed by both counsels with counsel for the respondent not raising any request for any document that was not in her possession including the decree.

Therefore, given that fact, counsel for the respondent would be estopped from complaining about what would have been naturally cured during summons for directions hearing leaving the court to proceed to give directions as to the next steps in the disposal of this appeal.

Furthermore, it was submitted that counsel for the respondent was being unnecessarily technical and selective because even before this appeal was filed counsel was already in possession of both the record of proceedings and the judgment from which this appeal arises as these very contended documents formed the basis of the taxation hearing notice dated 24th of January 2022 extracted by M/s Atigo & Co. Advocates, who indeed counsel in personal conduct of opposing this appeal.

Meaning that all the relevant documents necessary to enable a reply to the appeal were already in the possession of the respondent and as such there was no ambush of the respondent at all.

Nonetheless, it was argued, even if that was a requirement, then judicial notice of the fact that the Respondent was already in possession of the decree since she had been attached to a taxation notice and even her counsel actively participated on the summons for direction before the Registrar with no further request for any document made resulting in both parties and counsels agreeing on a schedule to file final submissions meaning that both parties had acquiesced to the finality that the appeal should proceed as prosecuted.

Arising from the above facts, it was thus concluded by counsel for the appellants that since the extraction of the decree for instituting an appeal was no longer mandatory as this requirement had been over taken by clear provisions of Article 126 (2)(E) of The Constitution then this allegation had been brought in to subvert the cause of justice and as such should be dismissed with costs.

On the second of preliminary objection raised which was in regard to the legal representation of appellants, it was submitted that it was true that the memorandum of appeal in respect of this appeal had been filed on behalf of the appellants by M/s Oyoit & Co. Advocates on 17th January

2022 and that indeed final submissions intended to dispose of this appeal was filed under M/s Okanyum Namusana & Co. Advocates.

According counsel for the appellants, this act was not an anomaly at all for the notice of change of advocates representing the appellants was served onto the respondent and that there was no law which bound clients as to who should represent them meaning that even though the appellants were previously represented by M/s Isodo & Co. Advocates in the lower court and then later Oyoit & CO. Advocates in the appellate court which filed the memorandum of appeal, the appellants chose to instruct at their own expense M/s Okanyum Namusana & Co. Advocates to file the submissions and that the required notice of change was served onto the respondent through her counsel at counsel's chambers by one clerk called Angella who even stamped the same with the respondent's firm stamp on 17th of March 2022 with that the change of advocate by the appellants not in any way disadvantaging the respondent as no change of the grounds of appeal for which a new memorandum of appeal would be required was filed given the fact that the memorandum of appeal earlier filed by the appellants through M/s Oyoit & Co. Advocates remained the same as it was sufficient for the prosecution of the appeal where and so there was no need to amend the same as documents filed by litigants including pleadings remained those for a litigant and not for counsels , change of advocates notwithstanding.

In maintaining this stand, counsel for the appellants relied on the position in the case of ***Mugisa M Abraham & 4 Others v Rwambuka & Co. Advocates Miscellaneous Application No. 733 Of 2018*** wherein Ssekaana Musa, J while quoting with approval the case of ***Nareeba Dan & 5 Others Vs Joseph Bamwebeheire & 4 Others HCMA No. 45 of 2009*** went onto hold that a party was at liberty to decide which lawyers to represent them in court.

Given this position, it was the submission of the appellants that this 2nd preliminary point of law should similarly be overruled with costs to the appellants.

After considering the arguments, the authorities and the decided case in relations to the two preliminary points of law raised, I am inclined agree with the position of the appellants on both preliminary points of law that these were raised to subvert the cause of justice.

The disposition above is based on the fact that the said reiterations are of constitutional and legal provisions which have been amply interpreted by the cited authorities above and would thus find and conclude;

Firstly, that there is no legal requirement for an intending appellant to attach any other document to an intended appeal other than the notice of appeal and the memorandum of appeal in order to initiate an appeal process with any authority stating otherwise would be outside constitutional and legal provisions in that respect which I would respectively depart from.

Secondly, it is my finding that so long as notice of change of advocates has been notified to an opposite party as was in this instant case, there is no legal requirement for an intending appellant to change an already filed memorandum of appeal as a result of changed advocates so long as the intended appellant is satisfied with a file memorandum of appeal.

This means that a change of advocate would not by its nature necessitate a change of a memorandum of appeal already filed.

Arising from my findings above, I would overrule the preliminary objections raised.

I now proceed to consider the grounds of appeal in this appeal.

c. <u>Ground One:</u>

The appellants' grievance in relations to ground one is that the learned trial magistrate erred in law and fact when he failed to properly evaluate

evidence on record as a whole in regards to ownership of the suit land when he relied on wholly on hearsay evidence and came to a wrong conclusion that the respondent is the rightful owner of the suit land.

According to the appellants, the lower court believed the evidence of the respondent on facts which occurred before she was born.

That while testifying, the respondent as plaintiff in formed the lower trial court that her late father called Ileper Peter inherited the suit land in 1920s yet herself she was borne around 1938 and that she was not there when her late father Ileper Peter giving Moruyang, the father of the appellants 30 acres in 1950.

The respondent / plaintiff, Claudia Ileper testified as PW1. She told court that the land she had was over 20 gardens which she inherited from her late father who died in 1958. That she was born in 1938. She confirmed that she was not there when her late father gave land to one Moruyang. That those who were there when the land was given to Moruyang had since died and she was the only one who was still alive. She told court that though she had other land, she was suing the appellants/defendants for the recovery of 12 gardens which her father gave to the appellants /defendants as in those gardens had graves of her father, her mother, her step mother called Tino, her brother's wife called Ikarewot, her brother, her step brother called Otim and a grandson called Apolot which graves were still visible especially those for her late father and brother's wife as they had been cemented and that her father and mother had been buried on the suit land in 1958 and 1969, respectively.

In cross examination, this witness told court that she was not aware of any land dispute between her father and Moruyang except that she was aware of a dispute between her brother called Onyine Guzeberito with Moruyang. She insisted that she was resident on the land at Ocorimong

village and told court that she recalled even taking the land dispute to LC1 court in 2011.

PW2 Anukur John Robert informed the lower trial court that he was a retired civil servant who had served as a Community Development Assistant from 1976 to 1981 and had worked with Moruyang who was a sub county chief of Katakwi sub county. He did not work with Ileper. He further told court in cross examination that he met Moruyang had already settled on the e suit land. He told court that when the defendants went to survey the suit land without knowing the boundary. He did not tell court under which circumstances but went on to confirm that the plaintiff / respondent reported the matter not himself and that two graves were on the suit land with the rest of the suit land ploughed. He informed court that the Defendants came to Ocorimongin village in 1970.

PW3 Imongirot Cyrus testified similarly as PW2 Anukur John Robert.

DW1 Alemu Patrick testified that he knew the plaintiff / respondent as a neighbour whom he came to know as a child from 1950's. he also told court that he knew her father called Ileper peter and her mother called Irakit. He informed court that he owned land measuring about 1 square kilometer and that even if the one in dispute was deducted then he would still have more than 100 acres.

That in in 1958, his father litigated with the plaintiff's father at Usuk Court over the suit land and he was successful. He confirmed to the lower trial court that the prominent features on the suit land were homesteads belonging to his family and that they had used the suit land for grazing and cultivation. That his father had been an agricultural officer and later a sub county chief and that he had grown up on the suit land which they had used without any protest from the plaintiff. He confirmed that indeed when the father and the mother of the plaintiff died they were buried on the suit land forcibly and that even after the burials they continued to protest the

illegal burials on their land. That apart from the two graves of the plaintiff's relatives which were forcibly buried on their land, there were none other.

DW2 Ijala martin, an adult of 49 years then testified in the lower court confirming the testimony of DW1.

DW3, Oling George William an adult of 74 years then confirmed to court that he knew both parties and that the suit land belonged to Moruyang and not Ileper. That he knew only of a boundary dispute between the two families but not a land dispute.

DW4, Alemu Lemuya, an adult of 60 years and a grandson of late Moruyang testified in court that the defendants' houses were on the suit land and was not aware of at any one time the plaintiff / respondent using the suit land.

The above formed the summary of testimonies taken in court.

The trial court conducted a *locus in quo* visit subsequently on 22nd December, 2020. The plaintiff attended the same together with her called Onyune Steven.

Both defendants were also in court and the LC chairman called Olupot George William.

In the locus report, which though not comprehensive points to the fact that there were graves of the relatives of the plaintiff on the suit land which fact was not disputed by the defendants but who insisted that they were there illegally on the suit land which their father litigated upon and won.

The above constitutes the summary of the evidence adduced in the lower trial court.

In this first ground, the appellants fault the lower trial court in finding that the suit land was for the late father of the respondent called Ileper yet her testimony was full of hearsay evidence. The respondent insisted that the suit land belonged to her late father.

In civil matters, it is the party who brings a case to court who has the burden to prove their case on a balance of probability as was held in the case of ***Miller Vs Ministry of Pensions [1947] 2 ALL ER 372.***

From the evidence on record, it is the appellants' testimony that respondent's/ plaintiff's evidence that her family owned the suit land was not corroborated by any iota of any evidence as the family of the respondent / plaintiff had never owned any home on the suit land and even utilized the suit land though her father and mother were buried on the suit land which according to the appellants / defendants the burials were illegally and forcibly carried out in the absence of the late father and under protest.

It can be concluded from the evidence of DW1 Alemu Patrick at page 14 of the record of proceeding that he had lived on the suit land from childhood from the 1950's together with his family and that they had cultivated and grazed the suit land since that time and had two homes on it which were still evident to date when he testified.

This fact is corroborated by DW2 Ijala Martin who testified similarly to DW1 of having lived on the suit land since his birth and had built a home on the suit land on it since 2002 and had stayed in it and cultivated it undisturbed for 14 years until 2016 when the respondent instituted this suit. He points out even neighbours as being Yowana Adiikol on the west, Odeke s/o Ileper on the West, Pampas Omoding also on the West, Late Mzee Okollo in the South.

The plaintiff/respondent only testimony in claim for the suit land are the two graves which court confirmed while at locus. Nothing else. Indeed, there was no evidence adduced that the plaintiff / respondent ever resided on the suit land as nobody could point of any use of a home belonging to the plaintiff / respondent' relatives as ever existing on the suit land.

Given this position, I am satisfied that the learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record as a whole in regards to ownership of the suit land as I appears he relied majorly on hearsay evidence of the plaintiff having on the suit land yet the testimony of PW2 Anukur John Robert , an independent witness, who last lived in the said village in 1981 while working as a community Development Assistant, testified to the fact that he found the / appellants defendants on the suit land but not the plaintiff. Given these very clear fact, even if the land originally belonged to the plaintiff, the learned trial magistrate should have found as a matter of fact that since there was no evidence of constructive possession by the plaintiff/ respondent, then the fact that the appellants were already on the suit land by 1981.

In paragraph 4, the court states that the 1st defendant testified that they have 2 homesteads in the land and that the suit land belonged to Moruyang Ezekiel as part of his 200 acres of land and that the plaintiff had earlier bought land from the defendants when she was constructing a shop in Ocorimongin trading center.

Arising from the finding and conclusion above, I would agree with the appellants/defendants that the learned trial magistrate failed to evaluate the evidence on record in relations to ownership of the suit land and therefore arrived at an unreliable conclusion that the plaintiff / respondent was the rightful owner of the suit land merely based on the graves of her parent's being on the suit land without inquiring in detail how those graves came by to be on the suit land.

Yet even those facts were disputed and testified to as having been litigated upon successfully by the respondent's father which would mean that the remaining support to the plaintiff's claim to the suit land would be adverse possession which was not prove. She also did not prove that her

family had a home on the suit land nor did she prove that her family had been cultivating the land.

That being the case, the claim by the appellants / defendants is more likely to be believed than that of the plaintiff/respondent for they had proved through even independent evidence that they had homes on the suit land which they had continuously cultivated uninterrupted.

Ground One of this appeal thus succeeds.

d. Ground Two:

In this ground, it was the contention of the appellants that the trial magistrate erred in law and fact when he failed to find that the Respondent's suit was barred by limitation.

According to the appellants, the suit should have been found to be time bared by virtue of **Section 5 of the Limitation Act Cap 80** which provides that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or her.

Section 20 of the Limitation Act Cap 80 provides:

> **"Subject to section 19(1), no action in respect of any claim to the personal estate of a deceased person to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued..."**

In respect of this ground, the appellants pointed out that their evidence which was even concurred with by the leaned trial magistrate in page 2 of the judgment, the plaintiff's father Ileper acquired the suit land in 1920s and gave 30 acres Moruyang, the father of the defendant in the 1950's which was 66 years to 2016 which was the date when the suit for the claim of the land in dispute was made by the respondent/ plaintiff.

Additionally, the evidence on record show that the plaintiff's father died on 18th of June, 1959 which is 57 years from 2016 while the plaintiff's mother died in 1968 which is 48 years.

At page 2, last line and page 3 the 1st paragraph of the judgment, it is stated that PW2 Anukur John Robert testified that he was a retired civil servant who had worked as a Community Development Assistant from 1976 to 1981 and found the respondents/ appellants on the suit land having come to Ocorimongin village in 1970. All these point to very many years in actual possession of the suit land before the head claim was made.

DW3 Olinga George William testified that he was shown the boundaries of the land between Moruyang and Ileper in 1982, DW2 Ijala Martin testifies that he had lived on the suit land since 2002.

In page 4 paragraph 3 of the judgment, I note that the Magistrate states that ***"I find that the suit land belongs to the plaintiff. The reasons of my findings is that the defendant occupied the land much later say, encroachment of 1982".***

Even by this very finding it is clear that even if I were to believe his point that there had been encroachment, the same was for 34 years before the head suit claiming for the suit land was made which was outside the 12 years provided for by the Limitation Act as by 2011, which the plaintiff/Respondent, alleged the defendants/appellants had trespassed, they were actually in possession and were actively use of the suit land.

The evidence on record show that appellants/ defendants had been in possession of the suit land for over 12 years unchallenged by the plaintiff/ respondent or her relatives. 2nd Defendant/ appellant also has (d) home of on it and even the home of the late Chikan where his widow lives with her children as testified by the 1st defendant, is found on the suit land. Nothing shows that the / respondent/ plaintiff has ever lived on the suit land but

outside it. She only bought sand from the suit land and used it for constructing a building at Ocorimongin Trading Center where her ancestral land is.

Arising from the above, I would find and conclude that since the respondent/ plaintiff took no action to lay claim on the suit land within the time allowed by the **Limitation Act** then her suit in the lower court was time barred and could not be sustained as against the appellants/ defendants in line with **Section 5 of The Limitation Act** as was held in the case of ***Gawubira Mankupias Vs Katwiita Stephen C.A No. 230 of 2008*** at page 5 as a cause of action relating to a claim to land must arise as at the date a defendant adversely acquired land. This was also the position of the court in ***Odyeki & Ors Vs. Yokonani & 4 Ors Civil Appeal NO. 009 of 2017 [2018] UGHCCD 50 (11th October 2018)*** where it was pointed that ***"... action for recovery of land there is a fixed limitation period stipulated by section 5 of the Limitation Act. This limitation is applicable in all suits in which the claim is for possession of land based on title or ownership".***

The period of limitation begun to run as against a respondent/ plaintiff from the time her cause of action accrued until when she actually filed her suit in the lower court in 2016 and once that cause of action accrued, for as long as she had the capacity to sue, time begun to run against her with no any other subsequent disability or inability to sue stopping it with the court only being able to grant the remedy or relief sought where an inability is pleaded.

This is not the case here and 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.

Two major purposes underlie the statutes of limitations and these are the protecting of a defendant from having to defend stale claims by providing

notice in time to prepare a fair defense on the merit, and secondly, the requiring of a plaintiff to diligently pursue their claims.

Uninterrupted and uncontested of land for a specific period, nullifies the rights and interest of the true owner resulting in a defendant being regarded as the true owner of the land. **(See: Perry v. Clissold [1907] AC 73, at 79).**

Also in ***Gawubira Mankupias Vs Katwiita Stephen C.A No. 130 of 2008 page 7*** it was held that in respect of unregistered land, the person who in advance processes the land acquires ownership when the rise of action to terminate the adverse possession expires under the concept of **Extinctive Prescription** as is reflected in **Section 5 and 16 of The Limitation Act**.

This principle was further extended in the case of ***Rwanjuma vs. Jingo Mukasa, H.C Civil Suit No. 508 of 2012*** where it was pointed that a claim of adverse possession would succeeds if it has the effect of terminating the title of the original owner of the land for as a rule, limitation not only cuts off the owners' rights to bring an action for recovery of the suit land that has been in adverse possession over 12 years but also that *the adverse possessor would be invested with the title there over 12 years but also the adverse possessor is invested with the title thereof.(Emphasis mine)*

According to the appellant/ defendants they had been in possession of the suit land and had used it for cultivation since childhood from the 1950s. This fact is confirmed by DW1 Alemu Patrick. The plaintiff in her testimony also testified that her father gave the defendants/ appellants father land in 1950s amounting to 30 acres. DW1 further testified that there were two homes in the suit land which were the homes of DW2 of a permanent structure and the home of their late cousin called Chikan. The first

defendant stated that he inherited the suit land from his father one Moruyang who owned this land before his demise in 1990.

The presence of the homes of DW2 and of his relative, the late Chikan whose widow lives in with the children is sufficient evidence to prove the defendant's/Appellants possession of the suit land. This is also coupled with the fact that they continued to cultivate crops on the land as is testified to by DW1 and DW2.

On the other hand, the respondent/ plaintiff failed to show evidence that she was in possession of the land. She does not have a home on the suit land and has not cultivated it apart from stating that her two relative's two graves were on the suit land. Apart from that, she has never utilized the land since she was born.

The mere having of graves alone on a suit land does not entitle one to such land and it is not a bar to the application of the principal of limitation for the purpose of institution of a suit unless this is coupled with other evidence of adverse continued possession which is not the case here.

Given these very clear facts, I would find and conclude that the learned trial magistrate erred in law and fact when he failed to recognize that the suit before him was time barred and as such ought to have dismissed it accordingly. Ground Two succeeds.

e. Ground Three:

In this ground, it is the contention of the appellants that *the* trial magistrate erred in law and fact when he failed to conduct proper visit of locus.

The purpose of the court visiting to a *locus in quo* was well explained in the case of ***Odyek Alex & Nor Vs Gena Yokonani & Nos C.A No. 009 of 2007.*** In that case, the court pointed out that the purpose of the court visit to a *locus in quo* was to check on the evidence adduced by the witnesses in court but not to fill gaps in their evidence for them or lest a court may run the risk of turning itself into a witness in the case given the

fact that the adjudication and final decision of suits should be made on the basis of evidence taken in court.

Therefore, visits to a *locus in quo* is limited to the review of specific aspects of a case as verified during the oral testimony in court and to testing such evidence of those points only. The locus visit is essentially for the purpose of enabling the trial court to understand the evidence better as such visits harnesses the physical aspect of evidence given in court and conveys and enhances the meaning of an oral testimony.

According to the appellants, the learned magistrate who wrote the judgment did not visit the locus but in his judgment at page 4 paragraph 2 states that locus visit was conducted on 22nd December 2020 and that the court established that the 1st defendant had nothing on the suit land.

This finding is contradictory to the claims in the plaints against the 1st defendant yet the cause of action as stated in the plaint and corroborated by the testimonies of the plaintiff herself was that the defendants were trespassers on her land who had initiated surveys and had dug it for sand which they were selling to their personal benefits. These two activities were the basis of the suit. It is not true that the Defendant One had no activity on the land because this would mean there would have been no cause of action even on perusing the plaint alone.

The evidence on record confirms that Defendant 1 had been in occupation of the suit land since his childhood and only inherited it upon the death of his father Moruyang in 1990. This particular aspect of the testimony means that the plaintiff was never actually in possession of the suit land as the defendants were in possession.

It is not so clear what exactly happened on the visit of locus as the record available is very sketchy yet a visit of locus was the basis of the judgment of the lower court. In the case of ***Badru Kabalega Vs. Sepriano Mugangu (1992) KARL 265,*** where court inter alia stated that;

"The purpose of visiting locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross examined."

In accordance with the holding in ***Badru Kakungulu's case (above)***, it is clear to me that the magistrate who wrote the judgment reported on what the actual trial magistrate must have seen since the record indicates that the magistrate who visited the locus was H/W Awacnedi Freddie and not H/W Owino Paul Abdonson. By H/W Owino Paul Abdonson purportedly surmising what took place during locus visit without a report and without himself having gone to the locus meant that his findings based on such locus visit was faulty and it occasioned a total miscarriage of justice resulting in the suit land the land being wrongly declared to be for the plaintiff while there is no clear indication that the plaintiff had ever been in occupation of the same except for the graves of Ileper Peter, father of the plaintiff and that of her mother erected in 1959 and 1968 which were 57 and 47 years at the time of filing the suit in 2016.

On page 4 second paragraph of the judgment of the lower court, the magistrate who had never visited the locus in his judgment states that the locus visit was conducted on the 22nd of December, 2020 and court established that the first defendant had nothing on the suit land. That he was not cultivating it. That court observed the grave of Theresa Irakit, the mother of the plaintiff who had died on the 8/6/1955.

It is further stated that court observed the pond where the defendant used to mine sand for sale. Ijala DW2 stated that ***"I do not dispute the graves."***

The above statement in the judgment is a version of what the magistrate who wrote the judgment perused from the record but not what he actually witnessed at locus which undermines the purpose of the visit of locus by the trial magistrate which is to confirm the oral testimony got making this

specific paragraph hearsay of what the trial magistrate might have observed or heard making the principal of the admissibility of hearsay evidence applies to this specific paragraph because the magistrate who wrote the judgment is attesting of what he did not see. The correct procedure to cure this defect would have been the transferring of the file to the magistrate who heard and concluded it so that he could make a judgment and authoritatively make his findings of what he saw on locus. Alternatively, the magistrate who wrote the judgment ought to have considered revisiting the locus before writing the judgment to confirm the record.

Indeed, Sir Udo Udoma CJ. (R.I.P) in ***Mukasa vs. Uganda (1964) E.A page 698 at page 700*** while reflecting over this issue stated that;

> "***A view of locus in quo ought to be, I think to check on the evidence already given and where necessary, and possible to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed objet already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in a case. Neither a view nor personal observation should be substituted for evidence."***

The plaintiff at page 2 of the judgment is stated to have testified that she utilized the suit land at all times and was born on the suit land and lived on it yet no single evidence of her use of the suit land was adduced such the existence of old homesteads or any cultivation activity on the land. In fact, the learned magistrate in his judgment goes on to conclude in page 4 paragraph 2 states that ***"court further observed the plot where the defendant used to mine sand for sale"*** which in my considered view was a correct finding of fact which proved ownership of the suit land by the defendants/ appellants. No single evidence points to the respondent/

plaintiff being in possession of the suit land as she has no home, has not cultivated the same and none of her relatives are on the suit land alive. She only has two graves which were stated to have been illegally dug on the suit land and even disputed. It is only the second defendants home which is the suit land.

Given the paucity of supporting evidence in regard to the respondent/ plaintiff ever having lived on the suit land, I would find it wrong for the learned magistrate to have gone to conclude that the suit land belonged to her.

f. Ground 4:

The appellants/ defendants argued that the learned magistrate award of Ten million shillings Uganda shillings only was excessive and without any justifiable reason. My perusal of the record show that no foundation was laid for this award. It was a guess work. However, given my findings above, I would agree with the appellants that not only the said award was excessive but was uncalled for as the respondent was not inconvenienced in any way by the continued presence of the appellants on the suit land. On the other hand, it is her relatives' graves who are on the suit land which inconveniences the appellants. Those graves ought to be remove at the respondent's cost.

This ground succeeds.

g. Ground 5:

The last ground in this appeal was that he decision of the learned trial magistrate occasioned a miscarriage of justice. A miscarriage of justice occurs when a court or judicial system fails to attain the ends of justice, especially one which results into contrary decision to what is based on evidence on the record. A miscarriage of justice occurs when a grossly unfair outcome is made in a criminal or civil proceeding.

In the instant matter, it is clear that the issue ownership of the suit land which was clearly testified to as belonging to the appellants / defendants was irrationally changed to belonging to the respondent/ plaintiff on unsubstantiated grounds yet the plaintiff's claim to the suit land was not only limited by the law of limitation, but was bereft of evidence in proof of ownership of the suit land. All these inconsistencies amount to miscarriage of justice. This ground thus succeeds.

h. Conclusion:

Arising from my findings above, it is the conclusion of this 1st appellate court that the decision of the lower trial court was arrived at without examining thoroughly the evidence on record and the lower court ended up arriving at a wrong conclusion. That being the case, this appeal would be allowed.

6. Orders:

- This appeal succeeds on all grounds.
- The judgment and orders of the lower court set aside.
- The judgment of the lower court is substituted with judgment in the favour of the appellants as the rightful owners of the suit land.
- The appellants are awarded the costs of this appeal and that of the lower court

I so order

Hon Justice Dr Henry Peter Adonyo

Judge

4th May, 2022