THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL APPEAL NO. 04 OF 2021

HAJAT NAMBI LUGWISA ... **APPELLANT**

V

SHEIK HUSSEIN SSENGENDO ..... **RESPONDENT**

BEFORE: - HON. LADY JUSTICE P. BASAZA – WASSWA

J U D G M E N T

Representation:

Mr. Baingana Paul for the Appellant.

Mr. Kaweesa Abubaker for the Respondent.

Introduction:

[1] This Judgment is in respect of an appeal filed by Hajati Nambi Lugwisa; the Appellant herein, against the decision of the learned Chief Magistrate of Makindye Chief Magistrate's Court; **HW Katushabe Prossy,** dated January 11, 2021 vide Cs No. 29 of 2018. (The said lower Court decision shall hereinafter be referred to as **'the impugned decision'**).

[2] In the impugned decision, the learned Chief Magistrate dismissed with costs, Hajati Lugwisa's suit against Sheikh Ssengendo (the Respondent herein) after she upheld a preliminary objection to the effect that Hajati Lugwisa lacked the *locus standi* to institute that suit.

Background:

[3] In her plaint in the original suit vide Cs No. 29 of 2018, Ms. Lugwisa sought for *inter alia;* a Declaration that Mr. Ssengendo was a trespasser on the suit land, and an eviction order against him. The suit land (kibanja), with developments thereon, is situate at **Buziga, Kiruddu LC 1, Munyonyo, in Makindye Division.** (Hereinafter referred to as **'the suit Kibanja'**)

[4] She (Ms. Lugwisa) contended that she is the rightful owner of the suit Kibanja, and claimed that it was bequeathed to her by her late brother; **Mugenyi Lupa Muhamadi ('the deceased')**, in his Will attached to her plaint marked as 'A'. She contended further that Mr. Ssegendo, who was a friend of the deceased, was only allowed by the deceased, to temporarily occupy the suit Kibanja. That after the deceased's demise, Mr. Ssegendo refused to vacate the suit Kibanja when she and her family asked him to do so, and begun claiming that the suit Kibanja is his, by way of a gift from the deceased vide a document marked 'B' to the plaint.

[5] Two preliminary objections were raised at the lower court by Mr. Ssengendo's Counsel. First that Ms. Lugwisa lacked *locus standi* to institute

that suit, and second, that Ms. Lugwisa's suit was barred by the law of limitation. As already shown above, the learned chief Magistrate upheld the first preliminary objection on *locus standi*, but however, did not make a finding on the second preliminary objection. The reason she gave was that since she found as she had on the first preliminary objection, it was not necessary for her to make a finding on the second objection.

[6] For clarity, the impugned decision was particularly contained in a paragraph in which the learned Chief Magistrate stated thus;

> '...there was no inventory or final accounts that verify that legal power of the estate had ceased from the administrator and moved to the beneficiary thus granting her legal capacity to sue in her own capacity. In other words, the plaintiff had to file such inventory or final accounts plus the affidavit of the administrator verifying the final accounts to which would have granted the plaintiff *locus standi* / capacity to sue the defendant or the plaintiff had to sue the defendant after obtaining powers of attorney from the administrator of the estate since the estate had not yet been fully distributed and her legal interest given to her'.

[7] Dissatisfied with the impugned decision, Ms. Lugwisa appealed against the same to this court. Oral submissions were made by learned Counsel for each party, and hence this Judgment.

Grounds of Appeal:

[8] In her memorandum of appeal, Ms. Lugwisa raised the following three (3) grounds of Appeal;

1. **That the learned trial Chief Magistrate erred in law and fact when she failed to find that the Appellant was suing in her individual capacity as legatee.**

2. **That the learned trial Chief Magistrate erred in law and fact when she failed to appreciate that a legacy by will passes to the legatee upon proof of the will.**

3. **That the learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record hence coming to a wrong decision.**

[9] In my view, all three grounds of appeal can be summed up into one ground, to read;

'That the learned Chief Magistrate erred in law when she upheld the preliminary objection that the Appellant lacked *locus standi* to sue'.

Submissions of Counsel:

[10] In his oral submissions, Mr. Baingana; learned Counsel for Ms. Lugwisa argued that in arriving at the impugned decision, the learned Chief Magistrate was wrong. That she dealt with the matter as if it was arising out of an administration of an estate. That she did not look at it as having a will and letters of Probate, a legacy that was passed on to the Appellant. That the Appellant sued in her right as a beneficiary of a will and not as an

Administrator. That as such, the Appellant had the legal capacity to sue in that right, and had locus as a legatee. Learned Counsel relied on **section 154 of the Succession Act**[1], which reads;

'Where property specifically bequeathed is subject, at the death of the testator, to any pledge, lien or encumbrance, created by the testator himself or herself, or by any person under whom he or she claims, then, unless a contrary intention appears by the will, the legatee, if he or she accepts the bequest, shall accept it subject to such pledge or encumbrance, and shall, as between himself or herself and the testator's estate, be liable to make good the amount of the pledge or encumbrance'

[11] In reply, Mr. Kaweesa; learned Counsel for Mr. Ssengendo, argued;

(i) That Ms. Lugwisa had no locus to file the original suit in the lower court. That a beneficiary of an estate can sue in an individual capacity if the estate is in danger of being wasted or diminished, but that is before an executor or administrator has been appointed by court. That Sheikh Rajab Kakooza was appointed executor of the will of the deceased, yet the Appellant filed the suit and not the executor.

(ii) That a beneficiary can sue if authorized by the executor, and that no such power of attorney was there.

(iii) That a beneficiary can sue when the executor has fully executed the will and has been discharged by Court.

[1] The Succession Act, Cap 162 (as Amended).

(iv) That a beneficiary can sue where the executor has assented to a legatee taking possession of his / her legacy. That once the assent of the executor is obtained, it completes the legatee's title.

(v) That unless the grant of probate or administration has been recalled or revoked, no one has the capacity to sue or be sued, save in the circumstances cited. That the Appellant did not plead anywhere that the grant in this case had been recalled or revoked.

(vi) That sec. 154 of the Succession Act cited by Mr. Baingana, is not applicable to the instant case. That the will of the deceased does not describe the suit land as an encumbrance.

For his propositions, learned Counsel relied on **sections 264 and 278 (2) of the Succession Act, and to the case of Faith Namyenya v Faith Nabatanzi & 2 Ors**[2]

[12] By way of rejoinder, Mr. Baingana argued for Ms. Lugwisa;

(i) That under **sec. 293 & 294 (2) of the Succession Act**, the assent of the executor may be verbal or can be implied from his / her conduct. That in the present case, the executor gave evidence in the LC1 Court of Kiruddu, Buziga and also in the Criminal case against Mr. Ssengendo, to the effect that the suit land belonged to Ms. Lugwisa.

[2] HCCS No. 0615 of 2007 [Land Div.]

(ii) That in respect of **sec. 154 of the Act**, the gift bequeathed was subject to an encumbrance, and Mr. Ssengendo is the encumbrance.

Consideration of the Appeal:

[13] In accordance with settled law and practice (see **DinKerrai R. Pandya v R[3]),** I have dutifully and carefully looked at and considered the impugned decision, the arguments for and against this appeal, and the law.

[14] **The crux of this appeal is to determine whether a legatee can sue in her / his own name, in respect of property said to have been bequeathed to such legatee, after letters of probate have been granted to the executor of a deceased's will?**

[15] In the present case, the executor of the last will of **the late Haji Muhammed Lupa Mugenyi ('the deceased')**, a one **Sheikh Hussein Rajab Kakooza** was granted letters of Probate by Mwangusya, J. (as he then was), vide High Court Administration Cause No. 1046 of 2005, on September 30, 2005. The original suit in the lower court was filed by Ms. Lugwisa, thirteen (13) years later, on March 16, 2018.

[16] Before determining whether the impugned decision was correct or incorrect, it is prudent that that term; ***'locus standi',*** is first laid out here;

Locus standi, which is also termed as ***'place of standing'***, is defined as;

[3] [1957] E.A at pages 336 - 340

'**The right** to bring an action or to be heard in a given forum' **See Black's Law Dictionary**[4]

[17] In **Kithende Appolonia & 2 Ors v Eleanor Wismer**[5], the Court of Appeal defined *'locus standi'* as;

> '**The right** that one has to be heard in a court of law or other appropriate proceedings. Once one has a direct interest in the matter, then one is eligible to claim relief respecting that matter if that one's interest is being adversely affected'

(Underlining and emboldening added).

[18] In the celebrated case on the subject at hand; **Israel Kabwa v Martin Banoba Musiga**[6], the Supreme Court held that a beneficiary of the estate of an intestate has locus to sue in his own name to protect the estate of the intestate for his own benefit, without having to first obtain letters of administration. Tsekooko, JSC. stated that the Respondent therein; Banoba, had proved that he had inherited his father's land as the customary heir of Yosefu Banoba, and that he had developments thereon, and could have very well been entitled to 76% or more of the estate, and therefore had sufficient interest to give him locus in that case even if no letters of administration had been obtained.

(Underlining added)

[19] From the **Kithende Appolonia and the Israel Kabwa cases (supra),** it is clear that for a beneficiary of a deceased's estate to be eligible to sue in

---

[4] 9th ed. at page 1026
[5] CACA No. 34 of 2010
[6] SCCA 52 / 1995 reported in [1996] 11 KALR at 109 -120

their own name, to wit; to have *locus standi* to sue, **such beneficiary must have direct and or sufficient interest in the subject matter.**

[20] In the circumstances of the present case, did Ms. Lugwisa **have sufficient interest in the suit Kibanja**, to be eligible to sue in her own name?

[21] It is important to note here, that unlike the **Israel Kabwa case (supra)** in which letters of administration had not yet been obtained and the estate was in danger of being wasted, in the present case, letters of probate had been granted to a one **Sheikh Hussein Rajab Kakooza** on September 30, 2005.

It is equally important to note that the general rule[7] is that '**all property first vests in the personal representatives of the deceased, who in due course transfers to the beneficiaries any of the property not required in the administration of the estate'**, e.g. for payment of debts, taxes, and funeral expenses.

[22] **It is trite that unless a transfer to a beneficiary has been made, or the executor has assented to a specific bequest, a legatee's title to his / her legacy is not yet complete (sec. 293 of the Act[8]). Such assent by the executor shall be sufficient to divest his or her interest as executor in it, and to transfer the subject of the bequest to the legatee, unless the**

[7] See Megarry & Wade; The Law of Real Property, 8th ed. paragraph14-137
[8] Succession Act, Cap 162 as Amended.

nature or the circumstances of the property require that it shall be transferred in a particular way. That assent of the executor may be verbal, and it may be either express or implied from the conduct of the executor (sec. 294 of the Act).

[23] The scenario in this matter, is that Ms. Lugwisa brought the original suit claiming as a legatee allegedly with a specific bequest. **Therefore, by virtue of sections 293 and 294 of the Act, unless the executor and grantee of the letters of probate; Sheikh Hussein Rajab Kakooza, assented to the alleged specific bequest of the suit Kibanja to Ms. Lugwisa's, and as such divested his interest therein to her, the said bequest to her would remain incomplete.**

[24] Leaned Counsel; Mr. Baingana argued for Ms. Lugwisa; that the said executor and grantee of the letters of probate; **Sheikh Hussein Rajab Kakooza,** had assented to the specific bequest of the suit kibanja to Ms Lugwisa when he gave evidence in the LC1 Court of Kiruddu, Buziga and also in the Criminal case against Mr. Ssengendo. That his evidence was to the effect that the suit land belonged to Ms. Lugwisa. That by so doing, by his said conduct, **Sheikh Hussein Rajab Kakooza** rendered his assent, and that Ms. Lugwisa therefore had the requisite *locus standi* to sue.

[25] I have looked at the plaint and a copy of the judgment against Mr. Ssengendo in the chief Magistrate's court of Makindye vide Criminal appeal

case No. 01 of 2007 (annexture 'D' to the plaint), and also at the judgment vide Criminal case No. 1381 of 2015 from which that appeal arose, and **I am in agreement with the submission of Mr. Bainagana. Indeed, by the act of testifying in that case, in unity with Ms. Lugwisa (PW1), Sheikh Rajab (PW2) assented to and affirmed the specific bequest of the suit Kibanja to Ms. Lugwisa. They gave evidence, in unity, to the effect that the suit kibanja belonged to Ms. Lugwisa.**

[26] **By so assenting, Sheikh Hussein Rajab Kakooza thereby divested his interest, as executor, in the suit Kibanja to Ms. Lugwisa. Her bequest was thus made complete since by implication, Sheikh Hussein Rajab Kakooza divested his interest in the suit Kibanja to Ms. Lugwisa. Sec. 264 of the Succession Act therefore did not apply to this case, as the suit Kibanja no longer vested in him.**

[27] Similarly, **section 154 of the Act is also inapplicable to this case**. It was not pleaded in the plaint that the suit land was either pledged, is under a lien or is encumbered within the meaning contemplated by that section.

[28] I have carefully taken into account the nature of the suit kibanja. For the latter type of interest, no formal written and or registered transfer; from a grantee of letters of Probate to a legatee, is requisite before such transfer can be effectual. That would have been different if the nature / tenure of the land had been a mailo, a leasehold or a freehold interest,

for which a formal transfer is requisite before a grantee of letters of probate can effectually divest his / her interest to a legatee.

[29] To this end, the alleged facts in the original suit in the lower court are distinguishable from the facts in the **Faith Namyenya case (supra)** that was cited by Mr. Kaweesa. In that **Namyenya case**, unlike in the present case, the land in issue; **comprised in Busiro Block 358 plot 22 at Ssumba** was registered in the names of the Administrator General who was the Administrator of the estate of Ibrahim Mayanja Serunjogi, and no transfer or divestiture of that land had been done from the Administrator General's name into the name of Ms. Namyenya. Sec. 264 of the Succession Act therefore applied to that **Faith Namyenya case,** but is inapplicable to the present case.

[30] **In the scenario in the present case, unlike the scenario in the Faith Namyenya case, the assent by the grantee of the letters of probate completes Ms. Lugwisa's (the legatee's) title to her legacy. Such assent is implied from the executor / grantee's conduct, and is sufficient to divest the executor's interest in the subject of the bequest to the legatee. (Sec. 293 & 294 of the Succession Act applied).**

[31] **By reason of the foregoing, I hold that Ms. Lugwisa's plaint and annextures thereto, indeed disclose that she had sufficient interest in the**

suit Kibanja. She was / is therefore clothed with *locus standi,* the right to institute the original suit in the lower court against Mr. Ssengendo.

It is thus my conclusion that the learned Chief Magistrate erred to hold otherwise; that Ms. Lugwisa lacked *locus standi.*

[32] I will now turn to the second objection.

Although the learned Chief Magistrate did not make a finding on the second preliminary objection on the question; ***'whether the original suit was barred by time limitation'***; I am obliged to address that issue. A plea of limitation is a point of law, which if found valid, would dispose of that suit. As such, it is an issue that ought to have been addressed by the learned Chief Magistrate. For points of law; see **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd**[9]

[33] The objection by Mr. Kaweesa; learned Counsel for Mr. Ssengendo, was that by virtue of **section 20 of the limitation Act**[10] the original suit in the lower court was time barred. That the letters of Probate were granted on September 30, 2005 and that the 12-year period expired on September 29, 2017 yet the plaint was filed on March 16, 2018 five (5) months after the expiry date, and that no grounds of disability were pleaded.

[9] [1969] E.A. page 696 (at pages 700 & 701)
[10] Cap. 80 of the Laws of Uganda

Counsel relied for his proposition on **Adam Namadowa & 6 Ors v Hakim Kawaidhanako & 3 Ors**[11]

[34] In answer Mr. Baingana; learned Counsel for Ms. Lugwisa adopted his earlier submissions made at the lower court. In those submissions he argued that his client's claim is not time barred. That it is not in respect of the personal estate of the deceased or any share or interest therein, but rather it is a claim in trespass. He relied for his proposition on the case of **Justin E.M.N. Lutaaya v Stirling Civil Engineering Co. Ltd**[12]

[35] I cannot agree more with the above argument of Mr. Baingana. Indeed, the original suit is an action in alleged trespass against Mr. Ssengendo and not a claim to the personal estate of the deceased, or to any share or interest in his estate. **Section 20 of the Limitation Act** therefore does not apply to the original suit. **Section 20 of the limitation Act** provides that;

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

With respect, the **Adam Namadowa case (supra)** cited by Mr. Kaweesa, was cited out of context.

[36] Trespass to land is a continuing tort, if it is proved that there is an unlawful entry on the land, and such entry is followed by its continuous occupation

[11] HCCS No. 100 of 2012 at Jinja HC Circuit (unreported)
[12] SCCA No. 11 of 2002

or exploitation, the date of the alleged entry is of little significance, except in the assessment of damages. As per **Mulenga, JSC. in Justin E.M.N. Lutaaya v Stirling Civil Engineering Co. Ltd (supra).**

[37] Similarly, in the text; **Winfield and Jolowicz on TORT**[13], the learned authors state;

> 'Trespass, whether by way of personal entry or by placing things on the claimant's land, may be "continuing" and give rise to actions from day to day so long as it lasts. In Holmes v Wilson[14], highway authorities supported a road by wrongfully building buttresses on the claimant's land, and they paid full compensation in an action for trespass. They were nevertheless held liable in a further action for trespass, because they had not removed the buttresses. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass'[15].

[38] Guided by the above authorities, a person with the right to sue, may exercise that right to sue immediately after the alleged trespass commences, or at any time during its alleged continuance, or after it has ended. If the commencement date is outside the time limitation, such part of the alleged continuing trespass as is within the time limit, is severed and actionable alone. (Underlining added for emphasis).

[39] In the result, I consequently also find no merit in Mr. Kaweesa's second objection.

---

[13] 19th ed., Sweet & Maxwell London, 2014, para. 14-015 at pg. 433

[14] (1839) 10A. & E. 50

[15] Hudson v Nicholson (1839) 5 M. & W. 437 followed in Konskier v Goodman Ltd [1928] 1 KB 421

Decision of Court:

[40] **In the final result, this appeal succeeds. The Ruling and Orders of the learned Chief Magistrate are overturned and set aside. I substitute the impugned Ruling and orders with my findings that Ms. Lugwisa has *locus standi* to sue Mr. Ssengendo, and that her suit is not barred by time limitation.**

[41] I order that the lower court file be remitted back to the lower court for trial before another Judicial Officer / Court with Jurisdiction to adjudicate over the case.

[42] The costs of this appeal and the costs of the preliminary objections in the lower court shall be paid by the Respondent (Mr. Ssengendo) to the Appellant (Ms. Lugwisa).

I so Order,

P. BASAZA - WASSWA

JUDGE

January 9, 2023

Ruling delivered electronically on the Judiciary ECCMIS system and via email to the parties.