**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MBALE**

**HCT-04-CV-CA-0016/1999**

(From Tororo Civil Appeal No. 3 of 1995)

**BATULUMAYO WAMBUGA.....APPELLANT**

**VERSUS**

**FIRIMONI ANGURYA .....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**JUDGEMENT**

This is a second appeal from the decision of the Chief Magistrate Mbale in which he allowed an appeal from the decision of a Grade III Magistrate of Pallisa in Civil Suit No. 229 of 1984 Firimoni Angurya v. Batulumayo Wambuga and Vincent Okiria.

In the trial court, the respondent sued the appellant and Steven Okiria for recovery of some 5 acres of land occupied by the appellant, and sold to appellant by Steven Okiria. He inherited this land from his late father. Steven Okiria was his guardian upon the death of his father. Okiria sold part of this land to the appellant in 1968.

It came out from the proceedings that the respondent sued Okiria and the appellant in respect of this original sale of 1968, and judgement was entered in his favour. But the appellant did not vacate the land. That was the judgement in civil suit No. MT 129 of 1970. The judgement was delivered on 11th January 1971. This judgement is the subject of the first ground of appeal.

Later in 1970, Okiria again sold to the appellant another part of that same land which the respondent inherited from his father, and in respect of which Okiria was a guardian.

The respondent filed the suit in the Grade III Magistrates court in 1995 for recovery of both pieces of land. The court at first instance dismissed the claim in respect of the first part of the land sold in 1968, for the reasons that the suit in respect of that part of the land was time barred. The respondent was awarded the second part of the land, which was sold in 1970.

The respondent was dissatisfied with that decision which rid him of part of his inheritance. He appealed to the chief Magistrate in Mbale, and was successful in that court. The Chief Magistrate held that there was no limitation bar in respect of the land sold in 1968, in view of the judgment of the court of 1971 referred to above. He ruled both pieces of land to the respondent, who was the appellant in that court.

I noted that the name of the second defendant in the trial court was spelled variously as Okiria, or as Okiriya, while that of the respondent appeared as Anguria or Angurya. I followed suit.

Five grounds of appeal were set out in the memorandum of appeal as follows;

1. The learned Chief Magistrate erred in law in relying on a decision not tendered in evidence and occasioned a miscarriage of justice.

2. The learned chief Magistrate erred in law in failing to hold that the suit in the lower court was res judicata and therefore occasioned a failure of justice.
3. The learned chief Magistrate erred in law in holding that the Limitation Act was applicable and thereby occasioned a failure of justice.
4. The learned Chief Magistrate erred when he failed to consider the question of trust and thereby occasioned a miscarriage of justice.
5. The learned Chief Magistrate erred in fact and law when in as much as he failed to weigh the evidence judicially.

It is to be noted that the file from the lower court, which I was working from was a duplicate file. It did not contain the entire record. There were only photocopies of the judgements of the trial court and the 1st appellate court, plus proceedings of the trial court, also in photocopy form. I was not told what became of the original court file. With that handicap, I proceeded to deal with the appeal the best way I could in the circumstances.

Both Counsel filed written submissions as directed by court. I will deal with the grounds of appeal in the order they were argued by Counsel for the appellant.

There are two preliminary points of law, which were raised by Counsel for the respondent which need to be settled before going to the merits of the appeal. First it was argued that the original suit had two defendants but on appeal there was only one appellant. The fate of the second defendant, Okiria was unknown in this appeal. The judgment appealed from affected

both people. The appeal was against the entire decision, and therefore to proceed in absence of the second defendant could be prejudicial. The appeal was therefore incompetent. The Court of Appeal decision in *Bitahure Nyine Samsoń v. Ishage Ndyanabo Longino* Election Petition No. 14 of 2002 citing with approval *Ahmad Bin Ahmed Kassim V. Syed Abdulla Fadhul* [1958] EA 60 (C.A.) was relied upon.

Secondly it was submitted that the appellant died. There was no application to substitute him with another person who was living. That made the appeal incompetent.

I will start with the second objection. It was pointed out by Counsel for the appellant that there was an application HCMA No. 16 of 1996 in which court granted leave to substitute one Francis Musajja in place of Batulumayo Wambuga who was deceased. Copies of the application under O. 21 r.3 of the Civil Procedure Rules and affidavit in support were attached. I noted from the record, scanty as it was that there was a copy of a grant of letters of administration dated 5th March 1996, to one Francis Musajja son of Batulumoyo Wanbuga deceased in Administration Cause No. 33 of 1995.

I had no reasons to doubt that there was indeed a substitution of one Francis Musajja in place of the appellant. It was the lack of vigilance on part of Counsel for the appellant not to have pointed out earlier that the name on the record was not corrected, in accordance with the court order. The correction would, no doubt have been made. The objection is to be dismissed. I will not spend any more time on that point.

The objection in regard to absence of a second defendant on the appeal lacks merit and is to be dismissed. O. 39 of the Civil Procedure Rules deals with appeals to the High Court. Rule 3 thereof provides as follows;

> '3. Where there are more plaintiffs or defendants than one in a suit, and the decree appealed from proceeds from any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal fro the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.'

The above rule provides for the bringing of an appeal by any one of several plaintiffs or defendants. This does not make the appeal incompetent. The cases cited by Counsel for the respondent might well represent the true position in law. But they were concerned with appeals in the Court of Appeal, rather than appeals in the High Court, which are governed by O. 39 of the civil Procedure Rules.

On the merits of the appeal, the first ground of appeal was that the learned Chief Magistrate erred in law when he relied upon a decision of the court, which was not part of the evidence. The decision complained of was the Grade III Magistrates court judgement in civil suit No. MT 129 of 1970.

The complaint was that the judgement was not part of the proceedings in the trial court. It was argued that the Chief Magistrate imported this judgement into evidence on appeal. This was improper as there was no compliance with the rules in regard to taking additional evidence on appeal.

The Chief Magistrate in his judgement in regard to that judgement held as follows,

> ' It was the argument of the appellant that by the time even the first was sold, he filed a suit in Pallisa court in 1970. I have seen a certificate (certified) copy of the judgement of that case, civil case No. MT 129 /1970 between Firimoni Anguria and Vincensio Okiya. The case was decided in favour of the present appellant Firimoni Anguria by his Worship Banbade, Magistrate Grade III on 11th January 1970. *The copy of the judgement is on record.*' (Emphasis added).

The learned Chief Magistrate was clear in his judgement that the copy of the impugned judgement was on the record. This could not be anything but the record of the trial court. As I stated earlier, the copy of the record in my possession was incomplete. But that's neither here nor there. Both parties rely on the same record. There was no imputation that the Chief Magistrate had any motive other than the noble one, to do justice to the parties. There were no reasons for him to admit evidence on appeal in disregard of the law.

Except for fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the time of trial, or that reasonable diligence would not have made it available. Fresh evidence may also be admitted where some basic assumption common to both parties has been falsified by subsequent events, or when to refuse such evidence would be an affront to common sense and a sense of justice. See *Alice Janet Namisango V. Chrisestom Galiwango* [1986] HCB 37, and *American Express International Banking Corporation V. Atulkumar Sumant B. Patel* [1987] HCB 34.

I did not find that there was admission of fresh evidence by the Chief Magistrate when he entertained the appeal from which this case arose. I do not have any doubt that the judgement complained of was part of the record in the court of first instance, and I would therefore dismiss the first ground of appeal.

The second ground of appeal was that the learned Chief Magistrate erred in law in failing to hold that the suit in the lower court was res judicata. This is civil suit No. MT 129 of 1970. In the first instance, this fortifies my conclusion in the first ground above, of the existence on the record in the trial court at first instance of the judgement in that suit, otherwise Counsel for the appellant would not himself attempt to utilise it in his second ground of appeal if it did not exist.

On the merits of that second ground of appeal, the law relating to the doctrine of res judicata is set out in S.7 of the Civil Procedure Act as follows;

> 'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit in which the issue has been subsequently raised, and has been heard and finally decided by that court'

This provision has been considered in many case of this and higher courts. In *Semakula V. Magala* [1979] HCB 90 (C.A.), it was held that the doctrine

of res judicata is a fundamental to the effect that there must be an end to litigation. Accordingly therefore, every mater should be tried fairly once and having been so tried, all litigation about it should be concluded forever between the parties.

In determining whether or not a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in a another way in form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon.

If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the first court was called upon to adjudicate, but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties. See *Kamunye & Others V. The Pioneer General Assurance Society Ltd.* [1971] EA 263, and Mbabali V. Kizza & The Administrator General [1992-93] HCB 243.

The suit MT 129 of 1970 was between Firimoni Anguria, the respondent herein, and Venecensio Okiriya the second defendant in the trial court herein. The present appellant was not a party to that suit. The land, the subject of the dispute in MT 129 of 1970 was only that part of the land, which Okiriya had sold to the appellant in 1968. The land, the subject of the dispute in the present case was the land sold by Okiriya to the appellant in 1968, and in 1974.

It is clear therefore that the parties in the case of 1970 were different from those in the present suit. The appellant was not party to that suit. The suit property was also different. The doctrine of res judicata was therefore not applicable to the facts of this case. The learned Chief Magistrate was right to dismiss it. The second ground therefore fails.

The third ground of appeal was that the learned Chief Magistrate erred in law in holding that the Limitation Act was applicable. The complaint was that the appellant bought the land in 1968, and there was an agreement to that effect. He was not a party to the suit in1970. He was in possession of the land since that time. The suit against him for the land, which was instituted in 1995, was therefore barred by the Limitation Act, coming as it did well after the expiry of 12 years allowed by S. 5 of that Act.

It was also argued that the second piece of land, which was sold to the appellant in 1974, was protected by the doctrine of laches.

To my mind, both arguments do not help the appellant. There was a civil suit in 1970. The dispute was about the sale by one Okiriya of land to the appellant. The matter was decided in favour of the respondent, meaning that the appellant was dispossessed, if ever he was in possession, or he was estopped from taking possession. If he took possession, then he was in contempt of court orders, and his possession was clearly illegal. One cannot purport to call to his aid the provisions of the Limitation Act in order to perpetuate an illegality.

The appellant cannot then be said to have been in undisturbed occupation for more than 12 years. His holding was made illegal from the time the

judgement in civil suit 129 of 1970 was pronounced. There was no appeal therefrom, and so the Limitation Act does not shield the appellant.

The doctrine of laches was argued in this court. it did not feature anywhere in the lower court. I would not therefore address it as it did not form a ground of appeal. Be that as it may, since I have held that there was no time bar to the action in respect of both pieces of land, the respondent could not in the circumstances be said to be guilty of negligence or unreasonable delay, in enforcing his rights. See Osborne's Concise Law dictionary 6th Ed. page 193.

The appellant abandoned the fourth ground of appeal.

The fifth ground was that the learned Chief Magistrate erred in fact and law in as much as he failed to weigh the evidence judicially. The duty of a first appellate court is well laid out in the cases. The court is required to consider and evaluate the evidence, and to arrive at its own conclusions. The court in so doing must subject the evidence to a close and exhaustive scrutiny in order to come to a decision whether or not the evidence on record supports the conclusions of the trial court. See *Ephraim Ongom & An. V. Francis Benega* SCCA No. 10 of 1987, *Flora Nnambi V. Serapio Mukupe* [1979] HCB 47, *Selle V. Associated Boat Co.* [1968] EA 223.

It was submitted that the Chief Magistrate failed to evaluate the evidence, but based his conclusions on the ground that the appellant ought to have taken remedial measures, as he was aware of the dispute between the respondent and the notorious Okiriya.

The criticism of the Chief Magistrate in this regard was in my opinion not justified. His conclusion that the appellant was or ought to have been aware of the goings on concerning the suit land was, in my view justified by the evidence on record, and the circumstances of the case.

The appellants own witness Okiriya testified that he informed the appellant that the land belonged to the respondent, and warned him at the time of the purported agreements that should he should be prepared to accept back his cows if the owner of the land meaning the respondent, should desire to have his land back. This was in 1974. Earlier in 1970, when the respondent sued Okiriya, he was supposed to return the cows of the appellant in respect of that land. That would mean that the appellant, who was the illegal purchaser knew or ought to have known that he land was adjudged by court to belong to the respondent.

I found that the fifth ground was without merit, and I dismissed it. In the result, the appeal is dismissed with costs to the respondent in this court and in the court below.

**RUGADYA ATWOKI**

**JUDGE**

**1/6/2005.**

Court: The Deputy Registrar of the court shall deliver this judgement to the parties.

**RUGADYA ATWOKI**

**JUDGE**

**1/6/2005.**