

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – 01 – LD – CA – 0002 OF 2016**

**(Arising from KAS – 00 – LD – CS – 0029 of 2013)**

**MUKUHA THEMBO JOSEPH.....APPELLANT**

**VERUS**

**MALIRO JUSTUS.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is an appeal against the decision of his Worship Miftundinda George, Magistrate Grade 1, at Kasese delivered on 16/12/15.

**Background**

The Respondent instituted a Civil Suit against the Appellant for trespass. His claim was for; a declaration that the Plaintiff was the lawful owner of the suit land; payment of UGX 4,890,000 as special damages; permanent injunction, general damages, interest and costs. The Appellant claimed that he bought the suit land measuring 5 acres from Nderea Kasenya in 1971 and a sale agreement was executed to that effect. That he was in possession and occupation of the same until 2004 when he shifted to Kamusonge Village. In 2012 the Appellant then forcefully entered the suit land and planted eucalyptus trees and started grazing on it. The Respondent sued the Appellant in the LCII Court, judgment was passed in his favour, the Appellant then applied for revision and the High Court ordered for a retrial.

The Appellant on the other hand averred that on 5/6/1987 he bought the suit land at UGX 65,000/= and paid part in form of 2 goats from the Respondent and the Respondent thereafter shifted to another place. That from the time he bought the suit land he had been in occupation of the same until 2012 when the Respondent started claiming the suit land. That the civil suit was time barred and should be dismissed with costs.

Issues raised for determination in the lower Court were;

1. Whether or not the Plaintiff sold the suit land to the Defendant?
2. Whether the suit is barred by limitation?
3. Whether or not the Defendant is a trespasser on the suit land?
4. What remedies are available to the parties?

The trial Magistrate after the evaluating all the evidence and visiting Locus found that the suit was not time barred and that the Appellant was a trespasser. An order for a permanent injunction was issued and costs awarded.

The Appellant being dissatisfied with the above decision lodged this appeal whose grounds are;

1. That the learned Trial Magistrate erred in law and fact when he held that the Appellant did not buy the suit land from the Respondent in 1987.
2. That the learned trial Magistrate erred in law and fact when he held that the Plaintiff's suit is not time barred.
3. That the learned trial Magistrate Grade 1 erred in law and fact when he failed to properly evaluate evidence on record especially the evidence of DW1, DW2 and DW3 and came to a wrong conclusion.
4. That the learned trial Magistrate misdirected himself when he failed to consider the Appellant's long occupation of the suit land.

Counsel Ahabwe James appeared for the Appellant and M/s Guma & Co. Advocates for the Respondent. By consent, both parties agreed to file written submissions.

It is the duty of the 1<sup>st</sup> Appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the Appellate Court may re-appreciate the evidence and reach its own conclusion. **(See: Pandya versus Republic [1957] EA 336, Kifamunte Henry versus Uganda Criminal Appeal No.10 of 1997 Page 5(Supreme Court).**

Grounds 1 and 3 are discussed jointly and Grounds 2 and 4 separately in that order.

### **Grounds 1 and 3:**

- 1. That the learned Trial Magistrate erred in law and fact when he held that the Appellant did not buy the suit land from the Respondent in 1987.**
- 3. That the learned trial Magistrate Grade 1 erred in law and fact when he failed to properly evaluate evidence on record especially the evidence of DW1, DW2 and DW3 and came to a wrong conclusion.**

Trespass to land is defined in **Salmonds Law of Torts Ninth Edition at page 207** as follows:

- “1. The wrong of trespass to land consists in the act of (a) entering upon land in the possession of the plaintiff or (b) remaining upon such land or(c) placing any material object upon it in each case without lawful Justification.*
- 2. Trespass by wrongful entry. The commonest form of trespass consists in a personal entry by the Defendant, or by some other person through his procurement, into land or building occupied by the Plaintiff. The slightest crossing of the boundary is sufficient e.g. to*

*put ones land through a window, or to sit upon a fence. Nor indeed does it seem essential that there should be any crossing of the boundary at law provided that there is some physical contact with the Plaintiff's property."*

In the case of **Justin Lutaya v Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002**, the Supreme Court defined trespass as an unauthorized entry upon land that interferes with another person's lawful possession.

Counsel for the Appellant submitted that the Respondent called 3 witnesses and the Appellant too called 3 witnesses, whose evidence ought to have been properly evaluated to determine who the owner of the suit land was.

That it was the evidence of the Appellant that he bought the suit land from the Respondent and an agreement was executed to that effect but not signed by both parties. That witnesses were present during this transaction being DW2 and DW3 whose evidence was totally ignored by the trial Magistrate. And the Appellant had been on the suit land since 1987 and had developed the suit land with eucalyptus trees.

Further, that the Appellant was very honest and told Court that he remained with a balance of UGX 5,000/= that he has not paid to date for failure to access the Respondent.

Counsel for the Respondent noted that the said balance has never been paid and no proof was presented by the Appellant.

That the trial Magistrate rejected DE1 because it was not signed but still ignored the overwhelming evidence that the Appellant paid for the suit land and took possession of the same.

Counsel for the Respondent in this regard submitted that the Respondent had never sold land to the Appellant and there was neither documentary proof of the same or oral evidence adduced to that effect.

Counsel for the Appellant also stated that the Respondent greatly contradicted himself in regard to the time when he left the suit land meaning that he actually left it in 1987 when he sold it to the Appellant.

The Respondent through his Counsel maintained that he left the suit land in 2004 after being displaced by the R. Nyamwamba floods and that the contradictions if any were minor and thus, negligible.

In my view, the Appellant brought oral evidence through his witnesses to the effect that the transaction did indeed take place and he paid with 2 goats and UGX 10,000/= and remained with a balance of UGX 5,000/= that he had failed to pay to date for failure to get the Respondent.

The Respondent told Court that he left the suit land in 2004 after being displaced by the R. Nyamwamba floods and not in 1987 as alleged by the Appellant who also claimed that he bought the suit land from the Respondent.

I note that the Appellant tendered in Court a “sale agreement” but the same was not signed by either the buyer or the seller and not any witness either. In his evidence, the Appellant stated that this was because they were waiting for the elders to be present so that they could sign on the agreement. I wonder if indeed it were that essential for the elders to be present to witness the transaction why they were not informed prior, in order to have them present. The sale agreement was meant to corroborate the Appellant’s oral evidence but it cannot because it is not a valid sale agreement and therefore not binding on either party if anything.

The locus – in – quo was visited and eucalyptus trees were found planted at the very side where the River is. There was evidence of old tree trunks and new trees growing. I am inclined to believe that the Respondent indeed left the suit land and relocated. It was even the evidence of one of the Appellant’s witnesses that the Appellant waited 7 years before he could utilise the suit land. The Appellant himself said that he does not stay on the land but only planted trees and grazes on the same. The Appellant also in his evidence stated that some of the land was washed away by the floods of River Nyamwamba.

I find that the Appellant did not purchase the suit land but took advantage of the fact that the Respondent had left his land due to the floods. The Appellant could not produce a valid sale agreement to support his claim. He told Court that he had been trying to pay the Respondent the balance of UGX 5,000/= through the Respondent’s sister but did not bring her as one of his witnesses in Court. The Respondent’s sister was said to have also witnessed the transaction but was not brought to testify in favour of the Appellant. The Appellant in my opinion did not produce sufficient evidence to prove his claim and from the perusal of the file, the Respondent had left the suit land with the Appellant as the caretaker but did not sell to him.

These grounds therefore, fail.

**Ground 2: That the learned trial Magistrate erred in law and fact when he held that the Plaintiff’s suit is not time barred.**

Counsel for the Appellant submitted that the Appellant had been on the suit land since 1987 after purchase until 2012 when the Respondent came claiming ownership of the same. That these were 25 years of non-interference from the Respondent. That in the circumstances the Appellant had been on the suit land for over 20 years and thus the suit was time barred according to **Section 5** of the Limitation Act.

Counsel for the Respondent on the other hand submitted that the Respondent left the suit land in 2004 which was confirmed by PWII and that makes it 10 years and not 12. PWII told Court that the Appellant started trespassing on the suit land in 2004 corroborating PW1’s evidence. That upon visiting the locus – in – quo eucalyptus trees of about 5-6 years were found and these were planted at the side of the River.

Further, that the Respondent had litigated over this case with the Appellant in the L.C Courts meaning that indeed the Appellant never bought the suit land but just wants to grab the Respondent’s land.

It is trite law that trespass is a continuing tort, which in this case would imply that the alleged trespass by the plaintiffs on the suit land has been continuous for the time they have been in possession and occupation of the same.

In the case of **Justine E.M.N Lutaya versus Sterling Civil Engineering Company Ltd. SCCA 11 of 2002**; it was held, *inter alia*, that;

*“...where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended...in a suit for tort, the date when the cause of action arose is particularly material in determining if the suit was instituted in time. The commencement date is also material...in other continuing torts that date is of little significance...trespass to land is a continuing tort...”*

In my opinion, I find that the suit was not time barred, be as it may trespass is a continuous tort. Therefore, the learned trial Magistrate did not err in law and fact when he held that the Plaintiff’s suit is not time barred. This ground too fails.

**Ground 4: That the learned trial Magistrate misdirected himself when he failed to consider the Appellant’s long occupation of the suit land.**

Upon visiting the locus – in – quo, counsel for the Appellant submits that there were trees that were over 20 years old meaning that the Appellant had been in occupation of the suit land for long. That, the trial Magistrate did not put this into consideration while making his decision.

Counsel for the Respondent however stated that the trees as found at the Locus – in – quo were not as old as is alleged by Counsel for the Appellant. That these trees were planted by the Appellant in order to grab the suit land.

The Appellant told Court that he had harvested trees before and replanted, meaning that at locus, both old trunks and new trees would be found. However, I find that this should not have formed the basis of the trial Magistrates decision but rather the evidence as adduce by either party. Visiting locus is mainly to see if what the witnesses were saying was true. Respondent in his testimony stated that when he bought the land there were old trees. This could explain the old trunks that were found at the locus – in – quo. Therefore, the length of stay of the Appellant could not be determined based on the age of the trees found. This ground also fails.

The appeal generally lacks merit, and is dismissed with costs.

Right appeal explained.

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**OYUKO. ANTHONY OJOK**  
**JUDGE**  
**2/12/16**

**Judgment read and delivered in open Court in the presence of;**

1. Both parties.
2. Court Clerk – James

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**OYUKO. ANTHONY OJOK**  
**JUDGE**  
**2/12/16**