

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0029 OF 2012

(Arising from Adjumani Grade One Magistrate’s Court Civil No. 0003 of 2008)

1. DRAMADRI JOEL	}		
2. IDRO GODFREY	}		
3. TABAN RATIB	}		
4. CHANDIA MARGARET	}	APPELLANTS
5. ANNA ISA	}		
6. MADRA FELICE	}		

VERSUS

YUSUF IBRAHIM **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellants jointly and severally for recovery of approximately six acres of land held under customary tenure situated at Abirichaku village, Biyaya Parish in Adjumani Town Council near the Mosque. He sought a declaration that he is the rightful owner of the land, an order of vacant possession, eviction, general damages for trespass to land and costs. The respondent’s case was that during 1930, his father Ibrahim Said acquired the land in dispute from Chief Lumara of Adropi and lived on that land until his death in 1946. Upon his father’s death, the respondent inherited the land, lived on it and grew crops thereon until 1979 when he and his family fled into exile. When he returned from exile in 1986, he found the appellants had encroached on the land and they adamantly refused to vacate it despite his demands. He pleaded disability for the belated filing of the suit only in the year 2008 because of general instability that engulfed the Northern region of Uganda soon thereafter.

In their joint written statement of defence, the appellants denied the respondent’s claim. They contended instead that the land in dispute belonged to their late father and have lived there on since 1915 undisturbed until the respondent filed the suit against them.

In his testimony, the respondent stated that his father, Ibrahim Said acquired the land in dispute in 1930 from Chief Lumara of Adropi and lived on that land until his death in 1946. Upon his death, the respondent and the rest of the family continued only to cultivate crops on the land but did not live on it until 1979 when they fled into exile. Upon his return from exile, he found the respondents occupying the land and demanded that they vacate the land and when they refused to do so he reported the matter to the L.C. 1 Court which did not dispose of the case but only told him to wait. He did not file a suit in court immediately because he thought the L.C.s would help and because of the LRA war that prevailed in the area, he feared to file the suit. P.W.2 Romano Abuddallah testified that the land in dispute originally belonged to the respondent's father Ibrahim Said. When he died, the respondent took over the land until he fled to Sudan during the 1979 war from where he returned in 1986 only to find the appellants had settled on the land. He reported to the L.C. but the case was never heard and decided. He could not file the suit because of the LRA war which only ended in 2003 -2004.

P.W.3 Noah Ocen testified that when he came from Pekele to Adjumani in 1937, he found the respondent's father cultivating on the land in dispute and when he died in 1946, his son the respondent took over the land. When the respondent fled into exile, the first appellant settled on the land and was later joined by the rest of the appellants who constructed grass-thatched houses on the land. P.W.4 Asumani Yusuf son of the respondent testified that the appellants took advantage of the respondent's flight to Sudan in 1979 and settled on his land which he inherited from his grandfather. The appellants prevented them from reclaiming the land when they returned from exile in 1986 forcing the respondent to file a suit before the L.C. and later in court in 2008. That was the close of the respondent's case.

On his part, the first appellant testified that he knew the respondent's late father Yusuf Ibrahim as a person who used to sell water within the Town Council who did not own land anywhere. The land in dispute belonged to his great grandfather Benetura who settled there in 1915. It later passed onto his late father, Setimeie Bulle who lived there until his death in 1986 whereupon it passed to him. He was born on the land and has lived on it since then. The rest of the appellants are all his relatives and have lived on the land since their childhood. He constructed grass-thatched houses on the land in 1994 and lived peacefully thereon until 2008 when the respondent

filed a suit against them. Five of his deceased relatives were buried on the land from 1992 to 1996 without anyone raising a complaint. He was an internally displaced person during the 1979 war and did not flee into exile. The second appellant, a nephew of the first appellant testified as D.W.2 and he stated that he had lived on the disputed land for the past fifteen years and it was only in 2008 that the respondent filed a suit claiming the land as his. When his mother died, she was buried on the disputed land. The fourth appellant testified as D.W.3 and she stated that she is the mother of D.W.2 and they live on the disputed land which belongs to the first appellant.

The fifth appellant testified as D.W.4 and she stated that she came onto the land when the sister of the first appellant left her marriage and returned to live on land which belonged to her father. They grew up on that land and when their mother died, she was buried on that land. They had lived peacefully on the land until the respondent filed the suit against them. The third appellant testified as D.W.5 and he stated that the first appellant is his in-law and he is aware of a number of graves on the land of deceased relatives of the first appellant. The sixth appellant testified as D.W.6 and he stated that he had lived on the land in dispute since 1987 without anyone complaining until the year 2008 when the respondent filed the suit. D.W.7 Opendi the L.C.1 Chairman of Biyaya village testified that came onto the disputed land in 1987 and several burials of the first appellant's relatives took place on that land while he lived there. Within his then ten year tenure, the respondent had never complained to him about the land. The respondent has never lived on Biyaya village and has no land there. The disputed land is in Biyaya village and not in Abirichaku village as claimed by the respondent. That was the close of the appellants' case.

The Court then visited the *locus in quo* on 22nd August 2011, where it observed that all homesteads on the disputed land belong to the appellants. At the end of the exercise, the court on its own motion invoked the provisions of section 100 of *The Magistrates Courts Act* and summoned all the neighbours to the land to testify as court witnesses and proceeded to record their testimonies on 12th June 2012. The first witness Okudi Jobule testified that he has been a neighbour to the North of the land for over thirty five years and for all that time it was occupied by the parents of the first appellant who was born on that land. He had never seen the respondent undertake any activity on the land. The second witness Opika Richard testified that he knew the

respondent as a member of the Water Committee in town. When he came to the neighbourhood of the disputed land in 1991, he found the first appellant occupying the land. The third witness Muhammad Ali testified that upon return from exile in 1986, he saw that the appellants were occupying the respondent's land and had elected grass-thatched houses thereon. The fourth witness that the respondent had cultivated the land in dispute until he fled into exile only to return and find the appellants occupying it. His attempts to ask them to eve peacefully having failed, he filed the suit. The last witness Nasur Gadi testified that he used to see the respondent cultivate the land in dispute but upon return from exile in 1986, they found the respondents had taken it over. Having failed to cause them to leave peacefully, the respondent filed the suit

In his judgment, the trial magistrate found that the appellants had failed to prove their ownership since they seemed to have entered onto the land on permission of the first appellant who did not prove how his father, Bulle, from whom he claimed to have inherited the land, acquired it. He found that the respondent had proved the case on the balance of probabilities, granted an order of vacant possession and eviction as well as costs against the appellants.

Being dissatisfied with the decision the appellants challenge the decision on the following grounds, namely;-

1. The learned trial magistrate erred in law and fact when he failed to find that the suit of the respondent / plaintiff was time barred.
2. The learned trial magistrate erred in both law fact when he failed to properly evaluate the evidence on record and thus reached a wrong conclusion that the respondent / plaintiff is the owner of the suit land.

In his submissions, counsel for the appellant Mr. Samuel Ondoma argued that being a suit for recovery of land and time having begun to run in 1986 when the respondent discovered the encroachment, the suit which was filed in 2008 was filed out of time. This point was raised in the written statement of defence as well as a preliminary point of law whereupon the court undertook to give reasons for overruling it which it eventually never did in the judgment. Although war was pleaded as a disability, it was not proved during the trial. As regards the second ground, the practice of chiefs giving land to their subjects was not proved and therefore the respondent's father did not acquire any interest in the land. The trial court descended into the arena when it

relied almost entirely for its decision, on the testimony of the witnesses it called. He prayed that the appeal be allowed with costs.

In his response, counsel for the respondent Mr. Ezadri Michael argued that the respondent was prevented by insurgency in the area from filing the suit between 1986 when he discovered the encroachment and 2008 when he finally filed the suit. As regards the second ground, he argued that the trial magistrate considered all the evidence before him and came to the correct conclusion. The trial magistrate considered the testimony of the main witnesses of the parties alongside that of the witnesses it called and found the respondent had proved his case on the balance of probabilities. The appeal should therefore be dismissed with costs.

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

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

This appeal can be disposed of on basis of the first ground only. Limitation periods have a number of different policy justifications; public interest has always been concerned that litigation should be brought within a reasonable time. This enables cases to be dealt with properly and justly. Moreover the public interest requires the principle of legal certainty, defendants may have changed their position or conducted their businesses in the belief that a claim would not be made. Furthermore, evidence may largely depend on the recollection of witnesses, which deteriorates over time. It may depend on the preservation of written records which may be lost or destroyed. It is for these and other reasons that limitation statutes have been described as “acts of peace” or “statutes of repose”. People should be free to get on with their lives or businesses without the threat of stale claims being made. The Limitation Act also encourages claimants to bring their claims promptly and not, in the old phrase, “to sleep on their rights.” The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims (see *Dhanesvar V. Mehta v. Manilal M Shah* [1965] EA 321; *Rawal v. Rawal* [1990] KLR 275, and *Iga v. Makerere University* [1972] EA 65).

With those policy considerations, section 5 of *The Limitation Act*, which provides for limitation of actions for the recovery of land, states as follows;

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

This limitation is applicable to all suits for possession of land based on title or ownership i.e., proprietary title as distinct from possessory rights. Furthermore, Section 11 (1) of the same Act provides that;

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

These provisions have been applied in cases such as *Semusambwa James v. Mulira Rebecca* [1992-93] HCB 177 and *Kintu Nambalu v. Efulaimu Kamira* [1975] HCB 222, where it was held

that a suit for a claim of right to land cannot be instituted after the expiration of twelve years from the date the right of action accrued.

According to section 6 of the same Act, “the right of action shall be deemed to have accrued on the date of the dispossession.” A cause of action therefore accrues when the act of adverse possession occurs. In *F. X Miramago v. Attorney General [1979] HCB 24*, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. An owner of land is deemed to be in possession of the land so long as there is no intrusion. Non-use of the land by the owner, even for a long time, will not affect his or her ownership. But the position will be altered when another person takes possession of the land and asserts rights over it and the original owner omits or neglects to take legal action against such person for years.

In the instant case, it was the testimony of the respondent that after the death of his father he only continued to cultivate crops on the land in dispute but did not live on it, until 1979 when he fled into exile. Upon his return from exile in 1986, he found the respondents occupying the land and demanded that they vacate the land and when they refused to do so he reported the matter to the L.C. 1 Court. He did not file a suit in court immediately because he thought the L.C.s would help and because of the LRA war that prevailed in the area, he feared to file the suit. P.W.2 testified that when they returned from exile in 1986 they found the appellants had settled on the land. P.W.3 and P.W.4 too testified to similar effect. The combined implication of their testimony is that the adverse possession of the third appellant commenced sometime after 1979 but before 1986. Nevertheless, since the respondent only became aware of the adverse possession in 1986, from that moment forward, the process of the appellants’ acquisition of title by adverse possession sprung into action essentially by default or inaction of the respondent. It is then that time began to run against him and by virtue of section 21 (1) (c) of *The Limitation Act* which confers an extension of six years from the date the facts are discovered, his time ran out in 1992.

In section 21 (1) (c) of *The Limitation Act*, allowance is made in respect of a person to whom the cause of action accrues but who at the time is ignorant of material facts of a decisive character, that is facts relating to the cause of action which would enable a reasonable person to conclude that he or she had a reasonable chance of succeeding and as would justify the bringing of the action. A fact is taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he or she did not know that fact; and (2) in so far as that fact was capable of being ascertained by him or her, he or she had taken all such steps (if any) as it was reasonable for him or her to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him or her, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, if he or she had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

It is clear from the testimony of the respondent and his three witnesses mentioned above, that the respondent became aware of the appellants' adverse possession in 1986. There is nothing to suggest that from that year, the respondent had not been in open, continuous, uninterrupted and uncontested possession of the disputed land. From then going forward, he was no longer ignorant of any material facts of a decisive character. Therefore by 2008 when the suit was filed, the third appellant had occupied the disputed land with the respondent's knowledge, for twenty two years. Unless the respondent pleaded and proved disability for his failure to commence the action within the limitation period, he had by 2008 not only lost the right to bring an action for the recovery of the land, but also the appellants were already by operation of the law, vested with title thereto.

Uninterrupted and uncontested possession of land for over twelve years, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold* [1907] AC 73, at 79). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act*. In such cases, adverse possession has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa, H.C. Civil Suit*

No. 508 of 2012). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

Order 7 rule 6 of *The Civil Procedure Rules* requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff should show the grounds upon which the exemption from that law is claimed. This requirement was considered by the Court of Appeal in *Uganda Railways Corporation v. Ekwaru D.O and 5104 others, C.A. Civil Appeal No.185 of 2007 [2008] HCB 61*, where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaintiff, the plaintiff must be rejected.

In paragraph 6 of the plaintiff, the respondent pleaded disability thus; "the plaintiff will aver and contend that there was war going on in Northern Uganda and this was a disability preventing the plaintiff to file his action in time." In his testimony at page 16 of the record of appeal, lines 14 – 25 he stated as follows;

Because of the prevailing war in this area, I could not institute the case. Since people came back from the Sudan in 1986, the situation here was not quite conducive and the war of the LRA was here and I convey disabled people (sic) was killing people and even I couldn't bring the matter to the court for year ago (sic) represent from the people under the deqinse (sic) of war, to call me. Adjumani was also a disturbed area and this therefore affected people, people were killed here in Adjumani are right (sic) and several people suffered where people would sleep in the bush, and a very return (sic) the next day to the homes. Therefore there was a general state of fear, which could not allow me to peruses (sic) the case.

He is supported in this by the testimony of P.W.4 who stated that his father instituted the suit in June 2007 because of rebel activity in Adjumani involving the LRA, he said at page 24 line 3 "the war affected us in way people were scattered and you couldn't plan anything, all the time people were on the run." But under cross-examination at the same page lines 14 – 15 he continued to say "there were L.C. systems operating. This court also was working."

Section 21 (1) of *The Limitation Act*, Cap 70 provides that if a person to whom a cause of action accrued was under a disability at the time it accrued, the action may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability, notwithstanding that the period of limitation has expired. Although section 1 (3) of the Act limits the definition of disability for the purposes of the Act to situations where a person is deemed to be under a disability only while he or she is an infant or of unsound mind, disability has been defined to include any incapacity which might hinder a person from taking the right step at the right time (see *Bagalaliwo Mohammed Haji v. Attorney General [1988-90] HCB 136*). For that reason, imprisonment has been acknowledged as a disability (see *Siya John v. The Attorney General [1972] HCB 86*; *Mungecha Fred M. v. Attorney General [1981] HCB 34* and *Sempa James v. Attorney General [1981] HCB 32*).

From the above definitions, disability is attributed to an event or situation external to the person to whom the cause of action accrues, over which he or she had no control which prevents him or her from taking the necessary step by occasioning physical or mental incapacitation. In the instant case, the tenor of the respondent's explanation is not the existence of any physical or mental incapacitation occasioned by the war, since according to his son P.W.4 the Magistrate's Court at Adjumani remained operational despite the war, but rather his emotional distress. A person who advances fear as the reason for failure to file a suit is not prevented by anything external but only his or her own trepidation. Apprehension is not a physical incapacitation. The respondent therefore did not prove any disability.

He attempted instead to prove that he filed a suit before the L.C.1 Court in 1986. In his testimony at page 15 line 14 of the record of appeal, he said that the first challenge against the respondent's occupancy was made immediately in 1986 by way of a suit he filed in the L.C. 1. He is supported in this by the testimony of P.W.2 at page 19 line 14 of the record of appeal where he stated that, "I was among those who would escort Yusuf to the L.C. Court." P.W.4 at page 23 line 20 of the record of appeal alluded to the same fact but said he did not know whom the respondent had sued. On the other hand at page 20 of the record of appeal, line 6 stated that, "The L.C Courts were there but could not help."

It is trite law that no suit is considered filed until fees have been paid (see *Kalule Paul v. Losira Nanozi* [1974] HCB 202; *Katuramu Christopher v. Maliya and three others* [1992-93] HCB 161 and *National Housing Construction v. Lira Municipal Council* [1996] HCB 53). The date on which the plaint was received by the court will be recorded by a date stamp on the claim form held on the court file or on the summons issued by the court. In *St. Helens Metropolitan Borough Council v. Barnes CA* [2006] EWCA Civ 1372, it was held that proceedings are started when the court receives the claim form (plaint).

However, it is not factually correct that in 1986 Resistance Committees had any judicial power. That power was conferred in 1988 upon the enactment of *The Resistance Committees (Judicial Powers) Statute, 1 of 1988*. According to section 10 thereof, suits would be instituted by stating to the chairperson orally or in writing the nature of the claim against the defendant and the relief sought by the claimant. Every such claim had to be signed by the claimant, but if made orally it had to be reduced into writing by the chairperson or a person appointed by him or her for that purpose, and when so reduced in writing to be read to the claimant and to be signed by the claimant and countersigned by the chairperson. Section 11 required service of summons on the defendant and section 17 the maintenance of a record of proceedings by such courts. The respondent therefore would be expected to adduce documentary proof of his having filed such a suit, which he never furnished. Therefore, there is no evidence whatsoever that the respondent ever filed a suit before such a court within the six years extension provided for by section 21 (1) of *The Limitation Act, Cap 70*.

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

It was held in *Iga v. Makerere University* [1972] EA 65 that;

A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief

The point having been taken as a preliminary objection, the trial magistrate in his ruling at pages 6 - 7 of the record of appeal decided as follows;

I find therefore that the P.O and the replies there about only create triable issues and especially as to what amounts to a disability thus could not sustain this P.O unless evidence is led at the hearing. Therefore since disability was made a triable issue in the pleadings, I dismiss the P.O and proceed to hear the merits of the case to determine the real issues in controversy and I also reserve my reasons herein in the main judgment.

However, perusal of the judgment reveals that the trial magistrate did not proffer any additional reasons for overruling the objection. Indeed he did not evaluate the evidence at all in regard to the disability pleaded by the respondent. Had he done so, he would have come to a different conclusion in line with the one I have come to. In the circumstances, I do not deem it necessary to consider the rest of the grounds and arguments advanced by counsel for the appellants. I am satisfied that had the trial magistrate considered this ground alone in its proper perspective, he would have come to a different conclusion and dismissed the suit.

In the final result, I find the appeal has merit it is accordingly allowed. The Judgment, the decree and all orders made by the trial court are hereby set aside. In their place is entered an order dismissing the suit. The costs of this appeal and those of the trial are awarded to the appellants.

Dated at Arua this 29th day of March 2017.

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Stephen Mubiru
Judge
29.03.2017