THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

(Arising from Civil Suit No. FPT – 00 – LD – CV – 0001 of 2013)

KAITWEBYE EMMANUEL.....APPELLANT

VERSUS

TINKA JULIUS.....RESPONDENT

(Administrator of the Estate of Byembandwa Seperiano)

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

Judgment

This is an appeal against the decision of Her Worship Nihawa Shallon Magistrate Grade one at Kyegegwa delivered on 29th June 2013.

The Respondent also being dissatisfied with the decision of the lower court lodged a cross appeal.

Background

The Respondent instituted a Civil Suit against the Appellant for declarations that; the Appellant was a trespasser; the respondent was the lawful owner of the suit land; an order of vacant possession; general damages; permanent injunction restraining the Appellant from further trespass and costs of the suit.

The Respondent contended that he acquired the suit land from his Grandfather who also acquired it from Toro Kingdom in 1971.

The Appellant on the other hand averred that he inherited the suit land from his aunt after her demise as per her will.

Issues for determination were;

1. Who is the rightful owner of the suit land?
2. Whether or not the document marked Annexture “D” attached to the plaint is a true document of Brandina Nyanjura?
3. Whether or not the suit is barred by limitation?
4. Whether or not the Defendant trespassed on the suit land?
5. Remedies available to the aggrieved party.

The trial Magistrate passed judgment in favour of the Respondent and found that the Appellant was a trespasser on the suit land. All the prayers of the Respondent were granted save for general damages, reason being that there was no justification for their award proved.

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

1. That the learned trial Magistrate Grade one erred in law and fact when she held that the suit is not barred by limitation.
2. That the learned trial Magistrate erred in law and fact when she held that the suit land was acquired by late Sepiriano Byembandwa.
3. That the learned trial Magistrate misdirected herself when she declared the Appellant a trespasser and failed to consider his developments on the land.
4. That the learned trial Magistrate erred in law and fact when she based her decision on exhibits PEXH A and PEXH B which do not refer to the suit land.
5. That learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence of DW1, DW2, DW3, and DW4 and came to a wrong decision.

Counsel James Ahabwe appeared for the Appellant and Counsel Shaban Sanywa represented the Respondent.

Grounds 1 and 3 are discussed together, grounds 2 and 4 jointly and ground 5 separately.

It is the duty of the first 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).**

Resolution of the Grounds:

Ground 1 and 3:

1. That the learned trial Magistrate Grade one erred in law and fact when she held that the suit is not barred by limitation.

3. That the learned trial Magistrate misdirected herself when she declared the Appellant a trespasser and failed to consider his developments on the land.

Counsel for the Appellant submitted that it was the evidence of both parties' witnesses that the late Bulandina started staying on the suit land in 1971 and was in 1985 joined by the Appellant and they developed the suit land together. The Appellant even got married and had children on the suit land, and his occupation on the suit land was for more than 12 years.

Counsel noted that the trial Magistrate erroneously disregard the issue of limitation and misapplied the same. That the principle applies when the ownership of land is not in dispute otherwise **Section 5** of the Limitation Act would be inapplicable in Uganda. The Appellant

had occupied the suit land for over 28 years and thus the Respondent could not sue him in Courts of law.

Counsel for the Respondent on the other hand submitted that as per **Section 103** of the Evidence Act the Respondent brought PEXH A and PEXH B to prove that he was the lawful owner of the suit land as opposed to the Appellant who brought no proof to support his claim apart from alleging that the late Bulandina found the suit land vacant in 1971 and occupied the same. That the suit land was formerly Government land and Byebandwa was paying the requisite fees as the owner of the suit and this was evidenced by PEXH B that was paid in 1992. That the Appellant and Bulandina were mere licensees on the suit land and even Byebandwa wrote his will a year prior to the death of Bulandina.

Counsel for the Respondent cited the case of **Dezideriyo Ssekyenbe & 2 Others versus Hassan Mbogo, Civil Suit No. 500 of 2012** where it was held that the caretaker of land amounts to a licensee which ceases when the Land Lord wishes to take over the use of the land.

Also in the case of **Radaich versus Suith (1959) 101 CLR 209 at 222**, classifies a person who enters upon someone else's land with the permission of the owner as a licensee.

Counsel for the Respondent further submitted that it was the testimony of both parties that in 2009 after the death of Bulandina that Byebandwa wrote to the Appellant requesting him to vacate the suit land. That the cause of action for the Respondent arose in 2009 when the occupancy of Bulandina ceased caused by her death and the Appellant was notified by the owner to vacate the suit land.

In regard to the developments on the suit land, Counsel for the Respondent cited the case of **National Social Security Fund (NSSF) versus David Kyambadde, Civil Suit No. 188/2013** where it was held that the Defendant is unlawfully occupying the Plaintiff's land and is a trespasser on the suit land and similarly the Defendant's developments on the suit land are illegally on the Plaintiff's land.

That in the circumstances the developments the Appellant made on the suit land were made by him after joining the late Bulandina who had been given permission to stay on the suit land but that did not make him the owner of the suit land.

Counsel for the Appellant submitted in rejoinder that the Appellant cannot be presumed to be a licensee and no evidence was led to prove the purpose for which the late Bulandina was allowed to enter on the land. That the Appellant and his late aunt were not caretakers of the suit land therefore, the case of **Dezideryo** (Supra) is inapplicable.

Further in rejoinder that the late Bulandina did not seek permission from Byembandwa because the suit land was hers and not for the Respondent's grandfather who had his own land across the road which fact was confirmed by PW2. That the late Bulandina and Byembandwa both acquired their respective pieces of land in 1971.

It is my considered opinion that the suit was not time for according to the Provision of Section 5 of the Limitation Act, the cause of action arises at the time when the aggrieved party realises the cause of action and not when it started. In the instant case the Respondent's cause of action arose in 2009 when apparently his grandfather wrote to the Appellant to vacate the suit land and he refused. The trial Magistrate was therefore right to disregard the issue of limitation in the instant case because the suit was not time barred.

Secondly, it was the evidence of both parties that Bulandina the aunt to the Appellant started staying on the suit land in 1971 and that is the same year tht the Respondent's father acquired the same. However, it was the evidence of PW2 a daughter to the Respondent's grandfather that the two siblings had distinct pieces of land and Byembandwa the grandfather to the Respondent sold his to nyakato. I am inclined to believe that there were two different pieces of land as per PW2's evidence.

Thirdly, the Appellant joined his aunt in 1985 and also contributed to the development of the suit land, got married and had children as Byembandwa was quiet. It was only after the demise of Bulandina that he now started evicting the Appellant yet had not complained initially.

It was the argument of the Respondent that the Appellant and his aunt were licensees on the suit land and thus, the occupancy of Bulandina ceased after her death and therefore the Appellant was a trespasser. I find that the case as cited by Counsel for the Respondent distinguishable from the instant case.

As per PW2's testimony, I do not find that the Appellant was a trespasser and therefore the developments made on the suit land were not illegal.

Thus, the learned trial Magistrate Grade one did not err in law and fact when she held that the suit is not barred by limitation however, she misdirected herself when she declared the Appellant a trespasser and failed to consider his developments on the land.

Ground 1 fails and Ground 3 succeeds.

Grounds 2 and 4:

2. That the learned trial Magistrate erred in law and fact when she held that the suit land was acquired by late Sepiriano Byembandwa.

4. That the learned trial Magistrate erred in law and fact when she based her decision on exhibits PEXH A and PEXH B which do not refer to the suit land.

Counsel for the Appellant submitted that the Appellant was born at a time when his aunt was already in occupation of the suit land unlike the Respondent who is relying on hearsay evidence as he was not yet born at the time the Appellant acquired the suit land from his Aunt Bulandina. That the Respondent's testimony was based on hearsay from the information that he obtained from his grandfather in 2009.

Counsel for the Respondent submitted that the late Byebandwa before his death had filed a suit against the Appellant in the LC Courts and by then the Respondent was an adult and used to follow up on the same since his grandfather was of advanced age. The Respondent is also the Administrator of his late grandfather's estate therefore his evidence cannot be regarded as hearsay.

Counsel relied on **Section 58(c)** of the Evidence Act that provides that;

"If it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner."

Thus, the Respondent's evidence is admissible as proof of facts by oral evidence.

Counsel for the Appellant on the other hand prayed that the Respondent's evidence be dismissed for being hearsay since all the evidence he gave was what was told to him by his Grandfather in 2009. That according to the evidence of PW2 a daughter to Byembandwa, the Respondent's grandfather had land across the road which he sold to Nyakato. Further that PEXBA and PEXH B were in relation to the land that was sold and not the suit land.

In my opinion, it is true that the Respondent is the Administrator of the late Byembandwa's estate and gave evidence in that capacity, however, it should be noted that all the evidence he gave was what was told to him by the late Byembandwa and not information he knew on his own without being told.

In the circumstances I find the Respondent's in admissible and is accordingly struck out.

In regard to the exhibits tendered in Court, I find that these did not relate to the suit land but rather to another piece of land.

Grounds 2 and 4 succeed.

Ground 5:

That learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence of DW1, DW2, DW3, and DW4 and came to a wrong decision.

Counsel for the Appellant submitted that it was the testimony of the Appellant's witnesses that the Appellant started occupying the suit land in 1985, built on the same, got married, had children and all this happened when Byembandwa was alive and he did not protest. It is upon the death of Bulandina that Byembandwa started claiming the suit land. Furthermore, the Appellant's daughter was left as heir of the late Bulandina and this was confirmed by PW2. That in the circumstances the Respondent's evidence was tainted with lies.

It is true that the Appellant started occupying the suit land in 1985 and made developments on the same without the interference of the Byembandwa. What beats my understanding is how Bulandina could leave the daughter of the Appellant as her heir well knowing that the suit land did not belong to her. I find the Respondent's evidence wanting. If indeed the

Respondent's grandfather was the owner of the suit land, he would have protested the developments of the Appellant and not wait for the demise of Bulandina to start evicting him.

This ground is allowed.

The Respondent lodged a cross appeal whose grounds are;

1. That the learned trial Magistrate erred in law, fact and on legal principle in failing to award general damages as prayed for.
2. That the learned trial Magistrate erred in law and fact in failing to consider the sufficiency of evidence led to prove the award of general damages as prayed for.
3. That the learned trial Magistrate erred in law and fact on non-directing herself to the inconveniences caused by the Appellant's illegal occupation. The Appellant benefited by the said occupation.
4. That the learned trial Magistrate erred in law and fact by failing to evaluate all the evidence as a whole in regards to general damages hence occasioning a miscarriage of justice.

Resolution

A preliminary objection was raised by the cross Respondent to the effect that the cross appeal was out of time.

Section 79(1) and **(2)** of the Civil Procedure Act provides that every appeal shall be entered within 30 days of decree of judgment and in computing the period of limitation prescribed by this section, the time taken by Court or Registrar in making a copy of the decree appealed against and of the proceedings upon which it is founded shall be excluded.

Counsel for the Cross Respondent submitted that the Cross Appellant never showed when he developed interest of appealing. That he did not apply for the lower Court proceedings and he did not show how much time was taken in making the decree and proceedings in order to exclude such time. That the record of proceedings was available on 5th July 2016 and the Cross Appellant still did not lodge the appeal. Thus, the appeal be struck out with costs.

Counsel for the Cross Appellant submitted that the time of right to appeal excludes the time of preparation of decree and proceedings from the lower Court and it starts running at the time the Appellant is served with the basic documents in the appeal. That the record of proceedings was given to him on 17th January 2017 and the appeal was immediately lodged.

It is true that filing of appeals is time bound and the time starts running from the time when the decree and the proceedings of the lower Court are ready. However, in the instant appeal I find that this is a mere technicality and I there disregard this preliminary objection with all due respect.

Grounds discussed jointly

Counsel for the Appellant submitted that the Cross Respondent had been using the suit land since May 2009 independently despite the notification to vacate the same issued by

Byebandwa. That the continued use of the suit land by the Cross Respondent warranted award of damages to the Cross Appellant for the loss of use of the suit land.

Counsel for the Cross Respondent on the other hand submitted that award of general damages is at Court's discretion and court can choose to award them or not depending on the circumstances of the case.

In the case of **M/s Pago (U) Limited versus Fort Portal Municipal Council, Civil Appeal No. 28 of 2006,** it was stated that in a claim for General damages, it is incumbent upon the Appellant to prove that there was damage or loss that the Appellant suffered as a result of the Respondent's acts in respect of the suit land.

Counsel for the cross Respondent also noted that the Cross Respondent occupied the suit land in 1985 and developed the same with jack fruit trees, pawpaw, coffee, banana plantation and residential houses, which were seen during the locus visit. The Cross Appellant and his grandfather have never used the suit land, therefore did not suffer any loss.

I concur with the submission of Counsel for the Cross Respondent that award of general damages is discretionary and varies from case to case. In the instant case the trial Magistrate found no justification to award the same as no loss or inconvenience had been proved.

In regard to interest, it is also the discretion of the Judicial Officer to award interest on the award of general damages and there was no proof of mesne profits and the same were never prayed for in the lower Court. Thus, the Cross Appellant cannot pray for mesne profits on appeal having to pray for the same in the lower Court.

Order 43 Rule 2(1) of the Civil Procedure Rules provides that;

"The Appellant shall not except by leave of the Court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal."

Counsel for the Cross Appellant also prayed for costs in the appeal as per **Section 27(2)** of the Civil Procedure Act.

In a nut shell, this appeal is allowed; the judgment and orders of the lower Court are hereby set aside.

The Cross Appeal lacks merit and is dismissed. Costs are award in this appeal and the lower Court. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

29/03/2017

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

1. Counsel James Ahabwe for the Appellant.
2. Counsel Shaban Sanywa for the Respondent.
3. Both parties.
4. James – Court Clerk.

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OYUKO. ANTHONY OJOK

JUDGE

29/03/2017