THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0014-2015
(ARISING FROM TORORO CIVIL SUIT NO. 77 OF 2011)

ONYANGO SAM……..……..APPELLANT
VERSUS
OCHWO APOLLO AYEKA…….……..…….RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant appealed against the Judgment of Her Worship **Cherotich Kaibei** Magistrate Grade I Tororo of 4.2.2015 in which she found for the plaintiff/Respondent.
The appellant raised 4 grounds of appeal.

The duty of a first appellate court is to re-appraise the evidence and make its own findings and conclusions thereon; bearing in mind the fact that it never had the opportunity to observe the witnesses. This is the position as held in the cases of ***Banco Arabe Espanol v. Bank of Uganda SCCA 8/1988*** (unreported) and ***FR Narsensio Begumisa & 3 Ors v. Eric Kibebaga SCCA No. 17/2002*** (unreported).

In this case, I notice from the pleadings that the Plaintiff **Ochwo Apollo Ayeka** by plaint dated 12th August 2011 sued **Onyango Sam**, "*for recovery of his ancestral land measuring about 40 acres*." (paragraph 3). Under paragraph 4 of the plaint the plaintiff stated that the "defendant together with his agents without any colour of right unlawfully trespassed/encroached upon the plaintiff's 40 acres of land and

started therein to cultivate and grow food crops…." Under paragraph 5, that inspite of notices issued to the defendant to stop the same, he refused the same.

In defence by Written Statement of defence, dated 30th August 2011 denied the plaint; and contended that he is a customary heir to his father the late **Yowana Osuna Ogingo**, and inherited it from his late father. Under paragraphs 6-9 the defendant stated that the occupation was from 1993 to his late grandfather land was divided by a clan head one **Naphtali Owor** to all his sons and dependants. Plaintiff's father was dissatisfied and instituted criminal proceedings under criminal case M755/93, which was dismissed. Under paragraph 9 defendant averred that plaintiff has no claim against the defendant.

In the lower court, the evidence assembled consisted of a total of 6 witnesses alongside exhibits for the plaintiffs and five defence witnesses and exhibits.

On appeal the appellant argued each ground of appeal separately. The Respondents followed the same pattern of argument.

I have gone through the case as a whole, re-appraised the evidence and internalized the arguments on appeal. I have found that this appeal raises two important matters of law which ought to have been dully determined by the lower court; and which can conclusively suffice to finalize this appeal.

I will begin with the same matters herein argued under grounds 1 and 3 respectively.

Ground 1: The learned trial Magistrate erred in law and fact when she found that the plaintiff's suit was not time barred.

In arguing the appeal, the appellant argued that from evidence of PW.1, PW.2, PW.3, PW.4 and PW.5, it was shown that there were numerous litigation between the father of the Respondent/Plaintiff and father of appellant. It was also shown that these disputes allude to the fact that by 1988 the appellant had returned from Luwero and the land was divided by the 1990s. Evidence from DW.1, DW.3, DW.4, all shows that the defendant testifies that the land was divided amongst the five sons of **Ogino** by the clan in 1993.

It is also shown that defendant's father died on the land in December 1995 and was buried there. On 28th May 2012 the appellant served documents from M/s Majanga and Company claiming that his father had litigated with **Ofwono** and he was successful.

From the above, appellant's counsel argued that the suit was time barred given the fact that the law of limitation gives the limitation period for such actions as 12 years.

Respondent's counsel however contended that there isn't a scintilla of evidence to support the position that the suit was indeed instituted outside the limitation period. That appellant led no such evidence. He referred to the clan minutes dated 19.02.1988 admitted as exhibit P.I, to find that appellant's occupation of the 2 acres of land was lawful, save that in 2011 the appellant sought to evict the Respondent.

With due respect, I do not agree with the findings of the learned trial magistrate supported by the Respondent that this suit was not time barred. To begin with the

plaint itself is silent on the time frames. The plaintiff did not tie his case to the facts argued in submission by Respondent's counsel.

In the plaint under paragraph 3 "*the plaintiff's claim is for recovery of his ancestral land measuring about 40 acres*."

Under paragraph 4, he alleged that "*the defendant and his agents trespassed and encroached on the plaintiff's 40 acres…. And paragraph 5 "even when given notices to stop did not stop*."

The question therefore ought to be when did the plaintiff become aware of this act of trespass on the 40 acres of land?

By his evidence from PW.1- **Ochwo Apollo** he sued because on 28.05.2011 the defendant sued them before LC.I court alleging that they had trespassed on his land. That he brought a letter from **Majanga**'s chambers and they were given 24 hours to vacate the land.

From what is on record in this matter the whole of this dispute did not arise in 2011 as the learned trial Magistrate proposed. The entire dispute dated back 20 years ago! It began as a dispute between the defendant's father and plaintiff's father. Going by the pleadings in the written statement of defence, under paragraph 5, the defendant alleged that he is a customary heir to his father's the late **Yowana Osuna Ogingo** and in 1993 his late grandfather land was divided by the clan head one **Naphitali Owor** to all his sons and defendant under paragraph 8 he alleges that the plaintiff's father instituted a criminal trespass case against defendant's late father and 7 others but court dismissed the same under MT.555/93- (annexture MA/1).

This defence was supported during hearing vide the testimonies of DW.1, DW.2, DW.3, DW.4 and DW.5 in evidence in court.

The cause of action therefore cannot be taken to have been sparked off by the alleged **Majanga** letter of 2011. The evidence on record shows that the alleged trespass if at all relates to the land dispute which parties hold against each other and is recorded to have been litigated upon as far as 1993 as per exhibit P.2. Evidence shows that defendant and his mother have lived on the suit land since 1988, a period of over 20 years. From the above facts it is concluded that by the time of institution of C/S 77/2011, the matter of controversy had already arisen for over 12 years which is the period that the Limitation Act provides for.

From the above discourse therefore, I find that by virtue of section 5 of the Limitation Act (Cap.80), it is provided that ; "*no action shall be brought by any person to recovery any land after the expiration of 12 years from the date on which the right of action accrued to him or her.*"

The facts of this case, show that the plaintiff's cause of action as against the defendant arises from factors that arose long ago, for over 20 years ago when their fathers litigated over the said land. The suit is to that extent time barred.

I therefore find that ground 1 of the appeal succeeds.

Ground 3: The learned trial Magistrate erred in law and fact when she made a finding on a claim which the plaintiff had abandoned. The import of this ground is that the suit was *res-judicarta*.

According to counsel for the appellant, court ought to have found that the matter before it was *res judicarta* on the basis of prior litigations before the LC.I Court. The Respondent's counsel on the other hand argued that all matters before RC.1, RC.2, RC.3, RC.4 were a nullity and hence *res judicarta* as envisaged under the law (section 7 CPA) could not arise.

From the evidence on record I have found for a fact that the matters that were in controversy in C/S 77/2011 regarding this land were earlier on litigated upon by the RC.I Court of Panyirenja zone, of 19.2.1993 (Admitted on record as PE.4).

From that judgment and the evidence as alluded to by evidence both from plaintiff's witnesses and defendant's witnesses, there was litigation which indeed up at the level of the Chief Magistrate Tororo Criminal Case No.555 of 1913 (Exh. D.3).

The matters which the LC.I Court of Panyirenja decided are the root from which all subsequent litigations were based. The other events at RC.2, RC.3, RC.4, the Chief Magistrate were all a factor in from the RC.1 case. The present litigation was sparked off by the fact of the findings and the decision of the said RC proceedings. The law is that by virtue of section 7 of the CPA:

> "*No court shall try any suit 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 parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to buy the subsequent in which the issue has been subsequently raised and has been heard and finally determined*."

The import of that provision is that the plaintiff's case is biased on matters which when closely examined are found to have been substantially in issue in the RC.I court above, which in essence passed its judgment in favour of **Ochwo Obbo Ogino** who later divided the said land with assistance of the clan among the sons of **Ogino**. This matter was raised in defence by the defendant in the written statement of defence under paragraphs 6, 7, 8 and 9 thereof. This makes the suit against the defendant *res judicarta* to that extent; as there is no way one can separate the issues in this case from those which were before the RC.I Court above.

I am therefore in agreement with counsel for the appellant's assertion that the learned trial Magistrate erred to fail to find that the suit was *res judicarta*. This ground has been proved.

The court having found that this suit was both time barred and res judicarta, conclusively determines this appeal. The lower court, did not correctly evaluate the evidence and hence reached wrong conclusions as argued by appellants. On those grounds alone, I would allow this appeal.

Grounds 2 and 4: Failure to evaluate evidence

In case am wrong regarding grounds 1 and 3, my consideration under ground 2 and 4 leads me to the following findings:

In all civil cases the proof is on a balance of probabilities. The law under section 101, 102, and 103 of the Evidence Act requires he who alleges a fact to prove it. The law on pleadings is that parties must be bound by their pleadings and should not depart therefrom.

On the pleadings the plaintiff/Respondent sued defendant/appellant for trespassing on 40 acres of land; which he claimed he entered upon and cultivated.

In evidence of PW.1, PW.2, PW.3, PW.4, PW.5 and PW.6, exhibits adduced and evidence at locus, including evidence of DW.1, DW.2, DW.3, DW.4 and DW.5 and exhibits it was proved that defendant was not in occupation of any land belonging to plaintiffs. It was shown that defendant's mother a widow was in occupation of only two acres of land earlier on obtained by her late husband as per evidence. It is clear on record that plaintiff led evidence in speculation that "defendant intended to occupy another 38 acres." That was a departure from his pleadings as per the plaint. The evidence on record therefore did not support the plaint. The defendant on the other hand led evidence which supported his pleadings under the written statement of defence. There was therefore no evidence to support the findings of the learned trial Magistrate in favour of the Plaintiff/Respondent as against defendant/appellant.

In the result therefore I find that grounds 2 and 4 of the appeal are proved. The evidence on record does not support the plaint.

For all reasons above therefore this appeal succeeds on all grounds of appeal. The judgment and orders of the learned trial magistrate are accordingly set aside and replaced with judgment for the appellant as prayed. Costs of the appeal are allowed to appellant here and below.
I so order.

Henry I. Kawesa

JUDGE

09.02.2017