

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0005 OF 2010
(Arising from Nebbi Chief Magistrate’s Court Civil No. 0027 of 2008)

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OMUNGA BAKHIT..... APPELLANT

VERSUS

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AGRASIELA alias DAKTARI RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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In the court below, the appellant sued the respondent for a declaration that the land in dispute belongs to him, a permanent injunction, general damages and costs. The appellant’s case was that sometime during the year 1980 he bought from a one Yowana Okello, a plot of land measuring approximately 120 metres by 100 metres situate at Panyimur Singila “B” village, Panyimur Trading Centre in Nebbi District. When during the year 2006 he began making preparations to re-sell it, by first opening its boundaries, the respondent intervened and stopped him claiming the land belonged to her, hence this suit for the determination of the true owner.

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In her written statement of defence, the respondent contended that that the land in dispute belonged to the late Peter Daktari and upon his death in 1972, it devolved unto his family. The appellant’s purported purchase of the land was therefore void.

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In his testimony, the appellant stated that during the year 1980 he bought the plot of land in dispute from a one Yowana Okello at the price of shs. 18,000/=. Upon completion of the transaction, the seller vacated the house on the land and the appellant entered into possession together with his family and have lived there peacefully ever since. He tendered a copy of the agreement of sale in court. When he attempted to sell off the plot in 2006, he was blocked by the L.C.II at the instigation of the respondent. He was summoned to appear before a local clan chief but he declined to participate in the proceedings. The elders decided that since he was a foreigner

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in Panyimur, he could not own land there. At the time of purchase, the respondent and her husband lived in the neighbourhood across the road but the respondent's husband died in 1984. P.W.2 Ernesta Okello, the appellant's wife, testified that the appellant bought the land in dispute from Yowana Okello and she lived on that land from the time it was acquired. That was the close
5 of the appellant's case.

In her defence, the respondent testified that the plot in dispute belongs to her and she deposited some sand and gravel onto it to prevent the appellant from selling it. She last lived on the land in 1983 and subsequently the appellant and his wife occupied it. He left Yowana Okello, who was
10 an uncle to her husband Peter Daktari, in possession of the land when she vacated. Yowana Okello had lived on that land since the 1960s having requested for and been given the land by her husband. Yowana Okello had lived on the land until 1980. She acknowledged that the appellant first settled on the land in 1980 but she only chose to sue him before the local elders when he attempted to sell off the land. She challenged the intended sale on grounds that "since
15 Peter did not sell the land to Yoawana, Yowana could not sell it to the plaintiff."

D.W.2 Emmanuel Okello testified that the appellant came to live on the land in 1980 with the permission of his father Yowana Okello who asked the appellant for shs. 13,000/= to enable him meet some hospital bills which money the appellant gave him and they travelled to Congo where
20 they stayed for eight years. When Yowana Okello died in 2004, this witness returned to the land only to find the appellant occupying it together with many of his other Acholi relatives from Gulu. Under cross-examination, he stated that the agreement allowed the appellant to take possession but the land belongs to the family of the late Peter Daktari. The money paid by the appellant was for fuelling a boat and served as rent for the premises but without a specified
25 period. When they returned from Congo in 1988, his father did not repossess the house but found another place to live which was about seven miles from the Trading Centre until his death in 2004. D.W.3 Justin Oroma, the L.C.II Chairperson of Ganda Parish at the time testified that sometime in 2006 he had been called to witness a transaction of sale of land between the appellant and a prospective buyer but the respondent disputed the sale and he was forced to stop
30 the transaction. The houses on the land were built by Yoana Okello after Peter Daktari had given him the land. D.W.4 Ocicha Jenesio, Secretary to the Panyimur Konga Clan testified that the

respondent during 2006 filed a suit before the clan chief of Konga but the appellant refused to attend the hearing. The elders decided in favour of the respondent. According to the elders, the appellant had bought only the houses but not the land and the land remained the property of the family of Peter Daktari who died in 1983. Yowasi Okello sold his houses to the appellant at the price of shs. 18,000/=. That was the close of the defence case.

In his judgment the Grade One trial magistrate found that under the provisions of section 4 (2) of *The Land Reform Decree, 1975* which was the law in force at the time, any sale of a customary holding without consent of the prescribed authority was void. For that reason, the appellant did not acquire any interest in the disputed land by virtue of the purported purchase from Yowasi Okello. He therefore dismissed the suit with costs to the respondent.

Being dissatisfied with the decision the appellant raised only one ground of appeal, namely;-

1. The trial court failed to properly evaluate the evidence on record before it, thereby arriving at an erroneous decision.

In his written submissions, counsel for the appellant Mr. Louis Odong argued that there was evidence on record to the effect that Yowana Okello acquired the land by gift in 1960 as admitted by the respondent and therefore had the capacity to sell it to the appellant as he did in 1980. The respondent could not claim the land since she did not inherit it and it did not form part of the estate of her late husband since he had alienated it in 1960 to Yowana Okello. Much as there was non-compliance with the requirements of *The Land Reform Decree*, the court should have taken into account his long period of occupancy from 1980 to 2006 which had been acquiesced to by the respondent rendering him an adverse possessor. He prayed that the appeal be allowed with costs.

In his oral submissions, counsel for the respondent Mr. Komakech Dennis Atiine argued that the evidence was properly evaluated. From page one to page two of the judgment the trial magistrate agreed with the evidence of the respondent. The evidence of the respondent as provided by DW1 was to the effect that the suit land was given temporarily to Okello who without their knowledge sold the same. Okello had occupied the land in 1960. The sale was in 1980 and the suit was filed in 2008. The appellant had purchased the land but did not take possession. Although the issue of

limitation was not considered, even if the evaluation of the evidence is done again, the decision would be in favour of the respondent. He prayed that the appeal 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 trial court 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.

Having re-evaluated the evidence, I find that the learned trial magistrate misdirected himself when he relied exclusively on the provisions of section 4 (2) and 5 of *The Land Reform Decree, 1975*, to decide the case. Although relevant to the decision at hand, the trial magistrate did not consider the impact of those provisions on the status of the appellant's continued occupancy of the land thereafter. Indeed the transaction between the appellant and the late Yowana Okello was void by virtue of these provisions however the appellant's occupation continued thereafter uninterrupted and this called for a decision on his status following the void transaction.

The respondent together with D.W.4 Ocicha Jenasio contended that the late Yowana Okello had no capacity to sell the land but only the houses he had constructed thereon. D.W.1 contended that Yowana Okello's occupancy was meant to be temporary but in my view over twenty years' occupancy does not fit that description. In absence of express terms to the contrary at the time he
5 was allowed to construct the houses on the land, application of the principle that any immovable property attached to the earth forms part of the land, is inevitable. The expression "land" includes things attached to the earth or permanently fastened to anything attached to the earth. In other words, buildings which are attached to the earth i.e. land also form part of the land (see *Holland v. Hodgson (1872) LR 7 CP 328*). Therefore when the late Yowana Okello constructed
10 houses on that land which he later sold off, he sold off the plot of land on which they rested. But for the illegality that voided the transaction, the late Yowana Okello had the capacity to sell the land. If the family of the late Daktari retained any claim of title to the land, the sale by Yowana Okello was a denial of that title. The illegality of the transaction means that from that point going forward the appellant's possession of the land was adverse to anyone who claimed a better title.

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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 acquires ownership when the right of action to terminate the adverse
20 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
25 adverse possessor is vested with title thereto.

The law of limitation guarantees that 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".
30 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.

5 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;

10 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).

15 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.

20 According to section 6 of the same Act, the right of action is 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
25 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 unauthorised intrusion. Non-use of the land by the owner, even for a long time, will not affect his or her ownership. But the position
30 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.

The effect of limitation in the context of adverse possession was explained in the case of *Jandu v. Kirpal and another [1975] EA 225 at 323*, as follows;

By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.

The notion of possession is of pivotal importance under the doctrine of adverse possession. It is satisfied if two elements are present; first the *corpus*, which is the factual exercise of the rights derived from the ownership, i.e. the objective physical possession such as an owner would have which means that the possessor should have material control and use of the land and secondly, the *animus domini*, the subjective intent of the possessor to exercise material mastery over the land on his own behalf, rather than on behalf of another person. Ownership is not to be acquired through adverse possession, if the conditions of adverse possession exist only for a section of the land where it so happens that the parcel of land in question is indivisible.

The essential requisites to establish adverse possession are that the possession of the adverse possessor must be neither by force nor by stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to owner. What was required in establishing his claim as an adverse possessor are not the circumstances in which he came to take physical possession of the land but rather that he had enjoyed adverse, actual, open, notorious, exclusive, and continuous possession of the land for the prescribed statutory period. In the instant case, the respondent in her own admission became aware of the appellant's adverse possession in 1980. There is nothing to suggest that from that year, the appellant had not been in open, continuous, uninterrupted and uncontested possession of the disputed land. By 2006 when the respondent prevented him from selling it, the appellant had occupied the disputed land with the respondent's knowledge, for twenty six years. Unless the respondent pleaded and proved disability for her failure to commence an action within the limitation period, she had by 2006 not only lost the right to bring an action for the recovery of the land, but also the appellant was already by operation of the law, vested with title thereto. The appellant acquired ownership *ex lege*, once the statutory period had expired.

The suit sought a declaration of ownership. A declaration will be necessary where a challenge to the plaintiff's title raises a cloud on the title to the property. A cloud is said to rise over a person's title, when some *prima facie* right of a third party over it, is made out or shown. An action for declaration is then necessary as the remedy to remove the cloud on the title to the property. In the instant case the respondent's action of preventing the appellant from disposing of the land and asserting her claim on behalf of the estate of the late Peter Daktari, raised a cloud over his title acquired by adverse possession. The trial court misdirected itself when it found to the contrary. This not having been an action in trespass and since there is nothing to show that the appellant's possession was at any time interrupted by the respondent, the claims for general damages for trespass to land and for mesne profits were misplaced and cannot be granted.

In the final result, I find merit in the appeal and the appeal is accordingly allowed. The judgment and decree of the court below is set aside and judgment entered for the appellant against the respondent in the following terms;

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- a) It is declared that the land in dispute, measuring approximately 120 metres by 100 metres situate at Panyimur Singila "B" village, Panyimur Trading Centre in Nebbi District, belongs to the appellant.
- b) A permanent injunction is hereby granted restraining the respondent, her servants, agents or persons claiming under or form her, from trespassing on that land or in any other way interfering with the quiet enjoyment of the appellant or his successors in title.
- c) The costs of this appeal and those of the court below are awarded to the appellant.

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25 Dated at Arua this 15th day of June 2017.

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Stephen Mubiru
Judge
15th June 2017