

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

HCCS NO. 24 OF 2009

MAGUMBA WILBERT.....PLAINTIFF

VERSUS

- 1. IGANGA MUNICIPAL COUNCIL**
- 2. NATIONAL WATER & SEWERAGE CORP.....DEFENDANTS**

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

A: Brief background

The plaintiff as administrator of the estate of the late Eriya Magumba (hereinafter referred to as the deceased) sued the defendants in trespass with a claim for mesne profits and general damages in respect of an interest (under customary tenure) of land situate in Nkono 11, Northern Divison, formerly Bubumba-Bugwanandhala, Kigulu County (then Busoga District) (hereinafter referred to as the suit land). He claims in the alternative for compensation equivalent to the market value of the suit land.

When the suit came up for hearing on 26/9/2017, counsel for the 1stdefendant raised two preliminary points of law that is to say;

- 1. The suit is time barred.**
- 2. The plaintiff has no cause of action against the 1st defendant.**

Parties were ordered to file written submissions which order was complied with.

B: Issue 1 - Whether the suit is time barred

It was argued for the 1st defendant that the plaint seeks recovery of land under customary holding alleged to have previously been under the deceased's ownership who died during the 1960's. Therefore that the cause of action arose at the point of the deceased's death and the

letters of administration dated 4/5/2012 held by the plaintiff would date back to the date of the deceased's demise. In their view, since the plaintiff's pleadings indicate that the suit land was taken from him in 1956, under section 5 of the Limitation Act, (hereafter referred to as the Act) the suit should have been instituted by 1968. Counsel concluded that the plaintiff raised no exemption against the law on limitation, and was therefore time barred and must be struck out.

In reply, plaintiff's counsel submitted that section 5 of the Act does not apply because the cause of action arose in 2008 and the 1st defendant is not in possession of and has no interest in the suit land. Further that, the claim is for compensation for loss of land and there is no time limit to the constitutional right to claim compensation before or after deprivation of property. Counsel argued further that the defendants' occupation which is as a result of fraud is a continuing trespass.

C: My decision

The law applicable to the objection was well stated by 1st defendant's counsel. Section 5 of the Limitation Act stipulates that no action shall be brought by any person to recover land after the expiration of 12 years from the date on which the right of action accrued to them. The plaintiff claims as an administrator of the estate of the original owner and thus Section 6(2) of the Act would apply. It provides that:-

Where any person brings an action to recover any land of a deceased person, whether under a will or intestacy, and the deceased person was, on the date of his or her death in possession of the landand was the last person entitled to the land to be in possession of it, the right of action shall be deemed to have accrued on the date of his or her death. (Emphasis of this court).

It is provided further in Section 15 of the Act that

For the purposes of the provisions of this Act relating to actions for recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had

been no interval of time between the death of the deceased person and the grant of the letters of administration

It is clear in the plaint that the principle claim is for a declaration that the defendants are in trespass of the suit land and for a corresponding declaration that the plaintiff is its rightful owner. That and the attendant prayers clearly indicate that this is a claim for the recovery of the suit land. The claim for compensation is clearly an alternative claim in lieu. I would thus reject the argument by plaintiff's counsel that the Act does not apply.

It is stated in paragraph 5(b) Of the plaint that the deceased died in the 1965 but administration of his estate was only formalized on 4/5/2012, the date the grant was made to the plaintiff. 1st defendant's counsel would thus be correct on their argument that the right to sue as an administrator would date back to the point of the deceased's death in the 1965, which would clearly make the claim time barred. Even then, the fact of possession by a deceased person is a crucial factor to be considered for purposes of limitation for as argued by plaintiff's counsel, where it is evident that the trespass is continuous, the right to sue will accrue during and after the trespass has ended. See **EMN Lutaya Vrs Sterling Civil Engineering Company Ltd SCCA NO. 11/2002.**

According to paragraphs 5(b-c), as far as back as 1955, the colonial government attempted to take over the suit land from the deceased which the latter rejected. That the deceased and subsequently his family remained in possession and utilized the suit land until 2008 when the 1st defendant wrongfully obtained a lease over it and subsequently sub leased it to the 2nd defendant.

The above facts appear to be contradicted by Annexure B1 and B2 to the plaint. It is indicated there that on 1/6/1956, the deceased wrote to the District Commissioner (DC)Busoga rejecting compensation for destroyed property and crops that was being offered though the Gombolola Chief of Kigulu. In paragraph 1 (a) and (c), it is clear that by the time the deceased penned the above letter, the suit land had already been taken and a water tank placed on it. It is also indicated in paragraph 4 that the deceased had the option of obtaining

a temporary occupation licence to regain access to the land which he rejected. Thus, the plaintiff's pleadings show that the deceased lost possession of the suit land way back in 1956 before his death. The decision in **Justine EMN Lutaya (supra)** would be instructive in that regard. Hon Justice Mulenga held that

Needless to say, the tort of trespass in land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of land has capacity to sue in trespass"

I have found that the deceased lost possession of the land in 1956. He could not even be in constructive possession after entry by the Colonial Government because that entry would be deemed entry by the State for use of the suit land for a public purpose with the deceased only being entitled to compensation, but not an action in trespass.

None the less, the plaintiff could only maintain any action against the defendants with regard to the suit land, 12 years from 1956 when the alleged interference by the Colonial Government is first recorded. Since he died in 1965, before the statutory period lapsed, the plaintiff as his legal successor could resurrect the claim from the point of death in 1965 until 1977 after the expiration of 12 years.

The suit was first filed on 26/3/2009 which would make it time barred.

Accordingly the first objection succeeds.

D: Issue 2 - whether the plaint discloses a cause of action.

A cause of action was defined in the case of **Auto Garage & others Ltd vs. Motokov (No. 3) [1971] E.A 514**, where it was held that;

"For the plaint to disclose a cause of action it must demonstrate that; the plaintiff enjoyed a right, the right was violated and it is the defendant who is liable."

Further in **Jeraj Sharif vs. Chotai Fancy [1960] EA 374 at 375 Windham J.A**, held that;

“The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact in it are true”.

It was submitted for the 1st defendant that their pleadings show that they are neither in use nor in occupation of the suit land and have no interest in the same. Instead that it is the Uganda Land Commission (hereinafter referred to as the Commission) which is the registered proprietor vide a freehold certificate of title issued to them in 1962. Further that it is pleaded in defence for the 2nd defendant that it is the Department of Water Development and not the 2nd defendant who took over ownership of the suit land from the Colonial Government. That the 2nd defendant’s operations on the suit land dating back to 2008, are that of a mere licensee, and they would thus not be liable or concerned with issues of rights of compensation to the plaintiff.

In practice points of law are raised orally or in writing by the contending party. Under Order 6 rr. 8 CPR, they may be raised in the pleadings and if so, the Court may address them at any point in the hearing.

It is disclosed in the plaint that the 2nd defendant is in illegal occupation of the suit land having unlawfully acquired the same in 2008. It is stated that the 1st defendant’s occupation is by virtue of a lease and a subsequent sub lease to the 2nd defendant.

Annexure “C” to the plaint is a letter dated 13/2/2008 by the Town Clerk, Iganga Town Council requesting the Secretary Iganga District Land Board to issue lease offers in respect of several pieces of land, one of which (No. 2) is the Iganga Town Council Water Yard along Old Kaliro Road, presumably the suit land. This is by no means a definite lease offer and it is not clear who was actually offered the lease after that communication. The 1st defendant offered an explanation in their defence that the land was in 1962 leased to the Uganda Land Commission on 27/8/1962 and a certificate of title was attached to the plaint. Those facts were not contested by the plaintiff by reply. It is therefore not

shown in the plaint that it is the 1st defendant who is in violation of the plaintiff's right. Accordingly, no cause of action is raised against the 1st defendant.

It is stated in the plaint but not shown that the 2nd defendant obtained the suit land as an allocation from the 1st defendant. Indeed, following the 1st defendant's pleadings and arguments, the latter never had any interest in the suit land and thus could not have allocated it to the 2nd defendant. The latter admits being in occupation as a licensee/operator but not owner with no interest in the suit land. They further state that it is the Department of Water Development that took over possession of the suit land from the colonial government.

The legal relationship between the 2nd defendant and the Department of Water Development is not explained in either pleadings. Those facts are further complicated by the fact that the suit land appears to be the property of the Uganda Land Commission. Under such circumstances, the plaint has not sufficiently raised a cause of action against the 2nd defendant as well.

E: Conclusion

Under Order 7 rule 11, a plaint that does not disclose a cause of action shall be rejected.

I would thus uphold the second objection and dismiss the suit against the defendants.

Costs of this order are granted to the 1st defendant who generated the objections.

I so Order.

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EVA K. LUSWATA

JUDGE

DATED: 22/06/18

