

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL APPEAL NO. 26 OF 2019

1. SHAMIM MATOVU
2. SENGENDO MUHAMED
(Administrators of the estate
of the late Nabakka Hadija):::::::::::::::::::::::::APPELLANTS

VERSUS

1. NEMAH NIYAH
2. SURAYAH SHAFIGAH:::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This appeal arises from the ruling of His Worship Gakyaro Allan sitting at the Chief Magistrates Court of Makindye at Makindye wherein he dismissed **Civil Suit No.61 of 2016** on a preliminary objection, that is: that it is time barred.

The brief background of the suit is: the Appellants instituted a suit founded on trespass to land, on a Kibanja comprised at Kirundu Zone Makindye Division, Kampala (hereinafter the suit land). It was their claim that the suit land belongs to the late Nabakka Hadija (hereinafter the deceased), having obtained it from Abeli Sserubaale

in 1995. That the deceased developed the suit land and cohabited with the late Abdala Basef thereon.

It was undisputed that in 2000, the deceased vacated from the suit land, leaving the late Abdala Basef and his family, the Respondents inclusive, thereon. Later in 2002, the deceased died leaving Abdala Basef who, at all times, remained on the suit land and his family. He also died in 2013 leaving the Respondents thereon.

In 2016, the Appellants obtained letters of administration over the deceased's estate of the deceased. Following that, they attempted to claim actual possession of the suit land but, in vain after the Respondents, adversely, claimed that it belonged to their late father, Abdala Basef. This then prompted the Appellants to institute Civil Suit No.61 of 2016. Their suit was dismissed on a preliminary objection that it was time barred, under Section 5 of the Limitation Act Cap 80. In the ruling, the lower Court determined that cause of action arose in 2002 upon the death of the deceased.

Aggrieved with the dismissal, the Appellants brought this appeal on the following grounds:

1. That the learned trial Magistrate erred in law and fact when he dismissed the Appellants' suit with costs on ground that the Plaintiffs' suit is time barred.
2. The trial Magistrate erred in entertaining a preliminary objection and dismissing the suit without hearing evidence.

Counsel for both parties filed written submissions which I shall consider accordingly. In the determination of the appeal, I shall resolve both grounds at once, being that they are interrelated.

I have ably perused the ruling of the lower Court from which this appeal arose, and the respective submissions of Counsel.

In his ruling, I am able to find that the trial Magistrate considered the suit as one of recovery of land to which Section 5 of the Limitations Act Cap 80 applied. Obviously, Counsel for the Respondents supports the ruling, but the same is sharply faulted by the Appellants' Counsel.

At one point, both Counsel, in fact, even the trial Magistrate in the ruling, agree that trespass to land is a continuing tort and, thus, not time barred by Section 5 of the Limitations Act Cap 80. Several authorities were cited in support of this proposition to wit; *Justine Lutaaya versus Stirling Engineering Co. Ltd SCCA No.11 of 2002, Hwan Sung Ltd versus M & D Timber Merchants & Transporters Ltd SCCA No.2 of 2018, Gertrude Namakula versus Robinah Nasejje H.C.C.S No.2142 of 2016.*

That said, Counsel for the Respondents' insisted that the Appellant's suit, though disguised as trespass to land, was one for recovery of land to which Section 5 of the Limitations Act Cap 80 applied. His insistence is premised on the view that the Appellants lack possession of the suit land, which is a key ingredient of that cause of action to succeed. The lack of possession, to him, means

that there suit can only be sustained in trespass to land. The cases of *Adrabo Stanley versus Madriba Jimmy H.C.C.S. No.24 of 2013* and *Justine Lutaaya versus Stirling Engineering Co. Ltd SCCA No.11 of 2002* were cited in support of the view that one must have possession, legal or constructive/actual, to succeed in an action for trespass to land.

For the Appellants' Counsel, there is discomfort in the view that the Appellants don't have possession of the suit land is. As for him, the Appellants, being administrators of the deceased's estate, have constructive possession of the suit land. He categorized Abdala Basef and the Respondents as mere licensees who, according to him, only enjoyed possessory rights and not legal rights.

That Abdala Baseef's license terminated in 2013 following his death, and that of the Respondents terminated in 2016 when the Appellants demanded that they vacate the suit land. At one point, Counsel also qualified the Respondents as tenants at sufferance, following Abdala Baseef's death. The case of *Kyepaka Francis & Anor versus George Rwakarongo & 2 Other H.C.C.S. No.289 of 2017* was referred to for the definition of a license.

To further illustrate his view that the Appellants have possession of the suit land, Counsel for the Appellants cited the case of *Gertrude Namakula versus Robinah Nasejje H.C.C.S No.2142 of 2016*. In that case, the Plaintiff sued the Defendant for trespass on the

disputed land in 2012. The disputed land was acquired by the Plaintiff from her grandfather in 1965. She developed the same and thereafter started living with a one Kasumba James. After a misunderstanding in their relationship, James Kasumba brought the Defendant and started living with her on the disputed land. In 2001, James Kasumba died leaving the Defendant and the family on the disputed land. Subsequently, the Plaintiff attempted to evict the Defendant in vain hence filing the suit. At the hearing, Counsel for the Defendant raised a preliminary objection that the suit, though disguised as one of trespass to land, was for recovery of land and, thus, time barred. **Damalie J.**, rejected this objection, and ruled that the suit was one of trespass to land and, thus, not time barred. Crucially, she observed thus;

“I note that the Defendant was brought onto the suit property by James Kasumba who had been brought there by the Plaintiff and remained in possession thereof with her knowledge and permission. James Kasumba who had brought the Defendant died in 2001. Subsequent to his death, the Plaintiff asked her to vacate the suit property and she refused to oblige. That is when the cause of action accrued to the Plaintiff. The suit is not for recovery of the suit property on which the Plaintiff even got registered as proprietor in 2010...”

I therefore find that the Plaintiff sued the Defendant in trespass, after all other efforts to get her to vacate the suit property after Kasumba’s death proved futile. The trespass began when the

Plaintiff demanded that the Defendant vacates the property, and trespass being a continuing tort it continues for as long as she is still in possession of the suit property.

By analogy, Counsel argued that, in this case also, the trespass to land by the Respondents was committed when they refused to vacate the suit land upon demand by the Appellants, and that this has continued to date. This, of course, implies that the Appellants had possession of the suit land.

The argument of the Respondents and Abdala Baseef being licensees was vehemently resisted by Counsel for the Respondents. He referred to **Nuru Juma versus Kassiano Wadri H.C.M.A No.12 of 2017** wherein *Hon. Justice Stephen Mubiru* observed that;

“A bare license automatically revokes upon death of the licensor or by disposition of the land in question except where it was granted to a class of people. Accordingly, Counsel argued that following the passing on of the deceased, all the permission to occupy the suit land ceased to have effect”.

That as such, the Appellants ought to have evicted the Respondents and Abdala Baseef back then or at least demanded that they vacate the suit land. That they alienated themselves from the suit land having chosen to do nothing then until 2016. That consequently, their rights over the suit land were extinguished and no new cause of action could have arisen in 2016. Further, that the Appellants Counsel’s labelling of the Respondents as tenants at sufferance is

also misplaced since they have never been such. Also still, that the principles of tenancies do not apply to bare licenses.

Both Counsel continued to raise more arguments, which I shall not reproduce here, save were necessary. From my observation, there is a mischaracterization of the Appellants' cause of action against the Respondents by the Respondents. This is where the trial Court also erred thereby making reference to provisions of the Limitations Act Cap 80.

It is plain in the plaint that the Appellants' suit is founded on trespass to land. To sustain it, it is true that they must demonstrate having possession of the suit land. The possession must be actual, or legal or constructive. Counsel for the Respondents argued that the Appellants have no such possession. This is not right, in my view. Whereas they appear not to have actual possession, the Appellants have legal or constructive possession of the suit land. I shall illustrate this; but first, I want to reject the Respondent Counsel's argument that legal/constructive possession cannot arise in respect of Appellant because they do not hold legal title. To say so is to loosely believe that legal/constructive possession is only tied to persons having legal title. This is not true. I believe that even persons having other proofs of ownership, like the Appellants, who claim as Kibanja owners, can have constructive possession of land.

In this case, constructive possession can be demonstrated in the following ways. The Appellants claiming as administrators of the deceased's estate, is to also say that the deceased estate has never parted having possession of the suit land, notwithstanding her departure therefrom.

The deceased brought Abdala Baseef on the suit land. Given that fact, it is sound to categorise Abdala Baseef as a bare licensee at the time. As alluded to by Counsel for the Respondents, his license expired upon the demise of the deceased. That notwithstanding, Abdala Baseef remained in on the suit land till 2013; even with the knowledge of the Appellants. For all that time, the Appellants had locus to bring an action against him and the Respondents, even though they had no letters of administration. (Both Counsel were alive to the legal reality in *Israel Kabwa versus Martin Banoba S.C.C.A No. 52 of 1995*: a beneficiary can sue without waiting to obtain letters of administration).

The Appellants, however, chose not to, and this continued up to his death in 2013. And even after his death when the Respondents remained in possession. The acquiescence, in my view, cannot mean that the Appellants/the deceased's estate stooped having constructive possession, as the Respondents' Counsel seems to suggest. To me the acquiescence created an implied license; one protected by equitable estoppel. This license ran for as long as the Appellants' acquiescence lasted, and a notice of vacation given to the Respondents.

The notice was given when the Appellants demanded vacation, and this was resisted by the Respondents. In my view, this is when the trespass arose. In 2016 as properly agreed by both Counsel, this cause has no limitation. As long as the Respondents remain on the suit land, the Appellants are entitled to institute the same cause against them. Accordingly, I squarely agree with the reasoning in *Gertrude Namakula versus Robinah Nasejje (supra)*.

The trial Court, therefore, erred in law when it dismissed the Appellants' suit on the ground that it is time barred. Consequently, both grounds succeed, and the following orders are hereby granted:

1. An order setting aside the order dismissing Civil Suit No.61 of 2016.
2. An order reinstating Civil Suit No.61 of 2016 for hearing.
3. An order directing the Registrar of this Court to transmit the file of Civil Suit No.61 of 2016 the lower Court, for hearing before another Magistrate.
4. The costs of this appeal shall be determined in the cause.

I so order.

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Henry I. Kawesa

JUDGE

5/06/2020

5/06/2020

Lukwago Boniface for the Respondent.

Respondent absent.

Appellant absent.

Court: Judgment delivered to the party above.

Right of appeal explained.

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Henry I. Kawesa

JUDGE

5/06/2020