THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO.42 OF 2014

(ARISING OUT OF MAKINDYE CHIEF MAGISTRATES COURT CIVIL SUIT NO.0174 OF 2008)

ELIZABETH SYLVIA MUSAAZI::APPELLANT

VERSUS

BWANIKA ROSE:::RESPONDENT

Before: Lady Justice Alexandra Nkonge

Judgement.

This appeal arises from the ruling and orders of ***Her Worship Esther Nambayo, the Chief Magistrate Makindye Court,*** delivered on *2nd June, 2014.*

Background:

Ms Bwanika Rose, the respondent herein sued the appellant, Ms Elizabeth Musaazi, the registered owner of ***block 261, plot 122, Kyadondo,*** land adjacent to the respondent's *kibanja*, seeking: *a declaration that the kibanja extends into the land fenced off by the defendant; compensation at the current market value of part of the suit kibanja where the defendant encroached; an order compelling the defendant to realign her fence or demolish the same to provide the plaintiff with access to the main road; a permanent injunction restraining the defendant, her agents and servants from encroaching on the suit land; general damages and costs of the suit.*

The issues during the trial were:

1. ***Whether the defendant encroached on the suit land***
2. ***Whether the defendant blocked access to the plaintiff's home***
3. ***Whether the plaintiff was entitled to the reliefs sought.***

The learned trial magistrate in her judgement found that the appellant had encroached on the respondent's *kibanja* and passed judgment against her, in the terms below:

1. ***Having established that the defendant extended into the plaintiff's kibanja and fenced off a portion of it by putting up a wall fence, it is hereby directed that***

the defendant pays compensation to the plaintiff for the area encroached on at the market value.

2. ***An order is hereby issued to restrain the defendant, her agents, servants and any other person acting under her from any further trespass upon the plaintiff's kibanja.***

3. ***Since the defendant has already been ordered to pay compensation for the encroachment, I find it not proper to order for realignment of the wall fence. Secondly, re-alignment of the wall fence would amount to recovery of land which is not tenable under section 5 of the Limitation Act as already pointed out herein above and considering the fact that the disagreement over the access road started in 1992 as per paragraph 5 of the plaint.***

4. ***The defendant will pay the costs of this suit.***

The defendant, Ms Elizabeth Sylvia Musaazi being dissatisfied with the above decision filed this appeal, raising the following grounds:

1. ***The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby holding as she did, which occasioned a miscarriage of justice to the appellant.***

2. ***The learned trial magistrate erred in law and fact when she ruled that the suit was not barred by limitation and/or res judicata.***

3. ***The learned trial magistrate erred in law and fact when she failed to conclusively determine the suit.***

4. ***That the learned trial magistrate erred in law when she denied the appellant the opportunity to adduce all her evidence.***

5. ***That the learned trial magistrate erred in law and fact when she granted costs of the suit to the respondent.***

The appellant prayed therefore that the judgement of the lower court be set aside and the costs of this appeal and of the court below be awarded to her.

Representation:

The appellant is represented by ***M/s Kangaho & Co. Advocates*** while the respondent is represented by ***M/s Buwule & Mayiga Advocates.*** Both parties filed written submissions in support of their claims.

Duty of the appellate court:

It is settled that a first appellate court is required to subject the evidence to a fresh and exhaustive scrutiny and then draw its own conclusions. The court in doing so must bear in mind that it never observed the witnesses under cross-examination. (***See: Sanyu Lwanga v Sam Galiwanga SCCA No.48/1995).***

Resolution of grounds:

The grounds in this appeal were discussed separately by appellant counsel. I will however deal first with ***grounds 3 and 4.***

Grounds 3: The learned trial magistrate erred in law and fact when she failed to conclusively determine the suit.

And

The learned trial magistrate erred in law when she denied the appellant the opportunity to adduce all her evidence.

Arguments by the appellant:

Counsel for the appellant contended that the trial magistrate did not conclusively determine the case since the appellants' witnesses were never heard. That by not visiting *locus* and presenting two of her witnesses, he was denied an opportunity to present his client's case fully.

He referred to *page 22* of the record of proceedings, *line 9* thereof where Mr. Tibamanya learned counsel then for the appellant had prayed for an adjournment to call two additional witnesses: the LC1 Chairman and the surveyor. The matter had been adjourned to 20th February, 2014.

That the court however closed the defendant's case without making the necessary order, or provide reasons as to why it had not allowed the prayer to bring the two witnesses, disregarding the fact that the appellant was in attendance at the time, and still had two other persons who were to testify.

In so doing therefore, he opined, court not only denied the appellant the opportunity to adduce all her evidence but also ignored the settled law that mistakes of counsel should not be visited on the litigant. That if court had properly evaluated the evidence on record it could have come to a different conclusion and would have dismissed the case as being frivolous and vexatious.

Citing the provisions of ***Legal Notice No. 11 of 2007, Practice Direction No. 1 of 2007,*** he claimed that the court had mishandled the *locus* visit when it failed to follow the proper procedures.

That the parties and their advocates were not all at the *locus;* the markings for the boundary were not traced; and that the appellant was never availed the chance to cross examine the witnesses as provided under the cited provisions. Furthermore, that since the appellant had no legal representative court ought to have guided her on how to proceed, which it had failed to do.

His view was that the statements made in court by both sides ought to have been verified on the ground, in order to arrive at a balanced decision.

Arguments by the respondent:

On his part, counsel for the respondent however replied that the concerns had been raised and duly addressed by the trial court. Counsel Tibamanya had on 29th January, 2014 applied for adjournment to bring the two witnesses which court had granted.

That the appellant side never took up that opportunity nor was the issue ever raised again when the matter came up on 19th March, 2014, a date agreed upon by the two sides.

It was also noted in the judgment that during trial, the learned counsel for the appellant had requested court to recall the ***PW1*** for cross examination and to be given another date to re- visit the *locus*, to enable him to represent his client. Both prayers had been duly granted.

Duly noted by this court was also the fact that during the visit held on 15th December, 2011, both the LC1 and LC2 chairmen were present. But for some unknown reasons neither of them had been brought as a witness in court. No specific order had been issued prevent her from bringing her surveyor or any other witnesses to support or verify her claims at any time during the trial.

Resolution by court:

The purpose of visiting *locus in quo* is to check on evidence given by the witnesses in court, not to fill in gaps to bolster the party's case. In ***John Siwa Bonin v. John Arapkissa (HCCS No. 0058) of 2007,*** the court echoing the authority of De-***Souza v. Uganda (1967) EA 78).*** In ***Paineto Omwero v. Saulo S/o Zabuloni HCCS No. 31 of 2010*** held that failure to conduct the *locus in quo* properly renders the evidence to be procured in error.

In *paragraph (a) of the* ***Practice Direction No. 1 of 2007*** which counsel referred to, it is clear that court visiting the *locus* is required to ensure that all the parties their witnesses and advocates *(if any)* are present.

A perusal of the record of proceedings at the *locus* shows that both parties did attend the visit which took place on 15th December, 2011, in the presence of the LC1 and LC11 Chairmen of Water Pump Zone.

Counsel for the respondent attended the *locus*. Counsel for the appellant was however absent, and no reasons were given to court to explain his absence. The argument by counsel for the respondent raised in the course of trial was that at the *locus* the appellant had chosen to represent herself and had also opted not to cross examine the respondent. This particular point so crucial to this ground, was not challenged by counsel at the time. So when it is raised during this appeal, it appears to have been more or less an afterthought.

Be that as it may, in my mind the wording in *paragraph (a)* could not have been intended to absolve the counsel representing the parties from taking up their roles, among other things, to ensure that the parties and the witnesses who testified in court were present at the *locus* and to make all the arrangements necessary for that visit. It would therefore be wrong to shift that duty or even assume that this was a preserve of court. The appellant thus accorded a misleading interpretation to that paragraph.

In any case, the appellant had at all material times been duly represented by Counsel Tibamanya, the same counsel who had asked court for a re-visit at the *locus*, a request which court had duly granted (as per the judgment on *page 5*); the very same person who made no attempt to explain why he was not at the *locus* visit which he had requested for. In my view, the absence of learned counsel at *locus* on a date which had been notified to him could neither be blamed nor attributed to court; and in any case, that on own could not have affected the validity of the proceedings.

There was besides nothing from the record to lead to the conclusion, as counsel would have preferred court to believe, that any party had been denied a chance to bring all their witnesses; denied the appellant the opportunity to find another counsel to represent her (or even represent herself) and/or cross examine any witnesses during those proceedings (as allowed by the practice Directions).

There was no proof besides that she was denied the chance to adduce evidence and nothing to show that some of what had transpired at that visit had been omitted from the record of proceedings, and in contravention of the Practice Directions.

The appellant therefore failed to satisfy this court that the witnesses who had not been listed in the summary of evidence or lined up at the scheduling stage had been unduly denied the chance to testify.

He instead wished to drag court into conjecture and speculation as to what else may or may not, have happened other than that which had been recorded.

With all due respect, litigation must come to a close. Given the period that this matter had spent in court, one would have expected each side to have been ready at all time, with all the necessary papers filed, witnesses identified and listed, to enable the opposite side to adequately prepare for the hearing of the case.

This court could not therefore ignore the point made by the trial court that the suit had been filed in 2008 and therefore one of those listed among the back log cases. The hearing commenced on 20th December, 2010 and was concluded on 15th December, 2014 following the *locus* visit.

This was six years after the suit was filed. It was therefore reasonable to conclude that the appellant side were not ready years after putting in their defence and worse, lacked seriousness or interest in speeding up the conclusion of this matter.

In those circumstances also given the fact that this had been a long running dispute between the parties, court had done all it could have done to give the appellant/defendant a fair chance to present all the witnesses, a chance that they decided not to take seriously.

I find no real basis therefore to hold that the trial magistrate had not conclusively determined the case since the witnesses produced in court were heard; and no justification on that score to rule that the proceedings were mishandled or that a miscarriage of justice had been occasioned.

Grounds. 3 and 4 cannot succeed.

Ground No. 2: The learned trial magistrate erred in law and fact when she ruled that the suit was not barred by limitation and/or res judicata.

In his submissions, counsel for the appellant stated that the trial court had erred in law and fact when she held that the suit was not barred by limitation.

He cited several provisions and authorities, including ***section 5 of the Limitation Act*** and the case of ***Uganda Railways Corporation v Ekwaru & Others CACA No.90 of 2007*** for the proposition that where a suit is brought after the expiration of the period of limitation and it is apparent from the plaint and no grounds of exemption are shown, the plaint must be rejected.

Based on that same authority, he pointed out that higher appellate courts would not allow an illegality that escaped the eye of the trial court to cause undesirable consequences. A trial court therefore has the duty to use the judicial microscope to see all those illegalities that may not be seen by ordinary eyes of parties, including those of their counsel who may not have seen it.

In reply, counsel for the respondent submitted that whenever court is considering whether the suit is barred by any law, it looks only at the pleadings. To this end he cited a number of authorities, including ***Madhivani International S.A v Attorney General CA No.48 of 2004 cited in Poly Fibre (U) Ltd vs Matovu Paul & 3 others: HCCS No.412 of 2010.***

His contention was that the prayers in the amended plaint relate to trespass and that it was not indicated anywhere in that plaint that the claim was for the recovery of land, an expression which in: ***Western Highland Creamers Ltd vs Stanbic Bank (U) Ltd HCCS No. 462 of 2011,*** was held to mean recovery of title.

Further that the respondent's claim in the amended plaint is for compensation and damages for trespass on the suit *kibanja,* but not for recovery of land which therefore rendered ***section 5 of the Limitation Act*** inapplicable to this case.

Counsel therefore faulted the finding by court on *page 8* which he considered to be a misdirection that a prayer for re-alignment of the wall fence would amount to recovery of land, which would not be tenable under ***section 5 of the Limitation Act.***

He maintained further that this being a case for trespass, it is a continuous tort which gives rise to fresh actions for as long as it lasts and therefore according to him, the suit was not time barred.

Analysis by court:

In her judgement, the trial Magistrate relying on the case of ***Maniraguha Gashumba v Nkundiye Sam CACA No.23 of 2005*** which was cited by counsel for the respondent found that the action was not time barred, and was properly before the court, a decision which the appellant sought to challenge in this appeal.

The appellant relied on her own evidence and that of Kyalwazi Lubega Tomasi ***(DW2),*** who had been LC 11 chairman of Makindye 1 Parish, since 2001. He told court that he had intervened twice in the dispute between the two parties who were both known to him as his residents. The first time was in 2008 when the respondent approached the committee.

The said committee comprising of ten people had visited the area in dispute, shown boundary marks and saw the fence built by the appellant which at that time was not fully constructed especially on the side of the road.

During the trial, a series of acts were cited allegedly committed by the appellant against the respondent on the suit *kibanja.* The appellant in her evidence in chief stated that the land was empty. She however admitted later that she found crops on the land, planted by the respondent and one Manjeri, since deceased, which crops she had destroyed.

Upon intervention by the LC committee, she had been ordered to pay compensation based on a valuation report. From the record of proceedings, the dispute on the *kibanja* between the two parties therefore seems to have had started as early as 1992, as per ***Exh D 1,*** a letter dated 13th January, 1992.

The compensation amounting to ***Ugx 82,732/=*** based on a valuation report, had been paid to the respondent, a fact she did not deny. Although the respondent was not contented with the amount given to her as compensation for her destroyed crops, she did not raise the matter in her pleadings.

It comes out clearly from her evidence that this was compensation, not for the encroachment of the *kibanja* but for the crops that had been destroyed through an act of the appellant and deduced from the contents of that letter, this part of the dispute had been finally resolved.

What the respondent therefore sought in the main suit which the trial court had granted, was compensation for the part of the *kibanja* alleged to have been encroached upon and enclosed in the appellant's land.

The issue to be determined first therefore was whether the act (or acts) complained about were acts in trespass or for recovery of land. I will deal with this ground under two separate sub headings.

Sub issue No. 1: Whether the court was justified to conclude that the cause of action was for trespass to the kibanja and not for recovery of land:

In considering whether the cause of action is revealed what is important is the question as to what right has been violated. The plaintiff must appear as a person aggrieved by the violation of his right and the defendant as a person who is liable. ***(Cottar v Attorney General for Kenya 193 AC P. 18).***

The general principle applicable to all suits in which the claim is for possession of land, based on the title of ownership, ie proprietary title, as distinct from possessory rights is that no person shall bring any action to recover 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. ***(section 5(1) of the Limitation Act).***

According to ***section 6 of the same Act,*** the right of action is deemed to have accrued on the date of dispossession. A cause of action accrues when the act of adverse possession occurs. Thus in ***F. X Miramago vs Attorney General [1979] HCB 24*** it was held that the period of limitation begins to run as against the 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 sue, time begins to run as against the plaintiff; and as one of the important principles of the law of limitation once it begins to run, no subsequent disability or inability to sue can stop it.

Indeed as pointed out by counsel for the respondent, whenever court is considering whether the suit is barred by any law, it looks only at the pleadings. According to him, the prayers in the amended plaint relate to trespass and that it was not indicated anywhere in the plaint that the claim was for the recovery of land, a term which in: ***Western Highland Creamers Ltd vs Stanbic Bank (U) Ltd HCCS No. 462 of 2011,*** was held to mean recovery of title.

Counsel for the appellant on his part however made reference to *paragraphs 3* where the respondent sought a declaration that the suit *kibanja* extends to part of the land fenced off by the appellant; a declaration that the respondent had a right of access to her home from the main road; a permanent injunction restraining the appellant from encroaching on the suit *kibanja* as well as blocking her access to her home.

He also referred to *paragraph 11 (c)*, where the respondent also sought an order compelling the appellant to re-align her fence or demolish the same to provide the respondent with an access to the main road.

According to him, from the above pleadings this was an action intended for the recovery of the suit *kibanja*, which action was barred by ***section 5 of the Limitation Act,*** implying therefore that the respondent could not bring that action after the lapse of twelve years.

His point was that having acknowledged the fact that the appellant had in 1989 constructed her house on part of the *suit kibanja*, it was not until 2008 that the respondent had taken action when she filed the suit at Makindye vide: ***Civil Suit No. 174 of 2008***.

Referring to the trial magistrate's judgement at *page 4 and 8* he went on to submit that the trial magistrate was alive to the fact that the plaintiff's suit was barred by limitation but intentionally disregarded the same, and in so doing condoned an illegality.

The law:

It is a settled principle of the law that the tort of trespass to land is a continuing tort, such that the law of limitation does not apply to it in the strict sense. (***See: Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10)***. Maintenance of that action, however, is available to a person in possession.

It is also trite law that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.

As explained by the learned authors ***Winfield and Jolowicz 11th Edition, Sweet and Maxwell, London, 1979*** at page 342:

> ***"Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions de die in diern so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass."***

The evidence adduced by the respondent in this case showed that the appellant became registered owner of the land in 1990 and had been in possession from 1989; and later constructed a house on part of the *kibanja* claimed by the respondent.

From her own evidence, the appellant who testified as ***DW1*** admitted that she got to know the respondent as her neighbor in 1990. That the respondent even helped her to locate one of the mark stones for her land comprised in ***block 261, plot 122, Kyadondo.*** The said land which had been bought by her mother in 1959 had been handed over to her as a wedding gift in 1978.

On her part, the respondent as ***PW1*** told court that her late husband had acquired the suit *kibanja* in 1976, part of which the appellant had encroached on. From the contents of ***Exh P.2***, one Ddimirire Raymond who had obtained the *kibanja* from his mother, Eri Namutebi, gave it to his brother Edward Bwanika, late husband to the respondent.

Mr. Abbas Sebunya, ***(PW2)*** a friend to the late Bwanika Edward confirmed the transaction which he had witnessed.

In its judgment court came to the conclusion that since from the findings at the *locus* the markings of the *kibanja* had been partly enclosed within the appellant's wall fence, there was encroachment onto the *kibanja* amounting to trespass, and that the action was not therefore time barred.

Counsel for the appellant's other concern in this appeal while citing some excerpts of the evidence by both ***PW1 and PW2*** was however that the respondent was not present in 1976, at the time the transaction allegedly took place; and besides was the fact that the *kibanja* had no actual measurements, which put to doubt the trial court's conclusions on that point.

The whole purpose of visiting *locus* is for court to verify what is on the ground. It meant to be a transparent exercise, conducted in the presence of both sides and their witnesses. The court is required to take notes, confirm that what is stated in court tallies with what is found on the ground; and thereafter form its opinion.

It is only at that point in the fray of its duties that a trial court can be allowed to act both as a judge and an eye witness. The trial court in that regard has an edge over the appellate court based on what it saw, which the higher court did not have an opportunity to witness.

The appellant would therefore have to build a strong case to satisfy the appellate court that the trial court saw something different from what it recorded. Indeed the appellant in this case did not adduce any evidence to move this court to disprove such findings.

Counsel for the appellant also brought out the point, correctly in my view, about the contradiction picked from the respondent's evidence, which seemed to suggest on the one hand that the *kibanja* had been given to her late husband as a gift while on the other hand maintaining that it had been acquired through a sale transaction between him and the former owner.

On that point however, I did not find the said contradiction fatal to the respondent's case, given the fact that the respondent had lived peacefully on that land from as early as 1976 with her family enjoying quiet uninterrupted occupation, until the arrival of the appellant thirteen years later. By virtue of section ***29 of the Land Act, Cap. 227***, she acquired protectable equitable interest as a tenant in occupancy.

From the respondent's evidence, the acts of trespass complained of in the instant case had started in 1989. In 1992, fully aware of the interests of the occupants of the adjacent land, the appellant had

destroyed crops belonging to the respondent, fenced off her land using barbed wire and according to the respondent, went on to block her access to the *kibanja.*

In 2002, despite the efforts by the LCs and Town Clerk to stop her from digging the foundation, the appellant had persisted, and extended further into the *kibanja* which in turn also greatly reduced the access road to a path.

The act of construction of the wall fence went on till 2003 and it was the respondent's evidence at trial that after 2008 she could no longer access the *kibanja* on which she had stayed from 1976, facts which were not in dispute. These were a series of acts and events with each individual act amounting to trespass.

It may also be true as pointed out by the appellant's counsel that the actual size of the respondent's *kibanja* was not indicated in the 1976 agreement, ***Exh P.2***. In cross examination her evidence, the appellant claimed to have gone to look for her land between 1989 and 1990. She added that she did not know where her land was or its boundaries when she first occupied it in 1990.

Issues concerning the size of the land, boundaries/measurements with all due respect, could only have been resolved through prior verification of the boundaries by the appellant based on a survey at the time the appellant took possession. This constituted an element of due diligence.

However, neither the appellant nor her predecessors in title in whose interest it was to know, had taken interest or steps prior to occupying the land, to establish the actual measurements of the land they intended to occupy and to know what was actually existing on the ground at the time. If they did, that evidence was not presented to court.

A surveyor's report is dated 22nd May, 2013, proof that the survey was conducted decades after the appellant had entered possession of the land adjacent to the suit *kibanja,* which the respondent claimed. It was neither properly admitted in evidence nor was the surveyor who did the survey listed among the witnesses in the defendant's summary of evidence, or even at the scheduling.

That report was therefore more or less like an afterthought and I may add that it was more or less a post mortem report, having come too late in the day. It comes as no surprise therefore that its absence at the time material to this case was an omission contributed to the breeding of the disharmony between the two neighbors.

The conclusion therefore becomes inevitable that when the appellant started putting up a fence she encroached on the existing *kibanja,* thus committing an act of trespass in respect of which ***section 5 of the Limitation Act*** could not apply.

In the event that the appellant had any misgivings about the respondent's rights to acquire, possess or occupy the land which was part of what she (the appellant) claimed as the registered owner, she

never took any step to challenge such acquisition, possession or occupation. It was the appellant therefore who would be affected by the statute of limitation. Not the respondent in this case.

Sub issue 2: Whether the appellant blocked the access route and in the event that she did, whether the cause of action was barred by statute:

The Law.

Section 101 of the Evidence Act, Cap. 6 stipulates that whoever desires to court to give judgement as to any legal right or liability on the existence of facts he/she asserts, must prove that those facts exist.

It lies with the plaintiff who has to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contends, on a balance of probabilities. ***See: Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of2004.***

In *paragraph 11 (c)* of her pleadings, the respondent also sought an order compelling the appellant to re-align her fence or demolish the same to provide the respondent with an access to the main road.

On *page 14* of the lower court record, the respondent testified that when the appellant came onto the land, she closed the road on the upper side which has the appellant's premises and the road was transferred to the lower side and that her land and that of another neighbor Mrs. Lutwama, was now all fenced up, which narrowed the access route to her home.

In *paragraph 4 (f)* of her amended plaint, the respondent's claim was that the appellant had extended acts of trespass when she unlawfully extended construction of the wall fence deep in the *kibanja* thereby reducing the road to a mere foot path and denying the respondent access to her home.

This is what the respondent further told court:

> ***"Currently (sic!) in 2002, extended further into the suit kibanja and greatly reduced the access road to a path she completed building a wall fence on 25th December 2003. When digging up the foundation for the wall fence, she was stopped by the LCs and Town Clerk she persisted and completed building the wall. At the time she initially fenced off with barbed wire I had access because I had another house and cars would pass taking materials. After 2008 I no longer had sufficient access....."***

Upon perusal of the record of proceedings conducted during the visit at the *locus in quo*, the draft sketch map drawn by the trial magistrate reveals that there is an access road with two wall fences on either side leading to the old house.

PW1 at *page 3* of the record of the lower court identified photos marked ***Exh. P.2*** showing an access road and the fenced off area in 1996 showing the road. As per the letter dated 30th March, 2008 the

respondent had reported the matters to LC II office Makindye I Parish to the office of the Makindye Principal Town Clerk. The LC II committee had carried out an inquiry however, the report on the findings could not be traced.

The said letter indicated that *"a path measuring 4.5 feet between the (defendant's) wall fencing and the other neighbor Lutwama leaving access of 4.5 meters access to the respondent's home."* Several other letters on the same issue of blocking the access route were written: 29th April, 2008; 14th June, 2006, and admitted in evidence, proof of the respondent's desperate endeavors to resolve the dispute. (These were all attached to ***Exh PE 2).***

In her testimony, the appellant (***DW1)*** *at page 18* of the record of the lower court however told court that she had followed what the LCs had recommended, and left 10ft for an access road which was used by her neighbor, the respondent.

She had agreed to leave some space as access for the respondent if Lutwama would put her fence right in the line of the boundary. She added that since there were two accesses one had to be closed.

DW2 Mr. Kyalwazi Lubega Tomasi had been the LC. II of Makindye Division since 2001. He also testified that he had presided over the disputes between both parties on two different occasions. ***DW2*** went on to state that the second time was when the committee was approached by the respondent when Lutwama was trying to build a wall fence. That the committee intervened and told Lutwama what had been originally decided, requiring her to leave a passage of 10 ft.

The committee also found that if Lutwama's fencing was re-positioned in the line of the stone markings, the space left could be enough for a six feet (6-7 ft) access road to the respondent's home.

What remained outstanding on this matter was apparently what Lutwama had been advised by the LC II to resolve the impasse. Mrs Lutwama was however neither a witness nor a party to the suit. She did not even attend the *locus visit.*

In her prayer, the respondent sought an order to have the appellant's fence re-aligned, which court had however declined to grant. Neither side could deny however that the controversy over the access route had began as early as 1996, spiraling over to 2008 and beyond. Court however not ignore or dismiss the efforts made by the LCs to resolve the dispute over the route to the respondent's *kibanja,* which the respondent was entitled to.

The matters concerning the access route had been partially resolved and the recommendations by the LC II acted on by the appellant. In the premises, and in agreement with the trial court, I am therefore inclined to reject the order for realignment of the wall fence as a solution.

Finally, the issue of *res judicata* as enshrined in ***section 7 of the Civil Procedure Act*** was raised as part of ***ground No. 2*** but was not argued by counsel. In any case it was not applicable to this case.

Suffice to add that the trial court in its decision correctly noted that there was no judgment availed; and thus the partial execution was carried out based on the LCII recommendations, not as an LC court order.

Based on the above findings, the issue of limitation in so far as it related to the access route did not therefore arise and it is the final finding by this court that all in all the trial court had properly evaluated the evidence on record, in holding as she did, and no miscarriage of justice had been occasioned to the appellant. ***Grounds 1, 2 and 5*** therefore also fail.

In conclusion:

The respondent sought and was granted compensation for the *kibanja* trespassed on by the appellant.

The tort of trespass to land is treated by courts as a continuing tort for which an action lays for each day that passes,. ***(See: Konskier v. Goodman Ltd [1928] 1 KB 421)***, but it is only subject to recovery of damages for the period falling within the upper limit of six years, provided for by ***section 3 (1) (a) of the Limitation Act***, reckoning backwards from the time action is initiated, if the unlawful possession has continued for more than six years. (***Polyfibre Ltd v. Matovu Paul and others, H.C. Civil Suit No. 412 of 2010; Justine E.M.N Lutaaya v. Sterling Civil Engineering Company Ltd. S. C. Civil Appeal No. 11 of 2002 and A.K.P.M. Lutaaya v. Uganda Posts and Telecommunications Corporation, (1994) KALR 372)***.

In such event the plaintiff can recover for such portion of the tort as lays within the time allotted by the statute of limitation although the first commission of the tort occurred outside the period prescribed by the statute of limitation ***(see Winfield and Jolowicz on Tort 12th Ed. Page 649)***.

The trial court is therefore faulted for not addressing its mind to the above principles of law.

In the final result, the orders issued by the lower court are amended to read as follows:

1. ***The appellant committed trespass against the respondent in respect to a portion of her kibanja, when she constructed a wall fence on that portion of the kibanja.***

2. ***The appellant is hereby directed to pay at the market value compensation to the respondent for the area encroached upon since 2002.***

3. ***The actual size of encroachment shall be determined by a court appointed surveyor.***

4. ***A valuation exercise is to be conducted by an independent valuer to be appointed by court, to determine the amount of compensation payable to the respondent.***

5. ***The costs of survey and valuation shall be met by the appellant.***

6. ***An order is hereby issued to restrain the appellant, her agents, servants and any other person acting under her from any further trespass upon the plaintiff's kibanja.***

7. ***The respondent is entitled to access her kibanja. The issue of determining the actual access route is accordingly referred back to the LCII to make their conclusion on the selection of the appropriate access route to the kibanja; and to ensure due compliance with its recommendations.***

Costs incurred at the trial and for this appeal are hereby awarded to the respondent.

I so order.

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Alexandra Nkonge Rugadya

Judge

Delivered by email

Alexandra J.

8/10/2021

8th October, 2021.