

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL SUIT NO. 007 OF 2019

1.KATURAMU DAVID
2.MUTEGEKI HERBERT
(ADMINISTRATORS OF THE ESTATE
OF THE LATE KALISA YOKASI NGONDU) :::::::::::::::PLAINTIFFS

VERSUS

BUNDIBUGYO DISTRICT LOCAL GOVERNMENT :::::::::::::::DEFENDANT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING ON PRELIMINARY OBJECTION.

Introduction

The Plaintiffs filed this suit against the defendant for declarations and orders that land situate at Block 5 Plot No. 5 & 8, land at Bwamba measuring approximately 2.81 acres (herein after referred to as the suit land) belongs to the estate of the late Yokasi Ngondur Kaliisa, a declaration that the defendant's entity Bundibugyo District Hospital is trespassing on the suit land. They seek Special and General damages, Interest on the damages at court rate from the date of filing the suit till payment in full, Mesne profits and costs of the suit.

The plaintiff's case is that the suit land belonged to the late Kaliisa Yokasi. That Bundibugyo District Hospital trespassed on the said land and constructed staff houses. That the late Kaliisa Yokasi on realizing the hospital's trespass on his land attempted to get compensation from the District authorities but died before he was compensated.

That the plaintiffs being the administrators of the estate of the deceased took over processing the claims in respect to the suit land, which included meeting officials like the Chief Administrative Officer, having the land surveyed and valued to which a valuation report was prepared for purposes of compensation and computed at a market value of UGX 250,000,000/=, compensation value at 15% of UGX 37,500,000/= and a disturbance allowance at 30% of UGX 75,000,000/=. The plaintiffs then filed this suit for the same claim.

The defendant in his written statement of defence denied all the allegations and stated that the defendant at all material times occupied the land unchallenged by the plaintiffs since 1967 and stated that they intend to raise Preliminary Objections that the suit is barred under the law of limitation.

Representation and hearing

At the hearing, Mr. Kirungi Barnabas from Joel Cox Advocates was counsel for the plaintiffs while Ms Racheal Atumanyise from The Attorney General's Chambers represented the defendant. Both counsel filed trial bundles and witness statements for Courts consideration.

On the 16th of March 2022, the matter came up for hearing where counsel for the defendant raised the preliminary objection on limitation. Court then directed counsel to file written submissions on the intended Preliminary Objection which was done.

Preliminary objections

Counsel for the defendant raised two preliminary objections which are that;

- a. The plaint does not disclose a cause of action against the defendant
- b. the suit is barred by limitation.

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696***).

1. Whether the plaint discloses a cause of action

Counsel for the defendant relied on ***Order 7 Rule 11(a)*** of the Civil Procedure Rules to support her argument and the case of ***Tororo Cement Co. Ltd V. Frokina International SCCA No. 2 of 2001***, where it was held that in order to prove that there is a cause of action, the plaint must show that the plaintiff enjoyed a right, that the right has been violated, and that the defendant is liable. That if the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment.

Counsel made reference to paragraph 3 of the plaint wherein the plaintiff stated that the suit land is comprised in Block 8, Plot 5 & 8 at Bwamba along Bundibugyo-Nyahuka road. He submitted that the land that the defendant occupies is situate at Block 5, Plot 4, 5 & 360 at Kakonga Bwamba County, Bundibugyo district. It was counsel's submission that the two properties are different. That based on the said reason, the plaintiffs have no cause of action against the defendants and their plaint should be struck out.

Counsel for the plaintiff in reply submitted that the suit land was owned customarily by the late Kaliisa Yokasi and that the defendant illegally took it over around 1967 which facts disclose a cause of action against the

defendant. Counsel submitted that in considering the plaint, that the court must also look at the annexures attached to it. The plaintiff's claim under paragraph 3 of the plaint describing the land as Block 8, Plot 5 & 8 at Bwamba along Bundibugyo-Nyahuka road is a mere typographical error that is not fatal to the pleading or prejudicial to the defendant and can be cured through amendment. He referred court to annexures "F" and "G" to the plaint, a survey report and valuation report which describe the suit land as land at Bwamba Block 5, along Bundibugyo Nyahuka road, Bundibugyo Town Council. He pointed to annexure "E" to the plaint which described the late Kalisa Yokasi as the affected owner which is where they derive their claim and as such have a cause of action against the defendant.

In rejoinder, counsel for the defendant submitted that the plaintiffs mis-description of the land in its self is an admission that the plaintiffs are not alive to the particulars of the land they purport to have an interest or rights in.

Resolution

In order to prove there is a cause of action, the plaint must show that the plaintiff enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. All three elements must exist for a cause of action to be established. See

Tororo Cement (Supra)

Under **O7 r 11(a) of the Civil Procedure Rules**, a plaint may be rejected by the court if it does not disclose a cause of action. In determining whether a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any and nowhere else.

Counsel for the defendant's contention is that in the plaint under paragraph 3, the suit land is described as Block 8, Plot 5 & 8 at Bwamba along Bundibugyo-Nyahuka road. That the land occupied by the defendant is Block 5, Plots 4, 5 & 360 at Kakonga Bwamba County, Bundibugyo district.

Counsel for the plaintiff referred to the description in the plaint as a mere typological error and that the suit land is located at Block 5, land at Bwamba, along Bundibugyo Nyahuka road, Bundibugyo Town Council. He referred to the true description of the suit land as that stated in the attachments to the plaint, to wit annexures "F" and "G", the survey report and the valuation report.

I have looked at the description of the suit land complained of in paragraph 3 of the plaint describing the location of the suit land Block 8, Plot 5 and 8 land at Bwamba along Bundibugyo-Nyahuka road measuring approximately 2.81 acres. I have also looked at the description of the suit land on the survey report and the valuation report, both documents annexed to the plaint describing the location as land Block 8, Plot 5 and 8 land at Bwamba along Bundibugyo-Nyahuka road. The defendant's description is Block 5 Bwamba County, Bundibugyo district as per the written statement of defence.

I believe the explanation given by counsel for the plaintiff that the description in paragraph 3 of the plaint stating the suit land to be at block 8 was just an error and the true description of the suit land is at Block 5. I will therefore not treat the properties described as two different properties. It is the same land being contested. I will accord counsel for the plaintiff the benefit of doubt that he made an error. The said error was made by an advocate that prepared the plaint and should not be used to

deny the plaintiffs their claim without being heard. The plaintiffs' own land at Block 5 on which they possibly have rights, which rights are alleged to be violated by the defendant's continued occupation of the suit land would be sufficient to constitute a cause of action. The defect or omission can be put right by amendment. I accordingly overrule the first objection.

2. Whether the suit is barred by limitation.

Counsel for the defendant submitted the plaintiffs are barred from bringing an action for recover of land against the defendant after the expiration of 12 years as provided in section 5 of the Limitation Act, Cap 80. Counsel submitted that the defendant has been in occupation of the suit land for over 46 years without any interference or being challenged by the plaintiffs or any person whatsoever which makes the plaintiffs claim time barred. He referred to the case of ***Iga V. Makerere University [1972] EA 66***, and ***Order 7 Rule 11 (d)*** where it was held that a plaint barred by limitation is a plaint barred by law. Counsel also relied on ***Dr. Arinaitwe Raphael & 37 Ors. V. Attorney General HCCS No. 201 of 2012***, where it was stated that the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.

In response, counsel for the plaintiffs argued that this suit is premised on the tort of trespass. Counsel relied on the Supreme Court decision in ***E.M.N Lutaya V. Sterling Civil Enineering Co. SCCA No. 11 of 2002*** to support his argument that trespass. He submitted that the current suit is one of the tort of trespass to land, which is a continuing tort and that the law of limitation does not apply to it in the strict sense. Counsel relied on

Amin Aroga V. Hajji Muhammad Arule C.A No. 10 of 2016 to support his argument to that effect.

In rejoinder, counsel for the defendant submitted that section 5 of the Limitation Act applies to cases of trespass to land. Counsel cited **Kiwanuka Fredrick Kakumutwe V. Kibirige Edward Civil Appeal No. 272 of 2017**, wherein Justice Muzamiru JA, had this to say;

“Since the tort of trespass to land deals with possessory rights to land, an action for trespass to land falls squarely within the scope of “actions to recover land” whose limitation period is prescribed by the Limitation Act. Said differently, the Limitation Act applies to actions in trespass to Land.”

He submitted that the plaintiff’s cause of action accrued in 1967 when the defendant allegedly started using the land and as such the plaintiffs are bared by limitation and have shown no reason for any exemption for failure to institute their claim within time.

Resolution

The right of action of the plaintiffs arose in 1967 when Bundibugyo district hospital allegedly entered onto the plaintiff’s land. The plaintiffs in their plaint mention the year of entry onto the suit land as 1967 which is confirmed by the defence. The right of action therefore accrued to the late Kaliisa Yokasi in 1967.

Section 5 of the Limitation Act cap 80 provides:

‘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.’ See ***Odyeki & Anor V. Yokonani & 4 Ors, Civil Appeal No. 0009 of 2017.***

Section 16 of the same Act is to the same effect that at the expiration of the period of twelve years prescribed under Section 5(supra) for any person to bring an action to recover land the title of that person to the land shall be extinguished.

The plaintiffs claim that since trespass is a continuing tort, it is not subject to the limitation statute. To the contrary, the decision of ***Kiwanuka Fredrick Kakumutwe V. Kibirige Edward Civil Appeal No. 272 of 2017***, which was rightly cited by counsel for the defendant supports the view that all torts of trespass to land deal with possessory rights to land and as such, those actions fall squarely within the whip of the limitation statute.

It is intended that a litigant who sleeps on his rights when they accrue should not be at liberty to flood courts with ancient actions. In the instant case, the plaintiff’s right to sue having accrued in to him in 1967, it was extinguished around 1979. On record however, there are various correspondences between the plaintiffs and the defendant discussing the liability of the defendant. These include communications between the late Yokasi Kalisa, his lawyers Nyamutale & Co. Advocates and the District Chief Administrative Officer, minutes of a meeting held with affected families in 2017, survey report, valuation report all pointing to discussions on a possible solution to the plaintiffs’ complaints.

Could it be said that the various actions/engagements by the defendant revived the limitation period which then started to run at that point of engagements by the defendants? Acknowledgement by the defendant of the plaintiff’s right has been found to revive a cause of action as stated in

Section 22 of the Limitation Act. However, such acknowledgment should be clear and unequivocal to be relied on to revive an extinct cause of action. Correspondences between the plaintiff and the defendant are not an acknowledgement of the defendant's liability. I find that they are exchanges which can be helpful in resolving the dispute between the parties if they are successful. Amicable settlement of disputes is encouraged. They are however not sufficient to revive the plaintiff's cause of action which expired in 1979.

I note further that the alleged encroachment on the land started in 1967. The late Yokasi Kalisa who was the original claimant only began to write correspondences to the defendant in 2001 and unfortunately died later in 2007 without ever filing the suit.

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 sue, time begins to run against the plaintiff. One of the important principles of the law of limitation is that once time has begun to run, no subsequent disability or inability to sue stops it. I would emphasize that the claimant may only obtain protection, if they specifically plead disability.

The nature of rights the plaintiffs sought to enforce in the suit in the court are of both a proprietary and of a possessory nature. Hence this was for all intents and purposes, an action for recovery of land, of which the plaintiffs contend that they had been unlawfully deprived by the defendant.

As I have stated above, a litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred. The Court cannot grant the remedy or relief sought and must reject the claim where disability is not pleaded. This disability must be pleaded as required by **Order 18 rule 13 CPR**, which was not done in the instant case. It is trite law that a plaintiff that does not plead such disability where the cause of action is barred by limitation, is bad in law.

Two major purposes underlie statutes of limitations; protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defence on the merits, and secondly, requiring plaintiffs to diligently pursue their claims. Uninterrupted and uncontested possession of land for a specified period, 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**).

Unfortunate and unfair as it sounds, **Section 16 of The Limitation Act** provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. Thus the Supreme Court in her decision of ***Masailabu Vs. Simon Mwanga SCCA No. 4/93 (reported in (1994) V KALR 156***), found that a defendant who settled on land in 1964 acquired it by adverse possession and a plaintiff filed a suit in 1986 to contest that possession could not succeed.

The plaintiffs' suit is time barred and the same is hereby dismissed with no order as to costs.

It is so ordered

Dated at Fort Portal this 31st May 2023.

A handwritten signature in dark ink, appearing to read 'Mugabo', with a stylized initial 'V'.

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the ruling to the parties

A handwritten signature in dark ink, appearing to read 'Mugabo', with a stylized initial 'V'.

Vincent Emmy Mugabo

Judge

31st May 2023