THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0067 OF 2017

(Arising from Misc. Application No. 5 of 2017)
(Arising from Civil Suit No. 054 of 2013)

BYARUHANGA STEPHEN :: APPELLANT

VERSUS

BYABAKAMA ROBERT :: RESPONDENT
(Administrator of the Estate of
the Late Kaija Temiteo)

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

[1] This is an Appeal from the whole of the Judgment and orders of H/W Koluo Catherine Elayu, Magistrate Grade 1, Masindi Chief Magistrate's Court delivered on the 27th September, 2007.

Facts of the Appeal

[2] The Respondent/Plaintiff who is a son and an Administrator of the Estate of the late **Kaija Temiteo** sued the Appellant/Defendant in the lower Court for a declaration that the Respondent and others are beneficiaries of the Estate of the late **Kaija Temiteo**, comprised in unregistered land measuring approximately **200 acres** situate at **Kinywamurara village, Bwijanga Subcounty, Masindi District.** That their late father **Kaija Temiteo** bequeathed the suit land to all his children including the parties but the

Appellant is denying other beneficiaries of the Estate to benefit from it.

[3] The Appellant was served Summons to file a defence but he did not file Written Statement of Defence (W.S.D.) upon which the suit proceeded exparte and an exparte Judgment was accordingly entered for the Plaintiff.

[4] The Appellant then filed **Miscellaneous Application No. 74 of 2014** for leave to file a defence out of time which was granted conditionally for filing the defence within 14 days and pay costs of **UGX. 400,000=.** The Appellant accordingly paid the costs but he did not however, file the W.S.D. as permitted and ordered by Court.

[5] As a result, the Respondent again filed **Miscellaneous Application No. 090 of 2015** seeking to proceed with the suit without the Appellant's evidence which was allowed by Court on the grounds that the Appellant was guilty of inordinate delay, breach of Court order and failure to take the necessary steps. The Application was allowed and Judgment on the matter was entered exparte for the second time. The trial Magistrate found that the Appellant was the Respondent's brother, their late father **Kaija Temiteo** left a **Will (P.Exh.2a & b)** wherein the suit land situated at **Kinywamurara village measuring 200 acres** was mentioned to form part of the Estate of the late **Kaija Temiteo** and that the Respondent therefore, having been mentioned in the Will as the heir and was later appointed as the Administrator of the Estate of their late father, Judgment was entered in his favour inter alia, in the following terms:

(i) The Respondent/Plaintiff, the widow and other siblings are beneficiaries of the Estate of the late Kaija Temiteo.

(ii) The Appellant/Defendant's acts of preventing the Respondents/Plaintiff and other siblings from getting their share and also accessing the suit land are unlawful.

(iii) A permanent injunction issues against the Appellant/Defendant from selling, renting out or dealing in the suit land in any way with 3rd parties.

(iv) An order for recovery of any part of the suit land that has been alienated by the Appellant/Defendant by way of gifts to his children and others who are not family members.

[7] The Appellant filed **Miscellaneous Application No. 5 of 2017** seeking for review of the orders in **Misc. Application No. 90 of 2016** to allow Appellant to file a WSD in the head suit out of time but it was accordingly disallowed by the trial Magistrate hence this Appeal.

[6] The Appellant filed this Appeal on 3 grounds framed in the Memorandum of Appeal as follows:

1. ***The learned trial Magistrate erred in law and fact when she proceeded to determine the head suit when the cause of action was time barred.***

2. ***The learned trial Magistrate erred in law and fact when she dismissed the Appellant's Application to defend and hear the head suit inter parties occasioning miscarriage of justice to the Appellant.***

3. ***The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record occasioning miscarriage to the Appellant.***

Counsel legal representation

[8] The Appellant was represented by **Mr. Simon Kasangaki** of **Ms. Kasangaki & Co. Advocates, Masindi** while the Respondent was represented by **Mr. Willy Lubega** of **Ms. Lubega, Babu & Co. Advocates, Masindi**. Both Counsel filed their respective submissions for consideration of this Court in the determination of this Appeal.

Preliminary objection

[9] Counsel for the Respondent raised a preliminary point of law to the effect that the Appellant's appeal is incompetent for having been filed without leave of Court contrary to **S.76 CPA** and **O.44 r.1 CPR.** That this appeal is against an order of dismissal of **Miscellaneous Application No. 5 of 2017** made under **O.9 r.22 CPR** and therefore, that the remedy that was available to the Appellant was to apply to the same Court for the impugned Order to be set aside as prescribed under **O.9 r.23 CPR** and not an appeal to the High Court.

[10] Appeals from the Chief Magistrate to the High Court are governed by **S.220 of the MCA** but subject to the provisions of **O.44 r.1 CPR. O.44 r.1 CPR** which provides for orders where one can appeal against an order as of right. In agreement with Counsel for the Respondent, I find that the order vide **Miscellaneous Application No. 05 of 2017** dismissing an order for review of the

orders in **Miscellaneous Application No. 90 of 2016** to allow the Appellant to file a W.S.D. in the head suit out of time not falling under any of the orders provided for under **O.44 r.1 CPR** that are appealable as of right. It follows therefore that in the premises the Appellant ought to have first sought for leave before filing the first appeal as provided for under **O.44 r.2 CPR.**

[11] In the premises, I would allow the preliminary objection and have the appeal dismissed on this preliminary point of law. However, for purposes of having this appeal complete since the ends of justice require that the central matter in the controversy between the parties be dealt with by evaluating the evidence on record, I proceed to consider the appeal on merit.

Merits of the Appeal

Duty of the first Appellate Court

[12] As correctly submitted by Counsel for the Appellant, it is the duty of this Court on first appeal to re-examine and re-evaluate evidence on record to make its own inference of facts: **Pandya Vs. R [1957] E.A. 336** and **Williamson Diamonds Ltd & Anor Vs. Brown [1970] E.A. 1.** This being a first appeal, this Court is under 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 as explained in **Fr. Narsensio Begumisa & 3 Ors Vs. Eric Tibebaga S.C.C.A. No. 17 of 2002 [2000] KALR 236.**

Grounds 1 & 3

(1) The learned trial Magistrate erred in law and fact when she proceeded to determine the head suit when the cause of action was time barred.

(2) The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record occasioning miscarriage to the Appellant.

[13] Counsel for the Appellant while relying on **O.7 r.6 of the CPR** and a plethora of authorities to wit; **Vincent Rule Opio Vs. A.G. [1990-1991] KALR 68, Mohammed B. Kasasa Vs. Jaspher Buyonga C.A.C.A. No. 42 of 2008** and **Dima Dominic Poro Vs. Inyani Godfrey & Anor H.C.C.A. No. 17 of 2016** and others, submitted that review of the evidence that was adduced by the Respondent and the pleadings, established that the parties' late father **Kaija Temiteo** died in 1996 and the Appellant has since lived on the suit land without being challenged by the Respondent. That the Appellant having therefore occupied the land for more than 12 years before the suit for recovery of land and for enforcement of the Plaintiff's/Respondent's claim as an Administrator of the Estate of the late **Kaija Temiteo** was filed against him (after a period of 12 years), the Respondent could not sue the Appellant in respect of his claim in the personal Estate of the late **Kaija Temiteo**.

[14] Counsel concluded that the trial Magistrate erred when she failed to critically analyse the evidence to the extent that the Plaint did not disclose a cause of action when the Appellant was in possession thus, the Respondent cannot claim that the suit land

forms part of the Estate of the late **Temiteo Kaija**. That the Respondent/Defendant failed to disclose in its pleadings when the late **Temiteo Kaija** died, and or when he took possession of the suit land or the period of dispossession. That in the premises, the trial Magistrate should have found that the Respondent/Plaintiff's action for recovery of land and/or enforcement of rights in the personal Estate of the late **Kaija Temiteo** was time barred and dismiss the suit.

[15] On the other hand, Counsel for the Respondent submitted that the suit was not for recovery of land but rather, a claim of interest in the property of the Estate of **Temiteo Kaija**, the father to the parties to the suit. That the Respondent was not claiming for only his interest but also for other siblings and beneficiaries to the Estate and therefore, the Appellant's occupation of the land did not constitute any right of ownership to the Appellant. He concluded that in the premises, the Respondent's cause of action was not time barred.

[16] It is trite law that a suit which is barred by Statute where the Plaintiff had not pleaded grounds of exemption from limitation in accordance with **O.7 r 6 CPR** must be rejected because in such a suit, the Court is barred from granting a verdict or remedy; **Vincent Rule Opio Vs. A.G. (Supra).** It is the law that with actions for recovery of land, there is a fixed limitation period stipulated by **S.5 of the Limitation Act.** However, ~~and~~ according to **S.6** of the same Act *"the right of action is deemed to have occurred on the date of the dispossession".*

[17] In the instant case however, I find that the suit was not for recovery of land but rather a claim of interest in the property of the Estate of **Temiteo Kaija**, and for enforcement of the Plaintiff's/Respondent's rights as an Administrator of the Estate.

[18] In this case, it is not in dispute that the Respondent/Plaintiff is the Administrator of the Estate of the late **Temiteo Kaija** by virtue of the Letters of Administration with the WILL annexed granted to him vide **Masindi H.C.A.C. No. 026 of 2012**. Under **S.180 of the Succession Act,** it is provided that the Administrator of the deceased person is his legal representative for all purposes and all property of the deceased person vests in him/her as such.

Under **S.191 of the Act** it is proved thus;

> *"Except as hereafter provided but subject to Section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any Court of justice, unless Letters of Administration have first been granted by a Court of competent jurisdiction".*

[19] The above provisions would render any acts of a person in relation to the Estate of the deceased person illegal, null and void if that person has not obtained Letters of Administration. This is because, it is only by the grant that a person is clothed with the legal authority to deal with the Estate or any part of the Estate of the deceased.

[20] In the instant case, as already observed, it is not in dispute that the Respondent is the Administrator of the Estate of the late

Temiteo Kaija. The trial Magistrate admitted the Grant with the WILL annexed as **P.Exh.1**. According to the WILL which is also admitted in evidence as **PExh.2(a)** and its English translation **P.Exh.2(b),** in regard to the suit Kibanja at Kinywamurara, the deceased bequeathed it to his wife and children. Whereas in the WILL the Respondent was appointed as the deceased's heir, the Appellant was a mere caretaker of the suit Kibanja for purposes of safeguarding it from strangers from encroaching on it.

[21] From the foregoing, I find that the Respondent being an Administrator of the Estate of the late **Temiteo Kaija**, upon acquiring the Letters of Administration in 2012 **(P.Exh.1),** got every right to claim interest in the Estate on his behalf and on behalf of the other beneficiaries to the Estate. It follows therefore, the period the Appellant claims he has been on the land does not confer him any rights on the Kibanja for there is ample evidence that he occupied the suit Kibanja as a mere caretaker and not that it was given or offered to him as his share by his late father, as Counsel submitted on his behalf.

[22] In conclusion, I find that the Respondent's cause of action occurred to him on the **24th October, 2012** when he obtained Letters of Administration in respect of the Estate of the late **Temiteo Kaija** and the Appellant resisted or hampered his administration of the estate. He filed the present suit for enforcement of his rights as an administrator in 2013. The present suit cannot therefore, by whatever stretch and for all intents and purposes be found to have been filed out of the limitation time.

[23] The trial Magistrate properly evaluated the evidence before her and rightly found that the Appellant did not occupy the suit Kibanja as the owner but as a caretaker. The action by the Respondent was not time barred. In the premises, the 1st and 3rd grounds of appeal are found devoid of any merit and they accordingly fail.

Ground 2: The learned trial Magistrate erred in law and fact when she dismissed the Appellant's Application to defend and hear the head suit inter parties occasioning miscarriage of justice to the Appellant

[24] Counsel for the Appellant submitted that the Appellant in his **Application No. 05 of 2017** seeking to defend and have the head suit heard on merit pleaded that the suit land did not form part of the Estate of the late **Temiteo Kaija** and upon being granted leave vide **M.A. No. 74 of 2014** to file a W.S.D. he instructed his lawyer to file it but he ~~who~~ did not. However, on record, there was the proposed W.S.D. which was attached to **M.A. No. 74 of 2014** lying on record but was never endorsed by the trial Magistrate.

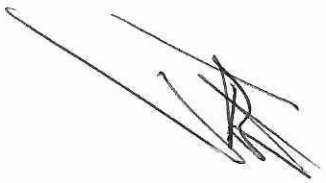
[25] Counsel concluded that it is now settled principle of law that mistakes of Counsel, however negligent, should not be visited on a litigant. That a litigant should not be permanently deprived of the right of putting forward a bona fide claim or defence by reason of the defaults of his professional advisor in the interests of substantive justice; **Banco Arabe Espanol Vs. Bank of Uganda S.C.C.A No. 08 of 1998 [1997-2000] UCL 1.**

[26] In the instant case, it is an admitted fact that the Appellant upon being served with summons to file a defence, did not file one. The Respondent obtained an exparte Judgment and Decree. The Appellant filed **Miscellaneous Application No. 74 of 2014** for setting aside the exparte Judgment and Decree. The Application was accordingly granted on condition that the W.S.D. is filed within 14 days of the order. The Appellant did not file the W.S.D. but waited until the main suit proceeded exparte and in 2015, filed **Miscellaneous Application No. 90 of 2015** to defend and have the head suit heard inter parties, which the trial Magistrate, in my view rightly found, that the Appellant/Applicant was guilty of inordinate delay, breach of the order of Court and the Application was an abuse of Court process.

[27] I find that in this case, Court granted the Appellant ample chance and an opportunity to file his W.S.D. but did not do so. He instead resorted to file one Application after another with the view to irritate and oppress the Respondent, which in my view, is an abuse of Court process; **Uganda Land Commission Vs. James Kamoga & Anor S.C.C.A. No. 08 of 2004**. The Appellant's instructing an Advocate to file a W.S.D. did not confer him and or his lawyer the right to abrogate their duty to file a defence within the 14 days as clearly ordered by Court. Court would not certainly consider and endorse a proposed W.S.D. that was attached to and therefore formed part of **Miscellaneous Application No. 74 of 2014** to constitute a defence filed. Such is not the W.S.D. Court ordered for filing within the 14 days.

[28] In this case therefore, I find that there was no mistake of Counsel but Counsel deliberately breached the Court's Order for filing the W.S.D. within 14 days purporting to rely on the proposed W.S.D. attached to **M.A. No. 74 of 2014** which in my view, was not the W.S.D. envisaged by the order since he was entitled to file a similar one or a completely different one. The proposed W.S.D. attached to the Application formed part of the Application and could not be taken as his defence to the suit. Besides, neither the Appellant nor his Counsel has explained to Court why either of them could not follow up the so called proposed W.S.D. for endorsement by Court since it was a requirement that such be served upon the opposite party, the Respondent. It is my view that the Appellant's claim of mistake of Counsel is a mere afterthought. Besides, neither this ground of "mistake of Counsel" nor proof of instructions to Counsel to file a defence were included in the Appellant's Memorandum of Appeal as a ground and it is trite law that no person should be allowed to argue an appeal outside the grounds set out in the Memorandum of Appeal, **O.43 r 2 CPR**.

[29] In conclusion, I find that the ground of "mistake of Counsel" is not available to the Appellant. Besides, considering the evidence on record whereby it is clear by the deceased's WILL that the suit land formed part of his Estate and the Petitioner was to hold it as a mere caretaker, I find that the Petitioner had no bona fide claim or defence worth the trial Court exercising its discretion to consider granting the impugned **Application No. 05 of 2017**.



[30] In the premises, I find this ground of appeal also lacking merit and it accordingly fails. As a result, the entire appeal is found to have no merit. It is accordingly dismissed with costs.

Dated at Masindi this 15th day of **August, 2023.**

Byaruhanga Jesse Rugyema
Judge