

THE REPUBLIC OF UGANDA
 IN THE HIGH COURT OF UGANDA AT KAMPALA
 LAND DIVISION
 CIVIL APPEAL NO 60 OF 2021
 (ARISING OUT OF CIVIL SUIT NO.18 OF 2018)

NSUBUGA VITALO-----APPELLANT

VERSUS

1.KIMBOWA IVAN
 2.NALUTAAYA VIVIAN
 3.SEKABEMBE PAUL-----RESPONDENTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

The Appellant, Mr. Nsubuga Vitalo, being dissatisfied with the judgment and orders of Her Worship Mbabazi Edith Mary of the Chief Magistrate Court of Makindye at Makindye made on the 2nd day of June, 2021 lodged an appeal to this court on three grounds.

GROUND OF APPEAL

1. The learned trial Magistrate, erred in law and fact when she held that the Appellant acquired the suit property illegally, without any evidence to that effect.
2. The learned trial Magistrate erred in law and fact when she held that the Respondents were the lawful owners of the suit property basing on highly contradictory evidence.
3. The learned Trial Magistrate erred in law and fact when she failed to analyse the evidence as adduced in Court hence coming to a wrong conclusion.

BACKGROUND TO THE APPEAL

The Appellant, Mr. Nsubuga Vitalo, is the maternal Uncle of the 2nd and 3rd Respondents; Ms. Nalutaaya Vivian and Mr. Sekabembe Paul. They are his late sister, Maureen Namutebi's, daughter and son. The 1st Respondent, Mr. Kimbowa Ivan, is the biological
5 father of both the Appellant and the late Maureen Namutebi.

According to the plaint in Civil Suit No. 18 of 2018, the 2nd and 3rd Respondents sued their Uncle, the Appellant seeking a declaration that they are the beneficial owners of the suit property comprised in Namasuba Kikajjo Zone and an order of vacant possession of the
10 suit property against their Uncle. As stated before, the siblings' co-plaintiff was their maternal grandfather and the father of the Appellant. It was their claim that during her lifetime, their mother, was given the suit Kibanja as a gift by her father, the 1st Respondent, by a deed dated 5th July 1994. She later built a small house on the land where she lived with the 1st and 2nd Respondent until she died on the 15th May 2000. After her death, her
15 brother, their Uncle, the Appellant, forcefully took possession of the house, during the period that their grandparents were looking after them. When they attained majority age, they brought the suit, along with their maternal grandfather, seeking, vacant possession of the suit property, among other remedies. This was after receiving threats from the Appellant and failure to get assistance from the authorities.

In his defence, the Appellant, asserted that he also acquired the same land from their father, the 1st Respondent, who in 1998 gave it to him as his son and later sold it to him on the 2nd April 2006. And that since 1998, he has been enjoying quiet possession without
25 any complaints from the Respondents or anyone else. He added that neither his late sister nor her two children have ever lived on the suit land. And therefore there was no basis for the orders and remedies sought by them.

After hearing the evidence of the parties' witnesses, the learned trial Magistrate found in favour of the Respondents.

It is the duty of the first appellate court to give the evidence led by the trial court, a thorough reevaluation and draw its own conclusion. See Kifamunte Henry v Uganda (Criminal Appeal-1997/10) [1998] UGSC 20 (15 May 1998) where it was held that;

'The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.'

Preliminary Observations of the Court

My evaluation of the lower court begun with a perusal of the Plaint. The cause of action is contained in paragraph 3 and the facts giving rise to it in paragraph 4(a) –(c)

'3. The plaintiffs' cause of action against the Defendant is for vacant possession of the suit property at Namasuba Kikajjo Zone, General Damages and costs of the suit.'

4.The facts which gave rise to the plaintiffs' action arose as hereunder;

a) By a document of bequeath dated 5th/7/1994, the 1st & 2nd plaintiffs late mother NAMUTEBI MAUREEN was bequeathed the suit Kibanja (land) by her father the 3rd plaintiff who also doubles as the father of the defendant. (See a Photostat copy of the document hereto and marked as annexure 'A')

b) That thereafter for the purpose of the above bequeath, the plaintiffs' late mother constructed a house thereon where she lived happily with her children the 1st & 2nd plaintiffs.

c) However, on the 15th May 2000, the plaintiffs' mother Namutebi Maureen passed away and left the 1st and 2nd plaintiffs in their infancy, the 1st plaintiff was 7 years and the 2nd plaintiff was 6 years old.

d) During or about the year 2003, the defendant, the brother to the deceased utilized the infancy of the plaintiffs and forcefully entered and occupied the suit house without any authority from any family member including the 3rd plaintiff who had bequeathed the same to their late mother...

5. The 1st & 2nd plaintiffs shall aver and adduce evidence that as a result of the above conduct of the defendant, they have been deprived of quiet enjoyment of their late mother's share for which they are direct beneficiaries wherefore they demand general damages.

It is apparent from the Plaint that the suit Kibanja is described as the property of the late Maureen Namutebi. She died intestate on the 15th May 2000. This was eighteen years before Civil Suit No. 18 of 2018 was instituted in the Chief Magist

191. Right to intestate's property, when established

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

5 *of competent jurisdiction.*

An extremely rare exemption to this provision of the law was articulated in the holding of the Supreme Court in **Israel Kabwa v Martin Banoba Musiga (Civil Appeal No. 52 of 1995) ((Civil Appeal No. 52 of 1995)) [1996] UGSC 1 (26 September 1996)**. In that case, the beneficiary in question was the customary heir of the intestate, who was in

10 occupation of the suit land and in possession of a Certificate of No Objection at the time of filing the suit in the trial Court. And Court held that he had the right to sue for the purpose of the protecting and preserving the estate.

In my view, the plaintiffs did not qualify for any exemption from the provisions of **section**

15 **191 of the Succession Act** and since they were not holders of Letters of Administration to the estate of the late Maureen Namutebi, they had no legal right to sue on behalf of her estate. Additionally, according to the plaint, the defendant has been in possession of the suit property since 2003, and by the time the suit was filed in 2018, he had been occupation for 15 years with the knowledge of the 3rd plaintiff, his father, Mr. Kimbowa

20 Ivan, who is also the late Maureen Namutebi's father. Mr. Kimbowa Ivan, has always been aware of the late Maureen Namutebi's alleged ownership of the suit land, since he asserts under the plaint, that he donated it to her in 1994. And therefore, under the **Limitation Act Cap 80**, the burden to plead exemption from the 12- year limitation period for the recovery of land of an intestate, **under section 5 and 6(2)**, lay on the plaintiffs. No such

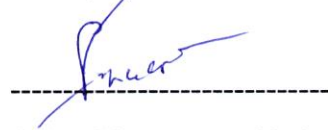
25 exemption was pleaded.

These preliminary observations, in my view, rendered the plaint before the trial court defective under **Order 7 rule 11(a) and (d) of the Civil Procedure Rules** for failure to demonstrate that the three plaintiffs jointly and severally enjoyed any right in the suit

30 property and that the suit was not barred by limitation. I hereby reject the plaint on those

grounds and set aside the proceedings, judgment and orders of the lower court arising out of the rejected plaint.

In conclusion, the appeal is allowed with no order as to costs since the parties are family members.



Olive Kazaarwe Mukwaya

JUDGE

18th December 2023

Delivered by email to Counsel for the Parties.