THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 52 OF 2019

WAMALA BENON :: APPELLANT

VERSUS

MARGARET DORCUS KAYAGA :::::::::::::::::::::::::::::::: RESPONDENT

(Administrator of the Estate of the late David Seruwu)

(Appeal from the Judgment and Decree/Order of the Magistrate Grade one, Her Worship Susan Awidi, Luweero Chief Magistrate Court Delivered on 25th April, 2019 arising from Civil Suit No. 083 of 2014)

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Background to the appeal:

The appellant, Mr. Wamala Benon is a son of the late Gombya the registered proprietor of the suit land comprised in ***Block 16, plot 8, land at Lukyamu, Bulemeezi.(suit land),*** who claimed to have been born on the suit land in 1966 where he currently resides and has been deriving sustenance.

The respondent, Ms. Margaret Kayaga Dorcus is a widow of the late David Seruwu who had died in the course of the trial. Prior his death he had filed a suit in 2014, claiming to have bought 11 acres of land from the late Gombya who at the time was the registered owner of the suit land.

In the amended plaint filed on 07th May, 2018, the deceased's name was substituted by that of his widow, Margaret Kayaga Dorcas as "administrator" for purposes of completing the suit.

The claim under *paragraph 4* of the plaint was for recovery of general damages for trespass onto his land situated at Lukyamu Bulemezi, comprised in ***Bulemezi Block 16 Plot 8; a*** declaration that the defendant is a trespasser to the plaintiff's suit land; compensation for all the destroyed plantation/trees; interest and costs of suit.

It was contended at the trial that at the filing of the suit, and at all material times, the suit land was registered to the late Andereya Edward Gombya since 3.3.1961.

During the trial the following issues were identified:

1. ***Whether the plaintiff owns the disputed land?***
2. ***Whether the defendant is a trespasser on the suit land?***
3. ***What remedies are available to the parties?***

In the judgment delivered on 25th April, 2019, the trial magistrate declared the respondent as lawful owner of the suit land measuring 11 acres comprised in ***Bulemeezi, Block 16 plot 8 in Lukyamu village, Kalagala sub county, Luwero district;*** that the defendant was a trespasser on the suit land as described; general damages of ***Ugx 5,000,000/=;*** an order for vacant possession; an order to survey off 11 acres from the suit land; compensation; interest and costs to the plaintiff.

Dissatisfied with the decision of the trial court, the defendant filed this appeal, raising several grounds:

1. *That the trial Magistrate erred in fact and in law when she failed to hold that the respondent had no locus-standi to bring a suit of trespass to land against the appellant a registered owner and came to a wrong conclusion.*

2. *That the trial magistrate erred in fact and law when she held that the appellant was a trespasser on the said suit land.*

3. *That the trial magistrate erred in fact and in law when she held that the respondent's land was comprised in* ***Bulemezi Block 16 Plot 8 at Lukyamu Village Kalagala Sub- county Luweero District.***

4. *That the trial Magistrate erred in fact and in law when she entertained and decided on the issue of ownership of land and thereby came to a wrong conclusion.*

5. *That the trial magistrate erred in law and fact when she violated the "Parole evidence rule" and gave demarcations to land and originally having demarcations thereby coming to a wrong decision.*

6. *That the trial magistrate erred in law and fact when she ignored all the evidence on record and the legal submission of the appellant's counsel and hence came to a wrong decision.*

7. *That the trial magistrate erred in fact and in law when she granted an order of vacant possession against the appellant.*

8. *That the trial magistrate erred in fact and in law when she granted in favour of the respondent an order to survey 11 acres of land on the appellant's land comprised in* ***Bulemezi Block 16 Plot 8 at Lukyamu***

9. *The trial magistrate erred in law and fact when she awarded the respondent general damages, interest and costs.*

The appellant's prayer was that the entire decision of the trial court be overturned; and for the costs to be awarded to him for both this court and in the trial court.

Grounds 1 and 5 were however abandoned by the appellant, while ***grounds 3 and 4*** were argued together. I will deal with these two first.

Evaluation of the Evidence:

Issue No. 3: That the trial magistrate erred in fact and in law when she held that the respondent's land was comprised in Bulemezi Block 16 Plot 8 at Lukyamu Village Kalagala Sub- county Luweero District.

And:

Issue No. 4: That the trial Magistrate erred in fact and in law when she entertained and decided on the issue of ownership of land and thereby came to a wrong conclusion.

This being the first appeal, the court is required to subject the evidence to a fresh and exhaustive scrutiny and then draw its own conclusions, bearing in mind that it never observed the witnesses under cross-examination. (***See: Sanyu Lwanga v Sam Galiwanga SCCA No.48/1995).*** This court has the duty to re-evaluate the evidence to avoid miscarriage of justice as it mindfully arrives at its own conclusion.

The law on trespass is well articulated in ***Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Co. Civil Appeal No. 11 of 2002 (SC)*** where it was held that the act of trespass occurs when a person makes an unauthorized entry upon land, and thereby interferes or portends to interfere with another person's lawful possession of that land.

It is also trite that such action can only be brought by a person in possession of the land. An action for the tort of trespass to land is for enforcement of possessory rights rather proprietary rights and an invasion affecting an interest in the exclusive possession of another's property. ***(Dima Dominic Poro vs Inyani and Apiku HCCA No. 17 of 2016***).

The fact of possession for purposes of an action in trespass to land is proved by evidence establishing physical control over the land by way of sufficient steps taken to deny others from accessing the land. Actual possession is established by evidence showing sufficient control, demonstrating both an intention to control and intention to exclude others.

The burden lies on the plaintiff to prove that the defendant illegally entered on to the suit land and that the facts as alleged by him/her are correct. He/she is deemed to discharge that burden if he adduces evidence sufficient to raise a mere presumption that what he asserts is true, enough to persuade court to rule in his/her favour.

But that burden may shift to the defendant, requiring him/her to adduce evidence sufficient to support a rebuttal of that presumption against him/her. ***(See also: S. 101, S. 102 and S. 103 of the Evidence Act Cap 6 and Mudiima & 5 Ors Vs. Kayanja & 2 Ors (Civil Suit 232 of 2009) [2014] UGHCLD 34).***

Counsel for the appellant in this appeal referred court to the decision in ***Odyek Alex & Anor V. Gena Yokonani & 4 Others Civil Appeal No. 009/2017*** which considered an action for recovery of land as distinguished from an action for trespass to land.

On the strength of that authority counsel implored this court to find that the action was inherently and essentially an action for recovery and not trespass to land.

That secondly, it was the duty of the trial court to establish whether the plaintiff had a cause of action against the defendant, which duty the court had failed to discharge.

He noted that it should have been the administrators of the estate and not the defendant who should have been sued since the relief lies in specific performance.

It was therefore wrong for the respondent to withdraw the suit against the said administrators. As such therefore the suit did not disclose a cause of action against the appellant.

In reply, counsel for respondent however maintained that this was not an action for recovery of land but rather an action for recovery of damages for trespass as shown in the plaint.

He referred to the case of ***Shamim Matovu and Sengendo Muhammed (administrators of the estate of the late Nabakka Hadija Vs Nemah Niyah and Anor Civil Appeal No. 26 of 2019.***

In that case, it was held by Justice Henry I. Kawesa that trespass to land is a continuous tort and the law of limitation does not apply to it. Learned counsel therefore rejected the assertion that the suit was time barred by ***section 5 of the Limitation Act.***

I will consider the objections under two separate sub-titles:

a) ***Whether or not the action was statute-barred;***
b) ***Whether or not the appellant was the right party to sue.***

Consideration of the issues:

a) ***Whether or not the action was statute-barred;***

Section 5 of the Limitation Act, Cap. 80 provides as follows:

> ***"No action shall be bought by any person to recover any land after the expiration of twelve years from the date on which the right of action to him or her or, if it first accrued to some person through whom he or she claims to that person". (emphasis mine).***

The overriding purpose is *interest republicae ut sit finis litum,* meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of the particular case.

Thus once the axe falls it falls it falls, and the defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights: ***(Muhammad B Kasasa vs Jaspher Bayongo Sirasi Bwogi, Civil Appeal No. 42 of 2008; Hilton vs Sulton Steam Laundry (1946) 1 KB 61, at page 81***.

The law is basically a defence, a shield but not a sword. It simply means the extinction of stated claims and rights of actions are limited in periods of time and once not pursued, they are lost since delay defeats equity. It is only the vigilant whom the equity helps to enforce their rights, not the indolent.

The Court of Appeal in its decision, ***URA vs Uganda Consolidated Property Ltd (1977- 2000*** ruled that time limits set by statutes were matters of substantive law and should be strictly complied with.

Counsel for the appellant in this case referred to the case of ***Miramango vs Attorney General [1979] HCB 24*** where 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. As per ***section 6 of the Limitation Act,*** the right of action is deemed to have accrued on the date of the dispossession.

The gist of his argument was that the respondent's claim was that they purchased the land on 23rd March, 1980 and therefore ought to have sought enforcement of the contract by 1992.

That a second time scale was that the late Seruwu got paralysed in 1995 and it is claimed that this is when the appellant taking advantage of his immobility, had dispossessed the late Seruwu.

That in a third time scale it is alleged that in 1998 the appellant had chased away Wakabi who had been entrusted by the respondent to survey the 11 acres purchased by Seruwu from Gombya which led to the dispossession of the

respondent's family. Accordingly, that if court were to take that as the truth, after the period of 12 years, the cause of action for specific performance arose.

Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run, save where the plaintiff pleads grounds of exemption from limitation in accordance with ***order 7 rule 6 of the CPR***.

In ***Cottar vs. Attorney General for Kenya 193 AC P. 18*** it was said by ***Sir Joseph Sheridan CJ*** as he then was that:

> ***"What is important in considering whether the cause of action is revealed is by the pleadings is the question to what right has been violated. In addition of course the plaintiff must appear as a person aggrieved by the violation of his right and the defendant as a person who is liable....If on the other hand any of those essentials is missing no cause of action has been shown ....."***

The general rule therefore 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 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.***

The trial court in the present case had to deal with the issue whether or not the action amounted to trespass or recovery of land, for such action to fall within the ambit of ***section 5 of the Limitation Act***.

Counsel for the appellant's point as submitted was that in the case referred to earlier of ***Odyek Alex & Anor V. Gena Yokonani & 4 Others*** (supra) court clearly stated that it did not matter that the plaintiffs/appellants names part of the action as trespass to land instead of recovery to land.

The court will consider the essence of the action rather than the nomenclature adopted by the parties. Court ruled in that case that the essence of the claim was recovery of land in respect of which ***section 5 of the Limitation Act*** was applicable.

The Court of Appeal in a more recent (2022) decision: ***Re: Kiwanuka Fredrick Kakumutwe vs Edward Kibirige Civil Appeal No. No. 272 of 2017*** had to determine whether the 1st appellate judge had erred in holding that the action against the defendant was time barred. It declared that it is important to identify the date on which the computation of the limitation period commenced.

The plaintiff in that case claimed ownership of the suit land and sought a declaration to that effect. He also sought a permanent injunction restraining the defendant from trespassing on the suit land, general damages and costs of the suit.

It was the plaintiff's claim in that particular case that in March 2009 the defendant had forcefully entered the suit land claimed its ownership and started trespassing on it by cultivating on it and cutting down the trees, despite the protests from the plaintiff.

Court cited the Supreme court cases of ***Justine E.M.N.Lutaya vs Sterling Civil Engineering company (supra)*** which deals directly with the tort of trespass. In the lead judgment of Justice Mulenga, JSC which the other justices concurred with, he stated the legal position about a right of action based on a continuous trespass to land, thus:

> "***Where trespass is continuous, the person with the right to sue may subject to the law or limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended.***
>
> ***Similarly, subject to the law on limitation of actions a person who acquires a cause of action in respect of trespass to land, may***

prosecute that cause of action after parting with possession of the land" [Emphasis added].

Court of Appeal thus arrived at the conclusion that based on the above decision which is still good law and binding under the doctrine of *stare decisis*, the argument that the ***Limitation Act*** does not apply to the tort of trespass to land no longer holds any merit.

Notably, counsel' 's efforts in that case to make a distinction between an action for recovery of land and an action of trespass to land for purposes of extricating the latter from the scope of application of the ***Limitation Act*** therefore did not yield any fruits.

The appellant's uncontroverted testimony in the present appeal is that the total area owned by the estate was 13.75 acres part of which the respondent was claiming.

That this is the area in which he was born in 1966, to the registered proprietor the late Andereya Edward Gombya (his father); built his home and since resided, utilising it for sustenance through cultivation.

He maintained that as a person raised, and living on the suit he did not need permission from anybody to remain on the land (not in the least, the respondent who was not in possession of the suit land.

In his response to the above, the respondent relying on the evidence of four witnesses including herself argued that after the purchase was concluded in 1980, the respondent family had taken possession by cultivating and planting trees.

That however when her husband fell sick he had employed Jafaari and his wife who continued tilling the land; and that when a surveyor was sent to open up the boundaries he was chased away by the appellant who doubles as the area chairperson.

As submitted for the appellant, these were three separate time scales, from 1980 when the agreement was made; 1995 when the deceased became paralysed and 1998 when the appellant chased the surveyor away.

Duly noted from the evidence on record, Gombya, the registered owner of the land passed on in 1984, four years after the agreement was purportedly signed. The appellant who testified as ***Dw1*** and his two witnesses: his mother and brother disowned the said agreement but as ruled by the trial court did not lead any evidence to prove that it had been forged.

Whereas in *paragraph 5 (c) and (d)* of the amended plaint filed 7th May, 2018 there was sufficient reason that explained why Seruwu could not file the suit, there is nothing to explain why prior to that he had not secured the transfer/mutation forms from Gombya when he was still alive after purchasing the legal interest in 1980.

Within the spirit of ***section 5 of the Limitation Act*** as cited, the action first accrued to Seruwu in 1980. He became sick more than 15 years later. No explanation was given in the pleadings (amended suit) as to why they had to wait some thirty years after Gombya's death before filing the suit.

In total it took him a period of 34 years after purchasing the land to lodge the caveat on the suit land and soon thereafter file the suit in this court. Thus in alignment with the above principle and findings this action was time barred.

The trial court in error, chose to treat this action as one of trespass and did not take into consideration the aspect of limitation in her judgment delivered on 25th April, 2019.

Understandably, this was before the clarification made by the Court of Appeal in the case of ***Kiwanuka Fredrick,*** as cited earlier, on the application of ***section 5 of the Limitation Act*** which clarification is binding to this court.

In the lead judgment delivered on 7th October, 2022 by JA Muzamiru Mutangula Kibeedi, the Court of Appeal declared that 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*. In short therefore, the Act applies to actions in trespass to land.

Court declared in the above suit that if the trial magistrate had addressed her mind to these issues and evaluated her evidence sufficiently, she ought to have dismissed the case in accordance with ***Order 7 rule 11 of the Civil Procedure*** Rules since it was barred by law. That conclusion equally applies to the present case.

It is trite that an illegality once brought to the attention of court cannot be sanctioned. It overrides all questions of pleadings, including admissions thereon. ***(Makula International Ltd vs H. E Cardinal Nsubuga & Anor CA No. 4 of [1982] HCB).***

A suit which is barred by statute where the plaintiff as shown in this case, has not pleaded grounds of exemption from limitation in accordance with ***Order 7 r.6 Civil Procedure Rules S.I 71-1*** must be rejected and in that respect, this court is barred from granting a relief or remedy. (***See: Vincent Rule Opio v. Attorney General [1990 – 1992] KALR 68; Onesiforo Bamuwayira & 2 Others v. Attorney General (1973) HCB 87; John Oitamong v. Mohammed Olinga [1985] HCB 86).***

In the cited case: ***Kiwanuka Fredrick Kakumutwe vs Edward Kibirige (supra)*** the main suit had been filed in 2010. The suit land was sold 22 years later after the right of action to sue accrued to the respondent/plaintiff.

In the present suit, and in alignment with the above findings and principles from ***Pw1's*** evidence the land was purchased by her late husband in 1980 as per ***PExh1*** sale agreement, and the family started to occupy and utilise the land soon thereafter. They neither had the land surveyed nor did not secure any

transfer instruments in respect of the suit land from the registered proprietor when he was still alive.

Thus for more than 30 years the family of the respondent had sat on their rights woke up several years after the late Gombya's death to put up a claim against his family (none of whom had been party to the agreement); and who after the purchase had remained in occupation unchallenged, even when the registered owner was still alive. Accordingly, sufficient steps were never taken by Seruwu's family to deny others from claiming the land.

After the appellant's family had continuously occupied the suit land for 12 years unchallenged, whether his original stay/possession was lawful or unlawful became irrelevant.

Section 16 of the said Act provides thus:

16.Extinction of title after expiration of period

> ***Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land including a redemption action, the title of that person to the land shall be extinguished.***

Accordingly, at the time Seruwu commenced court action in 2014 his title to the suit land had long been extinguished by operation of law and in law he no longer had any interest or estate in title in the suit land upon which to base the action.

The trial magistrate therefore erred in law when she proceeded to hear the suit which was statute barred. She ought to have dismissed it under ***Order 7 rule 11 of the CPR.***

Did the plaintiff/ respondent sue the wrong party?

On the second point of objection raised by counsel for the appellant that the respondent had sued the wrong party, I could not also agree more.

It was claimed by the respondent that the appellant is currently in possession and that the late Seruwu had left his workers, Jafaari (since then deceased) and his widow to utilize the land.

A copy of the special certificate of title ***DExh 2*** indicates clearly that the first entry on the said certificate was made on 3rd March, 1961. The second entry was made in December, 2015 in the names of the appellant and two of his siblings, having been granted letters of administration over their father's estate on 28th June, 2015, vide ***AC No. 075 of 2014. (DExh 3)***. The two were not parties to the suit.

The estate property had been distributed among the beneficiaries in 2018 by the said administrators. Deduced from the evidence at *locus* which was conducted by the trial court on 18th January, 2019, what he obtained as his share was clearly not part of the suit land.

Court noted at that visit the existence of a piggery project with a pig sty on the suit land which belonged to Sebagala ***(Dw3)*** and Sendegeya, both brothers to the defendant; an incomplete permanent house/structure for Sebagala ***(Dw3)*** and Ssendegeya; and a pit latrine as well. The crops on the suit land including maize, matooke and tomatoes all belonged to the two brothers, not to the appellant.

Pw4, Ms Ruth Nkonge aged 74 years confirmed to court that the defendant has lived on his father's land since his birth. However, that his house was not on the 11 acres.

As correctly noted by counsel for the appellant, the sketch map attached to the *locus* proceedings did not even indicate which area on the suit land the appellant

occupied or utilized, which therefore cast some doubt on court's evaluation on the possession and utilization of that land by the appellant.

The boundary marks as identified during the court visit were not derived from the document itself ***DExh 1.*** The 11 acres were never surveyed off at the time of the purchase.

The late Seruwu could have filed the suit for specific performance within the four years prior to his (Gombya's death). He never did.

After Gombya's death, subject of course to the law on limitation, with the right documents, he could have sued the persons in occupation of the 11 acres and/or those to whom the suit land had been distributed.

After 2015, the right parties to sue was not the appellant in his individual capacity but the administrators of the estate of the late Gombya as the trustees, under whose names the estate had been registered and who as claimed had distributed the estate in 2018.

The learned trial magistrate therefore erred in fact and in law when she failed to take into consideration her own findings at the *locus* which clearly showed that the appellant had no direct interest in the 11 acres save only as one of the administrators and trustees in the entire estate.

This appeal therefore succeeds. The appellant is awarded costs of this suit and of the court below.

Alexandra Nkonge Rugadya

Judge

20th March, 2023

Delivered by e-mail
24/3/2023