THE REPUBLIC OF UGANDA
IN THE SUPREME OF UGANDA
AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO 9/2002

BETWEEN

ERISAFANI MUDDUMBA :::::::::::::::: :::::::::::::: APPELLANT

AND

WILBERFORCE KULUSE :::::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal at Kampala (G.M. Okello, A.E Mpagi-Bahigeine, and J.P. Berko, JJ.A) dated 9.4.99 in Civil Appeal No. 8/98)

JUDGMENT OF ODER, JSC

This is a third appeal. It is against the judgment of the Court of Appeal, dismissing appellant's appeal from the High Court. The High Court had dismissed the appellant's appeal from a decision of the Grade I Magistrate's Court of Kamuli.

The case arose from a dispute over a "Kibanja" piece of land. During 1984, the appellant tried to evict the respondent from the kibanja. The respondent successfully sued him in a Grade II Magistrate's Court at Nawanyago in Civil Suit No. 3/87. The appellant appealed to the Chief Magistrate's Court in Jinja, in Civil Appeal No. 79.88. On 6/5/91 the Chief Magistrate ordered a retrial. However, on 6.5.91, the same Chief Magistrate, for unexplained reasons, directed the appellant to file a new suit against the respondent in a Grade I Magistrate's Court at Kamuli. The appellant did exactly that in Civil Suit 10/91. He lost the suit, and appealed to the High Court at Jinja in Civil Suit No. 4/91. He lost that appeal, too. Consequently, he appealed to the Court of Appeal which also dismissed his appeal. He then filed an appeal to this Court before leave to appeal had been obtained from the Court of Appeal as required by section 7 (2) of the Judicature Act. The appeal was struck out. It was subsequently reinstated after leave of the Court of Appeal

had been obtained on 30/7/2001. When the appeal was called for hearing on 13/11/2003, the appellant applied to adopt his original memorandum of appeal to this Court. The respondent consented, and the Court granted the application.

In this Court the appellant conducted his case personally as a pauper without assistance of counsel.

The grounds of appeal are set out in the memorandum of appeal as follows:

> **"l. The Honourable Justices of Appeal erred in failing to subject evidence adduced in lower court to sufficient fresh and exhaustive scrutiny.**
>
> 2. **The Honourable Justices of Appeal erred by not taking the law of limitation Act of Uganda as important and without mind to the period which I have occupied the land in dispute which is over 67 years and I have permanent crops and a permanent house built in 1950.**
>
> 3. **The Honourable Justices of Appeal erred for not taking falsehood, contradiction and discrepancy in the respondent's case and of the judgment of Lower Court seriously which caused injustice."**

Ground 1 of appeal is a repetition of ground of appeal in the Court of Appeal, which was abandoned before that court. The appellant, nevertheless argued that ground, but it was difficult for me to make sense of what he said. He partly referred to the respondent's evidence in Civil Suit No. 3/87, heard by the Grade II Magistrate of Nawanyago, in which the respondent was the plaintiff and the appellant the defendant. With respect to the appellant, the evidence in that case is irrelevant to the present appeal, which originated from the suit the appellant instituted against the respondent in the Grade I Magistrate's Court in Kamuli. The appellant further submitted that the Court of Appeal erred to hold that the respondent had inherited the land in dispute although he did not have a certificate of title to it, and to have accepted the evidence of Amisi, the respondent's DW2 at the trail that he, Amisi had sold the land at Shs: 400/= in 1944, to the respondent's father, Musalirwa, and the respondent inherited the land from his father. This, the appellant contended,

contradicted the respondent's evidence that his father, Yusufu Musalirwa, occupied the suit and after the "Kisoko" Chief had asked him for a "Kanzu" and Shs: 300/= of which the respondent's father paid Shs: 180. In the circumstances, the appellant submitted that the Court of Appeal erred to have accepted the evidence of the respondent's witnesses without scrutinizing it. The appellant further submitted that the Court of Appeal erred to have accepted the respondent's evidence that the appellant got the suit land through the Kyabazinga of Busoga in 1959.

In ground 3 the appellant repeated the submission he had made under ground 1, criticising the Court of Appeal for believing the respondent's evidence to the effect, inter alia, that he (the respondent) inherited the suit land in 1964. If that was true, the appellant contended, then the respondent occupied the land for 20 years before he instituted a suit for trespass against the appellant in the Grade II Magistrate's Court in 1987.

Mr. Ligga, the respondent's learned counsel argued grounds 1 and 3 together. He submitted that the High Court as the first appellate court in this case was alive to its duty in that capacity and subjected the evidence in the case as a whole to a fresh scrutiny, reevaluated the evidence and reached its own conclusion as it was entitled to do. It upheld the trial court on its findings of fact. Learned Counsel contended that the first appellant court fully weighed all the evidence before the trial court and came to the conclusion that the respondent owned the suit land. The Court of Appeal as the second appellate court did the same and upheld the findings of the first appellate court.

I shall first consider grounds one and three of the appeal together, and subsequently ground two. On the issue of evidence I must however, point out from the outset that the evidence relevant to this appeal is the one adduced in the appellant's suit before the Grade I Magistrates' Court. The evidence adduced in the respondent's suit in the Grade II Magistrate's Court is absolutely irrelevant. This really, is stating the obvious, but it is necessary to do so in view of the appellant's submission I have above referred to.

I am unable to agree with the appellant's submissions under grounds one and three of the appeal. With respect to the appellant his criticism of the Court of Appeal that it did not scrutinize the evidence in the case and, by implication, that if it had done so, it would have rejected the respondent's evidence and accepted the appellant's evidence instead, is unjustified. The Court of

Appeals the second appellate court in this matter. As such, it could only depart from the concurrent findings of fact by the trial Magistrate's Court and the appellate High Court if special circumstances justified it doing so. This is trite law on the role of a second appellate court regarding findings of fact.

In his judgment the learned High Court appellate judge properly directed himself on the duty of a first appellate court as being, inter alia, to subject the evidence as adduced in the trial court to fresh and exhaustive scrutiny and come to its own conclusion. The learned appellate judge then examined in detail the evidence adduced by the various respective witnesses of the appellant and the respondent, and concluded:

> ***"It was the above outlined evidence that formed the basis of the learned trial magistrate's judgment. In his judgment, he gave reasons why he disbelieved the plaintiff and believed the defendant. He came to that decision after considering all the evidence as given by both sides. His reasons are to be found on pages 7 and 8 of the typed copy of his judgment. With due respect to the learned counsel for the plaintiff/appellant I do not agree with him that when he said that the learned trial magistrate never gave reasons for his decision. I have examined and considered all the evidence on record and I have come to the conclusion that the decision reached by the trial court was in no way contrary to the weight of evidence as suggested by the learned counsel for the appellant in this submission."***

The learned appellant judge also considered alleged contradictions and discrepancies between the respondent's evidence and that of his witness Amisi Balyawangu (DW2) regarding whether the respondent's father paid Shs: 300 or Shs: 400 for the suit land, and regarding when the respondent acquired the disputed piece of land. On this, the learned appellate judge concluded:

> **" I** ***have failed to discover any material discrepancy in the evidence as established by the defendant's/respondent's witnesses. Even if there were some minor contradictions, those could be explained away as some of these things happened same 50 years ago."***

The learned Lady Justice A.E Mpagi - Bahigeine, J.A, wrote the lead judgment with which both the two other members of the Coram in the Court of Appeal agreed. The learned Justice of Appeal,

rightly so in my view, upheld the findings of fact by the learned appellate judge to which I have referred in this judgment and concluded thus:

> ***"There is overwhelming evidence that the appellant got access to the respondent's land in 1959 on the pretext of setting up a shop to assist people around as Mr. Liiga narrated'. This is when he set up a permanent house. This was through the assistance and influence of the Kyabazinga. The appellant was not allowed or meant to take the whole land. It is important to note that it was the respondent who sued him first. Secondly, the appellant ought to have been able to define his boundary with the respondent, but he could not. The Paucity of the appellant's evidence tilts the evidence against him. Evidently, this is why counsel said he had a difficult case. No wonder counsel concentrated his attack on the case put forward by the respondent forgetting the rule of law that the plaintiff wins on the strength of his case and not on the weakness of the defence. Both lower courts properly and minutely examined the evidence and reached the correct conclusion. I find no merit in the appeal and would dismiss it forth with."***

I am unable to fault the learned Justices of the Appeal on that conclusion. Grounds I and 3 of the appeal should, therefore fail.

The appellant's submission on ground 2 is that the Court of Appeal never took into account the provisions of the limitation Act whereas the trial Magistrate's Court did. In his judgments, the learned trial Magistrate framed the issues in the case. The first issue was whether the plaintiff's action was barred by any law. The learned Grade I Magistrate answered that issue in the affirmative, finding that the plaintiffs claim was barred by section 6 of the Limitation Act. In his appeal to the High Court, the appellant attacked that finding in the third ground of his appeal. The learned appellate judge considered the evidence and the arguments of parties on the issue and concluded:

> ***"In his evidence, the plaintiff/appellant told the Court that the defendant/respondent started encroaching his land some time in 1984 and that is the date when the tort complained of commenced. Since this suit was filed on***

sometime on 17/5/91 by then only 5 years had expired and that did not attend the provisions of sections 3 and 6 of the limitation Act. As the case arose in 1984 the plaintiff was not time barred both for recovery of the land and in his action for the tort of trespass. I hold that the learned trial magistrate was wrong in holding that the plaintiff/appellant was caught up by the provisions of the limitation Act. The third ground of this appeal is accordingly up held."

The appellant's appeal to the Court of Appeal was based on three grounds of appeal.

The first ground was abandoned. The remaining two grounds concerned alleged contradictions in the evidence of the respondent's witnesses at the trial. The issue of limitation of time was not raised in the memorandum of that appeal, nor was it canvassed in, or considered by, the Court of Appeal, rightly so in my view. The issue did not arise on appeal because the appellant had failed to prove his case on the facts supporting his case. I, therefore find no merit in ground 2 of the appeal, which should fail. In the result, I would dismiss this appeal.

On the issue of costs in this appeal, the respondent's learned counsel recalled that the appellant appealed to the Court of Appeal as a pauper, but he did not do so in appealing to this court. The learned counsel, nevertheless, suggested that there should be no order for costs. I accept the suggestion, and would make no order for costs.

Before I leave this case, I would like to comment on the highly irregular procedure with which the Chief Magistrate who handled this case dealt with it. The case went before her as Civil Appeal No. 79/88 in Jinja. She heard and allowed the appeal and ordered a retrial as follows:

"Accordingly the appeal is allowed and a retrial is herewith ordered to enable both parties to be heard. It is further ordered that the suit be filed in a Magistrate's Court at Kamuli and same to be heard by a magistrate Grade II at Kamuli station."

One year later, the record reads:

"6/5/91 both parties present. Chairman RC III Mr. Waibi and Moses Kalngu Secretary RC III both parties and they have been advised to open up a new suit

as the order of this court was on 6/2/90. The party which appealed in the name of Mudumba should institute a case in Grade I court Kamuli as soon as possible.

Signed Mwonsha F. (Mrs) Chief
Magistrate 6/5/91

There is no explanation regarding who moved the Court on 6/5/91; in what capacity the Chairman and Secretary R.C III attended court on that occasion; why a new suit should have been instituted in stead of an order made for a retrial of the original suit; why the new suit should be instituted by Mudumba, who was the original defendant in the suit before a Grade II Magistrate; and why the new suit should be instituted before a Magistrate Grade I and not before a Magistrate Grade II if it was proper for a new suit to be instituted.

With the greatest respect to the Chief Magistrate concerned (as she then was) this was a very strange procedure. Fortunately, it appears to have caused no miscarriage of justice to any of the parties.

As the other members of the Court also agree that the appeal should fail and with the order I have proposed, the appeal is dismissed and there is no order for costs.

JUDGMENT OF TSEKOOKO. JSC:

I have read in advance the judgment prepared by my learned brother, The Hon. Justice Oder, JSC and I agreed that the appeal should be dismissed with no order as to costs.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft the judgment of my learned brother, Oder, J.S.C, and I agree that this appeal should be dismissed. I also agree with the order he made as to costs

JUDGMENT OF A.N. KAROKORA JSC

I have read in draft the judgment prepared by my learned brother, Oder J.S.C, and I agree with him that this appeal should be dismissed. I also agree with the orders he has proposed.

JUDGMENT OF J.N.MULENGA, JSC.

I have read in draft the judgment prepared by my learned brother, Oder JSC, and I agree with him that this appeal should be dismissed. I also agree with the orders he has proposed.

Dated at Mengo this 22nd day of June 2004.