

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CIVIL APPEAL No. 0009 OF 2017**  
**(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 047 of 2012)**

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- 1. **ODYEK ALEX** }
- 2. **OCEN CONSTATINO** } ..... **APPELLANTS**

**VERSUS**

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- 1. **GENA YOKONANI** }
- 2. **ODOCH ROBERT** }
- 3. **OBONG RICHARD** } ..... **RESPONDENTS**
- 4. **ATO LUCIA** }
- 15 5. **AMO MARIA** }

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

20 The appellants jointly and severally sued the respondents jointly and severally claiming general damages for trespass to land, a declaration of ownership of land, recovery of land measuring approximately twenty acres at Awoo village, Parak Parish, Lakwana sub-county, Gulu District, an eviction order, a permanent injunction and the costs of the suit. The appellant's claim was the land in dispute belonged to the estate of the late Leopondino Adiyu, who acquired it in 1947. The  
25 appellants are lineal descendants of the late Leopondino Adiyu. During or around the year 1973, the respondent's unlawfully encroached onto that land. During the year 2010, the appellants referred the matter to the Atek Okwer Amor clan leadership which decided in favour of the appellants. It apportioned the land between the first appellant and the first respondent. Trees were planted to demarcate the established boundary. The respondents defied that decision,  
30 uprooted the boundary marking trees, and instead grew seasonal crops and established

homesteads upon the land allotted to the appellants. The respondents thereafter began the process of securing a freehold title over the land.

In their joint written statement of defence, the respondents refuted the appellants' claim and  
5 contended that it is a one Yakobo Aryak who in 1956 gave the land in dispute to the first  
respondent. The first respondent gave parts of the land on diverse occasions to the rest of the  
respondents. The appellants lived peacefully as neighbours of adjoining land to that of the first  
respondent from 1956 until 2009 when this dispute arose. The first respondent rejected the Atek  
Okwer Amor clan leadership's and appealed to the Lakwana sub-county Local Council Court.  
10 The first respondent thus initiated the process of acquisition of title to land he had occupied since  
the year 1956, although the first appellant refused to sign the land application form as a  
neighbour.

In his testimony as P.W.1, the first appellant stated that the land in dispute originally belonged to  
15 his step father, a one Adio Lepoldino, who in 1947 gave it to the first appellant. In 1953, the first  
respondents requested Adio Lepoldino asked him for a small portion of the land to create a  
motorable access road to his land. He was temporarily given a portion measuring approximately  
15 metres by 12 metres, for one year's use. He constructed a temporary shelter for parking his  
vehicle in that area given to him. In 1973, the first respondent without any claim of right  
20 encroached on more land, and eventually ended occupying the approximately twenty acres now  
in dispute. It was during the year 1980 that the first respondent trespassed onto twenty acres of  
his land. They could not take any action against him due to the security situation at the time. The  
first respondent subsequently permitted the rest of the respondents, who are members of his  
family and close relatives, to settle on the land he had wrongfully trespassed onto. During the  
25 year 2010, he referred the dispute to the clan leadership which decided to apportion the land  
between them, and planted trees to demarcate the boundary. The first respondent instead  
uprooted all the trees and continued to use the land. The first appellant sued the before the L.C.II  
Court which decided in favour of the respondents. The appeal to the L.C.III too was decided in  
favour of the respondents, hence the suit.

P.W.2 Ocen Constantino testified that the first respondent requested the late Adio for a small portion of land and he was allowed to utilise it for only three years. A dispute emerged between them in 1973 when the first respondent encroached on the land now in dispute. P.W.3 Ojok Martin testified that the grant by Adio to the first respondent was verbal and it was for a small  
5 piece of land measuring 15 metres by 15 meters that could accommodate only one hut. From 1971 onwards, the first respondent wrongfully extended that to twenty acres. He uprooted trees and made charcoal out of them. P.W.4 Otine Francis Abich, Chairman of the Atek Okwer Clan Land Committee testified that the first respondent was given a small portion of the land in 1953 for temporary use. He mediated the dispute between the first appellant and the first respondent  
10 on 21<sup>st</sup> February, 2010 consequent upon which he planted trees to mark the common boundary between them. later uprooted all the boundary trees. That was the close of the appellants' case.

D.W.1 Ajok Christine testified that the neighbours refused to sign the first respondent's application form when he applied for a freehold title over the land in dispute. D.W.2 the fifth  
15 respondent Amo Maria testified that during her marriage to the late Ochen Ayako from 1971 until his death, she lived on Awo village. She is not aware of any division of the land in dispute. D.W.3 the third respondent Obong Richard testified that his late father Adiga Macilino lived on the land in dispute as a caretaker for the first respondent, where he had four house which have since collapsed. D.W.4 the second respondent Odoch Robert testified that the land in dispute  
20 belongs to the first respondent, he having acquired it from Yakobo Aryak. In 1998, a boundary was created by the clan leadership to separate the appellants land from the respondents and a subsequent one in the year 2009, the latter one of which the first respondent rejected. In the year 2009 the first respondent began the process of acquisition of a title to the land in accordance with the boundary of 1998 but the neighbours refused to endorse his forms.

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D.W.5 the fourth respondent Atto Lucia testified that the land in dispute did not belong to Adia Yokodino. The dispute between Adia Yokodino and the first respondent was mediated by the clan leadership which demarcated the boundary. The dispute then re-emerged in 2009. D.W.6  
Ogwang Vincent testified that the land in dispute belonged to the late Yakobo Aryak, who in  
30 1956 gave it to the first respondent and he witnessed the grant. The dispute began around 2007 - 2009. The clan leadership mediated and resolved the dispute. D.W.7 Justino Okello testified that

the land in dispute belongs to the first respondent and he participated in construction of the first respondent's house now situated thereon. The dispute began in 2009.

The court then visited the *locus in quo* on 14<sup>th</sup> December, 2016. The court recorded evidence  
5 from Professor Isaac Newton Ojok. He testified that the land in dispute belonged to the late Adio Lepoldino. The first respondent then entered onto the land around 1960 - 1973, but he did not know the size of the land the first respondent occupied, and did not know the boundary of the land in dispute. Another witness, Rose Abeja Tiridri testified that she is the daughter of the late Yakobo Aryak who died in the year 2000. She was aware the late Adio Lepoldino had land  
10 within that area and so did the first respondent but did not know whether it was given to him by Adio Lepoldino. Another witness Dr. Opio Lawrence testified that he is the son of the late Adio Lepoldino. They shifted from the land in dispute in 1947 to their current location. In 1956, the first respondent came to the area but his car could not cross the stream to his home. The late Adio Lepoldino allowed him to construct a temporary shelter on the land in dispute as a garage  
15 for his car. The first respondent had occupied that part for 36 years by the time Adio Lepoldino died. Before his death, he made a series of complaints against the first respondent's trespass; in 1966, 1972, and 1980. The first respondent had refused to vacate and instead had constructed a house on the land in 1973. Another witness Okot Vincent Akulla testified that he had seen Adio Lepoldino's home on the other side although he did not know how the first respondent came to  
20 occupy the land in dispute. The last witness, Awelo Abina testified that it is Adio Lepoldino who allowed the first respondent to construct a house on the land in dispute.

In his judgment, the trial magistrate found that whereas the dispute over alleged encroachment by the first respondent onto the first appellant's land first arose in 1973, it was first mediated  
25 thirty seven years later on 10<sup>th</sup> May, 2010 while the suit itself was filed in 2012, thirty nine years after the dispute arose. He found that the suit was barred by limitation and dismissed it with costs.

Being dissatisfied with the decision, the appellant appealed to this court on the following  
30 grounds;

1. The learned trial Magistrate failed to properly evaluate the evidence on record and arrived at an erroneous decision against the appellants thereby occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact in not considering the effect of the testimony of P.W.3 Ojok Martin, P.W.4 Otine Francis Abich, P.W.5 Prof. Isaac Newton Ojok, P.W.6 Rose Abeja and P.W.7 Dr. Opio Lawrence and thus came to a wrong decision.
3. The learned trial Magistrate erred in law and fact when he held that the defendants (respondents) were not trespassers or strangers thereby dismissing the appellant's suit.
4. The learned trial Magistrate erred in law and fact in failing to consider the evidence collected from locus regarding the ownership, trespass, unlawful occupation, construction of structures, defiance of clan judgment, uprooting demarcated boundary, forceful planting of trees and settlement of the second to the fifth respondents onto the suit land by the first respondent.
5. The learned trial Magistrate erred in law and fact in failing to hold that limitation would not bar an action based on continued trespass.

In their submissions in support of those grounds, M/s Oyugi Onono & Co. Advocates, Counsel for the appellants, argued that the appellant's claim was founded on the continuous tort of trespass. A person bringing such action must be in actual possession or with overt ability to exercise physical control coupled with the intention of doing so. The appellants and their witness proved that the respondents had defied a the win-win decision of the Aek Okwer Amor Clan leaders. The appellants had occupied the land in dispute from 1956 until the year 2009. The respondents' evidence was filled with lies. At the trial, the respondents abandoned their defence and instead relied on adverse possession and limitation and this constituted a departure from their pleadings. The appellants were unable to commence a suit between 1973 and 2012 due to insecurity and court should have taken judicial notice of that.

In response, counsel for the respondents, M/s Masaba, Owakukiroru-Muhumuza & Co. Advocates, argued that the appellants called four additional witnesses at the *locus in quo* who had not testified in court and their evidence should accordingly be disregarded. By their suit in

the court below, the appellants sought recovery of land in respect of which the late Adio Lepoldino, under whom they claim, had persistently complained since 1973 without filing a suit in a court of competent jurisdiction until the year 2012, after a period of thirty seven years. The respondents have had physical possession of the land since the year 1956. The appellants did not  
5 plead any exemption for having filed the suit that belatedly. The trial court therefore came to the right decision when it found that the suit was barred by limitation.

This being a first appeal, this court is under an 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  
10 coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

15 The court finds the first ground of appeal is too general and offends the provisions of Order 43 rule (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered  
20 consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out  
25 numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). Accordingly the first ground of appeal presented in this appeal is struck out.

30 The second and fourth grounds of appeal assail the decision of the trial court based on its evaluation of evidence obtained at its visit the *locus in quo*, and will therefore be considered

together. The purpose of a court's visit to a *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The visit is essentially for purposes of enabling the trial court to understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony (see *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81).

It was therefore erroneous for the trial Magistrate while at the *locus in quo*, to have recorded evidence from; Professor Isaac Newton Ojok, Rose Abeja Tiridri, Dr. Opio Lawrence, Okot Vincent Akulla and Awelo Abina, none of whom had testified in court. That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the five "locus witnesses," since I am of the opinion that there was sufficient evidence to justify the decision, independently of the evidence of those three witnesses.

Grounds three and five too will be considered concurrently in so far as they assail the trial court's decision for reasons that even if the respondents were to be found to be trespassers on the land in dispute, the appellant's action against them was time barred. The appellants contend that the action was for trespass as a continuing tort.

Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46). It is a possessory action where if remedies are to be awarded, the plaintiff must prove a possessory

interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any  
5 right to enter into plaintiff's land.

An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion  
10 affecting an interest in the exclusive possession of his property. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. An action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of an action for trespass is violation of possession, not challenge to title. To sustain an action for trespass, the plaintiff must be in actual physical  
15 possession.

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 therefore is established by evidence showing sufficient  
20 control demonstrating both an intention to control and an intention to exclude others. In order to disclose a cause of action of the tort of trespass to land, the plaintiff had to plead facts to show that; (a) he was in possession at the time of the entry complained of; (b) there was an unlawful or unauthorised entry by the respondents; and (c) the entry occasioned him damage. Whereas the tort of trespass to land is a continuing tort, such that the law of limitation does not apply to it in  
25 the strict sense ( *Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10*) maintenance of that action is available to a person in possession. In *Nakagiri Nakabega and two others v. Masaka District Growers [1985] HCB 38*, it was held that only a party in possession is entitled to sue for trespass.

30 With the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass for which an action lays for each day that passes (see *Konskier v. Goodman Ltd [1928] 1 KB*

421), subject only to recovery of damages for the period falling within the upper limit of six years, provided for by section 3 (1) (a) of *The Limitation Act*, reckoning backwards from the time action is initiated, if the unlawful possession has continued for more than six years (see *Polyfibre Ltd v. Matovu Paul and others*, H.C. Civil Suit No. 412 of 2010; *Justine E.M.N Lutaaya v. Sterling Civil Engineering Company Ltd. S. C. Civil Appeal No. 11 of 2002* and *A.K.P.M. Lutaaya v. Uganda Posts and Telecommunications Corporation*, (1994) KALR 372 ). In such event the Plaintiff can recover for such portion of the tort as lays within the time allotted by the statute of Limitation although the first commission of the tort occurred outside the period prescribed by the statute of limitation (see *Winfield and Jolowicz on Tort* 12<sup>th</sup> Ed. Page 649).

10 This limitation is applicable to all suits in which the claim is for possession of land, based on possessory rights as distinct from title or ownership i.e., proprietary title.

However, with actions for recovery of land, the claim is essentially in the nature of an out-of-possession claimant asserting his or her title or ownership i.e., proprietary title, as distinct from

15 possessory rights. In essence, an action for recovery of land is founded on a special form of trespass based upon a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of land could sue for the specific restitution of that land in an action of ejectment. An action for the recovery of land is the modern equivalent of the old action of ejectment (see *Bramwell v. Bramwell*, [1942] 1 K.B.

20 370). It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

With regard to actions for recovery of land, there is a fixed limitation period stipulated by *section 5 of The Limitation Act*. This limitation is applicable to all suits in which the claim is for

25 possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights. Section 5 of *The Limitation Act*, provides that;

*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.*

This limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights. Furthermore, *Section 11 (1) of the same Act* provides that;

5 *No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land. (Emphasis added).*

10 According to section 6 of the same Act, “the right of action is deemed to have accrued on the date of the dispossession.” A cause of action accrues when the act of adverse possession occurs. 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  
15 begins to run as 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.

In paragraph 3 of the amended plaint, the appellants stated their claim to be "trespass, a declaration of ownership, recovery of approximately 20 acres of land.." The nature of rights the  
20 appellants sought to enforce in the suit were of a proprietary nature rather than of a possessory nature, hence this was for all intents and purposes an action for recovery of land, of which the appellants contended they had been unlawfully deprived by the respondents. It did no matter that they named part of the action as trespass to land instead of recovery of land. The court will consider the essence of the action rather than the nomenclature adopted by the parties. The  
25 essence of his claim was recovery of land and not the tort of trespass to land.

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 (see *Iga v. Makerere University*  
30 *[1972] EA 65*). This disability must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*, which was not done in the instant case. It is trite law that a plaint that does not

plead such disability where the cause of action is barred by limitation, is bad in law. The appellants in the instant case did not plead any disability that occurred after 1973 that would have justified extension up to the year 2012 when they filed the suit. In any event, even if a disability had existed, section 21 (1) (c) of *The Limitation Act* places the cap at "thirty years from  
5 the date on which the right of action accrued to that person."

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 requiring plaintiffs to diligently pursue their claims. Statutes of limitation are designed to protect  
10 defendants from plaintiffs who fail to diligently pursue their claims. Once the time period limited by *The Limitation Act* expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred. Moreover, 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  
15 acquisition of ownership of land (see *Perry v. Clissold [1907] AC 73, at 79*). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act*. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v.*  
20 *Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

Section 16 of *The Limitation Act* provides that at the expiration of the period prescribed by the  
25 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. This means that since the appellants, by allowing their right to be extinguished by their inaction, they could not recover the land from the respondents as persons in adverse possession. When their title to the land was extinguished,  
30 if it existed at all in the first place, their ownership of the land passed on to the respondents and their adverse possessory right got transformed into ownership by operation of the law. The trial

magistrate therefore was right in finding the appellants' action to be time barred. This appeal lacks merit and it is consequently dismissed with costs to the respondents.

Dated at Gulu this 11<sup>th</sup> day of October, 2018

5 Stephen Mubiru  
Judge,