

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0039 OF 2017
(Arising from Amuru Grade One Magistrate's Court Civil Suit No. 064 of 2013)**

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1. **BEIGA BALBIN** }
2. **CAL TOM** } **APPELLANTS**
3. **MUGOBA MARTIN** }

VERSUS

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1. **ATOO NAUME** }
2. **PILOYA OKOT LILLY JOYCE** } **RESPONDENTS**
3. **OBWOYA WILLY** }
4. **JOHN OCOL** }

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondents jointly and severally sued the appellants jointly and severally for recovery of
20 land under customary tenure, measuring approximately 9 acres, situated at Lalem village, Palema
Parish, Lamogi sub-county, Amuru District, an order of vacant possession, a permanent
injunction, general damages for trespass to land, interest and costs. Their case was that the
appellants too advantage of the end of the insurgency to trespass onto the land by constructing
dwelling houses and cultivating the land.

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In their joint written statement of defence, the appellants refuted that claim and contended
instead that they are descendants of the late Jakeri Tengo the original customary owner of the
land. Upon his death, the land was inherited by his two sons whereupon their death, the land
passed to the appellants through customary inheritance. The respondents were at all times their
30 neighbours across the road and have never occupied the land in dispute.

P.W.1 Atoo Naume Olok, the first respondent, testified that the land originally belonged to her grandfather, Omeny Atuya. It was then inherited by her father Lusefu Obwoya and subsequently by the respondents as siblings. Trespass by their neighbours, the appellants, began in 1993 - 1994 when they constructed grass-thatched houses on the land. Action could not be taken against them because of the insurgency. On return from the IDP Camp in 2007, they found the houses already constructed on the land. P.W.2 Achan Juliana, a neighbour, testified that the land in dispute belonged to the first respondent's father, Yozefu Obwoya who lived on the land for nearly 100 years. It lay astride the road. The dispute is in relation to the land on one side of the road, the Eastern side. The first respondent's father had continuously utilised the land until the insurgency. The encroachment by the appellants began with their return from the IDP Camp.

P.W.3 Ochok Jackson, testified that he at one time lived with the respondents at the home of their father, the late Yozefu Obwoya from around 1952. The boundary between their land and that of the appellants was a footpath to the well. The respondents occupied the Western side while the appellants occupied the Eastern side. The appellants' encroachment began around the time insurgency broke out. The second appellant has since built a house on the disputed land.

In his defence, D.W.1 Beiga Balbin, the first appellant, testified that the land in dispute belonged to his late grandfather, Jekeri Tengo. The respondents are neighbours to the South, across the road. The second appellant has a house built for him by World Vision on the land in dispute because he is disabled. He too is occupying a house thereon he inherited from his father. The third appellant too had by the time of the insurgency constructed a house on the land. The alleged path to the river that formed the boundary between theirs and the respondents' land does not exist. The road stops at their home. The disputed land belongs to Jakeri, who left it to Owot Erukana Singh, their father, who in turn left it to them. They still occupy the land that was left to them by their father. Before his death, their father had secured a lease offer for about 100 acres of land.

D.W.2 Arop Augustine Otto Yai, testified that the home of Yozefu Obwoya is to the North of the land in dispute while that of the appellants is to the right of the road from the airfield to Keyo Trading Centre. There was no dispute between Owot Erukana Singh and Yozefu Obwoya. The

land in dispute belonged to Zekeri Tengo, the father of Owot Erukana Singh, the first appellant's father. Yozefu Obwoya never owned any land across the road from the airfield to Keyo Trading Centre. There is a footpath from the road to Atiaba stream and the land in dispute lies to the right of that path, which is Zekeri Tengo's land. Around 1973, Owot Erukana Singh obtained a lease offer. The inspection report is incorrect. The corrugated iron sheets roofed house belonging to the second appellant is to the left side of the footpath. It was built in 1993.

D.W.3 Oyella Edisa Ocima, a neighbour, testified that the land in dispute belonged to Zekeri Tengo, who inherited it from his father Lagweng. When Zekeri Tengo died in 1978, his son Owot Erukana Singh took over the land. The dispute began in 2007 when people returned from the IDP Camp. The respondents' land is to the north of the road to Keyo, that of the appellants is to the South. D.W.4 Maria Owot, testified that she is one of the three widows of the late Owot Erukana Singh. The land in dispute belonged to the late Jekeri Tengo, father of the late Owot Erukana Singh. She and her co-wife Akech Gertrude have gardens on the land in dispute. The neighbour to the South is Obwoya Lusefu, father of the respondents. There used to be a foot path from Lakena's home to the land in dispute which formed the boundary between their land and that of Obwoya Lusefu but it was obliterated by the respondents in the year 2015. The respondents have since established another footpath. Her husband had applied for a lease over tye kland before his death in 2008.

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The court then visited the *locus in quo* where it recorded evidence from six other persons who had not testified in court, i.e.; (Pi) Ebong Festo; (Pii) Peris Too;. (Piii) Opiro Edwaed Jonyo;. (Div) Aling Edisa; (Dvi) Labil Akeyo Cecilia Oroma; (Dv) Ajulina Acayo. Three of them testified as witnesses for the respondents while the other three as witnesses for the appellants. The court was unable to inspect the land since the proceedings ended late that day, but did so four months later.

In his judgment, the trial magistrate found that on basis of the evidence recorded in court, at the locus and the observations of court during the inspection, by the time the appellants' father applied for a lease ever the land, parts of it were occupied as indicated in the inspection report. The common boundary is the footpath from Bar-Dege road to Atiaba Stream. He therefore found

that the land belongs to the respondents. The respondents were declared owners of the land, a permanent injunction was issued against the appellants, an order of vacant possession and costs of the suit were awarded to the respondents.

Being dissatisfied with the decision, the appellants appealed to this court on the following
5 grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to evaluate the evidence properly thereby reaching the wrong conclusion that the suit land occupied by the appellants belongs to the respondents whereas not.
2. The trial Magistrate erred in law and fact when he failed to evaluate the evidence
10 properly thereby failing to make a finding that the suit was time barred which occasioned a miscarriage of justice.
3. The trial Magistrate erred in law and fact when he imported evidence not on record and reached a biased judgement thereby occasioning a miscarriage of justice to the prejudice of the appellants.

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In their submissions, counsel for the appellants, M/s Ladwar, Oneka and Company Advocates, argued that the trespass is alleged to have began in 1993 yet the suit was filed in 2013. That was after 20 years. The suit was time barred. Disability was not pleaded. The trial court as well erroneously relied heavily on witnesses at the *locus in quo*. The trial court failed to make any
20 finding regarding the location of the path in respect of which evidence was led to the effect that it formed the common boundary. They prayed that the appeal be allowed and the judgment of the court below be set aside with costs.

In response, M/s Odongo and Company Advocates for the respondents submitted that although it
25 was pleaded that the appellants' trespass on the land began around 1993-1994, the issue of limitation was never litigated. In any event, disability was pleaded in paragraph 4 (b) of the plaint when they stated that the appellants took advantage of the security situation. No new evidence was imported by the magistrate during the visit to the *locus in quo* and most importantly, the court did not attach any weight to the evidence that was obtained there.

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It is the duty of this court as a first appellate court 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 (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence this 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). It may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The first ground of appeal is too general and offends the provisions of Order 43 rules (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 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 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*). That ground is accordingly struck out.

In ground three, the appellants impugn the manner in which proceedings were conducted at the *locus in quo*. Visiting the *locus in quo* is essentially for purposes of enabling the trial court 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 and therefore 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 practice of visiting the *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
5 run the risk of turning itself a witness in the case (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).

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or
10 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. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for
15 error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the
20 improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the
25 evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the six additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those six witnesses.

30 With regard to the second ground of appeal, it is true that the question of limitation was never pleaded nor argued during the trial. However, being a point of law, it can be raised at any stage

of the proceedings, even when not pleaded (see *Uganda Railways Corporation v. Ewan and five* [2000] HCB 61; *Makula International Ltd. v. His Eminence Cardinal Nsubuga and another* [1982] HCB 11; and *Broadways Construction Co. v. Musa Kasule and others* [1971] E.A. 16). once an illegality is brought to the attention of court, it overrides all questions of pleadings, including any admissions thereto.

The respondents' claim was for recovery of the land in dispute. Actions for recovery of land have a specific period of limitation unlike an action for the tort of trespass to land where 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* 12th Ed. Page 649). 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.

With regard to actions for recovery of land, which are in the nature of an action for possession of land, based on title or ownership i.e., proprietary title, 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 possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights. According to section 6 of the same Act, “the right of action is deemed to have accrued on the date of the dispossession. 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* [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 plaintiff that does not plead such disability where the cause of action is barred by limitation, is bad in law.

5 In the instant case, the respondents pleaded that the appellants' trespass began in 1993. In his testimony as P.W.1 Atoo Naume Olok, the first respondent, stated that trespass by their neighbours, the appellants, began in 1993 - 1994 when they constructed grass-thatched houses on the land. Although she added that action could not be taken against them because of the insurgency, this aspect was not pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*. The plaintiff was clearly bad in law as the action was time barred.

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It is trite law that 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 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. 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.

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In the instant case, the respondents sat on their rights for nearly 20 years and their claim for recovery of the land from the appellants was extinguished by prescription. In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead the suit is dismissed with costs of this court and the court below, to the appellants against the respondents.

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Dated at Gulu this 25th day of October, 2018

Stephen Mubiru

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Judge,

