

plaintiff (respondent) is the lawful owner of the suit kibanja, mesne profits and costs of the suit.

The appellant (defendant) disputes the respondent's case. In her evidence she claimed that she brought the suit land from the father of the plaintiff in 1991. The trial magistrate heard the case and gave judgment in favour of respondent. Hence this appeal on six (6) grounds of appeal.

3. The appellant's grounds of appeal.

The grounds of appeal are well set out in the Memorandum of Appeal. They are; that:

- (i) The learned trial magistrate erred in law and in fact in finding that the appellant was a trespasser on the suit land.
- (ii) The learned trial magistrate erred in law and in fact in holding that the action was not time barred.
- (iii) The learned trial magistrate made wrong/illegal findings about the agreement dated 1/10/1991.
- (iv) The learned trial magistrate erred in law and in fact in finding that the evidence of the respondent's witness was consistent.
- (v) The learned trial magistrate erred in law and in fact in holding that the respondent was the successful party.
- (vi) That the learned trial magistrate erred in fact and in law when she failed to properly evaluate the evidence adduced by both parties and therefore coming to wrong conclusions.

4. Resolution of the appeal by Court.

On 11th July, 2012 when this appeal came up for hearing Mr. Kajeke Kenneth counsel for the respondent informed Court that he had serious objections to

raise against the appeal. On that date counsel for the appellant, Mr. John Mary Mugaga was not present in Court. I then gave an order that the respondent's counsel was to raise those serious objections in his written submission in reply. In that regard and by implications I validated the appeal. That's why the appeal proceeded interparties.

In his submissions in reply, Counsel for the respondent raised a preliminary objection to the effect that the appeal is incurably defective and that it was filed out of time. To support his preliminary objections he submitted that according to the notice of appeal filed in this Court on the 24th June, 2011 the judgment of the lower court was delivered on 23rd May, 2011. The memorandum of appeal was filed in this Court on the 5th August 2011. Under Order 43 rule 1 of the Civil Procedure Rules appeals to the High Court are preferred in the form of a Memorandum of Appeal and under Section 79 (1) of the Civil Procedure Act, Cap 71, the appeal shall be entered in the High Court within thirty (30) days from the date of the decree or order of the Court. Clearly from the facts on record, the appeal before this Court was filed outside the thirty (30) days stipulated above.

Further under section 220(1) (a) of the Magistrate's court Act cap 16 laws of Uganda, it is provided that an appeal from the Chief Magistrate Court or Magistrates Court Grade one is from the decree or order from the decision of the trial Court.

I have perused the Court record it does not indicate that the appellant extracted the decree or order before preferring an appeal. This is fatal to the appellant's appeal. In the case of **Kiwege and Mgude Sisal Estates Land vs Manilal Ambala Nathwani Civil Appeal No. 69 of 1952 Court of Appeal for Eastern Africa; Alexander Morrison vs Mohammedrasa Suleman and**

another Civil Appeal No. 88 of 1952 Court of Appeal for Eastern Africa. W.T.N. Kisule vs V. Nampera Civil Appeal No. 110 of 1982 and Robert Biiso vs May T. Tibamwenda reported in [1991] HCB 92, it was held that “an Appeal to the High Court must be against a decree which must be extracted and filed together with memorandum. Failure to extract a formal decree before filing the appeal was a defect going to the jurisdiction to the Court and could not be waived.

The appellant’s actions have contravened the above provisions of the law”.

In reply, counsel for the appellants rubbished the respondent’s Counsel’s submissions; and submitted that the preliminary objection is a technicality which is curable under Article 126 (2) (e) of the Constitution of the Republic of Uganda. He prayed that the objections raised be dismissed and that the appeal proceeds on merit.

I wish to state that Article 126 (2) of the Constitution (supra) is very clear. The principles stated therein in **paragraphs (a) to (e) are to be applied** subject to the law. The laws concerning lodging of appeals from the lower Courts to the High Court are Order 43 rule 1 of the Civil Procedure Act, which provides that an appeal shall be commenced by a memorandum of appeal; and Section 79 (1) (a) of the Civil Procedure Rules , Cap. 71 which provides that an appeal shall be entered within thirty (30) days of the date of the decree or order of the Court. In the instant appeal, the appellant commenced the appeal with a notice of appeal; and filed the memorandum of appeal on 5th August 2011 which is far beyond the described time by law within which to file an appeal. Definitely, therefore, this appeal was filed out

of time. I in the result I would agree with the submissions by counsel for the respondent.

However, since the objections were raised within the respondent's counsel's written submissions, the parties also addressed Court on the grounds of appeal.

Counsel for the appellant argued the six (6) grounds separately. Counsel for the respondent in reply in two paragraphs argued all the grounds of appeal together. He argued that the learned trial magistrate on page 3 of the judgment of the Court looked at the evidence of the plaintiff and that of the defendant and that she believed the evidence of the plaintiff against that of the appellant. It was submitted that the photocopy of the agreement dated 1/10/1991 could still be dealt with. That with due respect to learned Counsel no evidence was led to prove that indeed the original agreement had been lost. The allegation that the original agreement was lost in the office of the RDC was denied by the office of the RDC through a letter written to Court. There was therefore no evidence led before Court so as to make the disputed document to be received under the exception to Section 64 of the evidence Act Cap. 6.

It was further argued for the appellant that the suit was time barred. It is the argument of the respondent in the trial Court that the plaintiff's claim was based on the cause of action of trespass to land as per para 3 (f) of the plaint. In the case of **Abraham Kitumba vs Uganda Telecommunication Corporation 1994 KALR ii 126**, it was held that **the action in trespass was not time barred because trespass was a continuing tort for which the injured party can sue from the date of the cessation of the wrong**. To that extent counsel for the respondent would be right.

It is also the argument of the respondent that in the case before the trial magistrate the defendant continued trespassing on the suit land and that the respondent/plaintiffs suit was not time barred at the time of filing in Court in 2009.

However, as I shall show here below in this judgment that the respondent's action against the appellant was time barred, and the respondent had no cause of action against the appellant.

Counsel for the respondent in his submissions supports the findings of the trial magistrate on this issue. Counsel for the appellant in his submissions, challenges the findings of the trial magistrate. He stated that the trial magistrate erred both in fact and in law in finding that the appellant was a trespasser.

I have considered the grounds of appeal, they more or less revolve on the allegation that the trial magistrate erred in law and in fact when she failed to evaluate the evidence on record, thereby coming to the wrong conclusion. I have therefore, found it pertinent to handle the six (6) grounds of appeal, the way counsel for the respondent argued them.

It is the duty of the first appellant Court to clearly re-evaluate the evidence on record afresh adduced by both parties before the lower court and come to its own conclusion. This is, however, done bearing in mind the fact that the appellate Court did not have an opportunity to look at the witnesses (their demeanour) while testifying in the lower Court. In dealing with this issue, I cautioned myself as an appellant Judge.

That the learned trial magistrate erred in law in relying on correspondences from the RDC's office regarding the suit kibanja and indeed that she wrongly based, partly on that holding that the defendant was a trespasser on the suit land. It is argued by counsel for the appellant that the trial magistrate, further wrongly based on the evidence of PW1 and PWII to the effect that they were conversant with their late father's handwriting and therefore wrongly dismissed the defendant's sale agreement. That the defendant told court and rightly so that she and her late husband bought the suit portion of the land from late Ssebaduka as per additional agreement. That Court was wrong in constituting itself into a handwriting expert and making erroneous decisions about the authenticity of the documents. That the appellant was not and is not a trespasser on the suit portion of land as wrongly found and or decided by the learned trial magistrate.

Though it is upheld in this judgment hereinabove, that the continuous act of trespass to land is a tort which cannot be affected by the law of limitation. However, in this instant appeal, according to paragraph 3 of the plaint, the respondent (plaintiff in the lower court) brought his claim for vacant possession, permanent injunction, general damages and a declaration that the plaintiff is the lawful owner of the suit kibanja, mesne profits and costs of the suit. From the claim of the respondent, it is clear that he sued the appellant for recovery of the suit land. The respondent did not plead trespass to the suit land as was alleged in this judgment of the trial court. The 1st issue of trespass that was framed for the determination of the trial Court was framed out by context. It did not arise out of the respondent's pleadings. The findings of the trial Court on that issue are a nullity.

There is evidence on Court record that the late Dan Sebaduka died in 1993. The respondent lodged this suit in 2009 to recover the suit land from the

appellant. From 1993 to 2009 is sixteen (16) years. Section 5 of the Limitation Act, Cap. 80 Laws of Uganda reads 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”

According to the Court record, there are no pleading or evidence that was adduced by the respondent (plaintiff) showing that the respondent claim over the suit land arose in 2009.

Indeed from the pleadings and evidence adduced by the parties, the respondent/plaintiff brought this action in Court against the appellant/defendant outside the prescribed period under Section 5 of the Limitation Act, Cap. 80 of 12 (twelve) years. Wherefore the respondent's action against the appellant was time barred. That trial magistrate ought to have dismissed the suit before the full trial began. There was no valid suit to try.

Furthermore, there is also another disturbing issue which was never addressed by the parties and the trial magistrate. That issue is on whether the plaintiff/respondent had capacity to bring this action against the appellant/defendant. In paragraph 3 (a) of the plaint, the respondent sued the appellant in his capacity as the heir of the late Dan Sebadduka. No documents were annexed to the plaint to prove that the respondent had the capacity to sue the plaintiff. There was no evidence, too, that was led by the respondent in the trial Court to show that he holds letters of administration. Section 192 of the Succession Act, Cap. 162 Laws of Uganda provides that:

“Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death”

According to this law, the respondent had no capacity to sue the appellant.

Further, Section 264 of the Succession Act, (supra) provides that:

“ A judge any grant of probate or letter or administration, no person other than the person to whom the same has been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked”.

Without the letters of administration to the estate of the late Dan Ssebaduka, the plaintiff (respondent) had no power to sue the appellant (defendant) in the Lower court.

From the law cited, above and my own analysis, I make a finding that the plaintiff (respondent) had no capacity to bring this action in the plaint against the appellant in the first place. To that extent the suit before the trial Court was a nullity. It could not have withstood the test by the law.

On the disputed sale agreement of the appellant, this document could still be dealt with as an exception under Section 64 of the evidence Act. The trial magistrate was wrong to hold and or find that the respondent and other witnesses acquainted with the hand writing of the late Dan Ssebaduka doubted the genuineness and authenticity of the document. The appellant clearly told Court that she and her husband bought the suit portion of land from the late Dan Ssebaduka and she exhibited to Court an agreement dated 1/10/1991. The respondent and his other witnesses could not validly

constitute themselves into handwriting experts to challenge the appellant's said document which was executed by Dan Ssebaduka. The burden of proof was on the plaintiff to adduce such evidence through a handwriting expert. The learned trial magistrate therefore arrived at wrong decisions basing on the plaintiff's evidence of the handwriting on the two documents. This would have been ably and legally done after a report and testimony of a qualified handwriting expert and not plaintiff's witnesses' opinions on the said sale agreements.

The evidence of the plaintiff's witnesses was not consistent at all as the learned trial magistrate wrongly found and/or held that there were glaring inconsistencies in the plaintiff's case which the learned trial magistrate failed to address. In fact in her judgment the learned trial magistrate ignored most of the evidence in the proceedings and this could possibly explain why she never held that there were glaring inconsistencies in the respondent's case. Most of the pertinent evidence in the proceedings is not reflected in the judgment of the trial Court.

The appellant duly presented to Court a sale agreement of the suit portion of the kibanja dated 1/10/1991 signed by the late Dan Ssebaduka selling to both the appellant and her husband. No sufficient evidence was advanced by the respondent and his witnesses to legally challenge the transaction apart from mere doubts by the respondent and his witnesses about the authenticity of the document. Short of any other evidence to the contrary the appellant remains and indeed is the owner of the suit portion of the land.

In the result, the appellant's complaints in the six (6) grounds of appeal have merit. The trial magistrate erred in law and fact and, all the grounds of appeal are upheld in favour of the appellant.

5. Conclusion

In the result and for the reasons given hereinabove in this judgment, judgment is entered in favour of the appellant in the following orders; that:-

1. The appeal is allowed.
2. Judgment and orders of the lower court are set aside. Judgment is entered in favour of the defendant in the suit. Accordingly, the plaintiff's (respondent's) suit is dismissed with costs.
3. All the subsequent and executions, if any, arising from the said judgment and decree of the lower Court are set aside.
4. The appellant is the rightful owner of the suit kibanja land.
5. A permanent injunction is issued against the respondent, his relatives, agents, servants or any other persons who could be claiming title of the suit land from the respondent.
6. In the event that the appellant was evicted by respondent from the suit land, on the basis of the orders of the trial magistrate, I do hereby order the respondent to give vacant possession to the appellant within seven (7) days from the date of this judgment.
7. From the way this appeal was instituted and my findings on the preliminary objection raised by the respondent, I order that each party shall bear its own costs of this appeal. The appellant is only awarded costs in the lower Court.

Dated at Kampala this 15th day of February, 2013.

sgd
Murangira Joseph
Judge