

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – 0019 OF 2016
(Arising from FPT – 02 – LD – CS – 15 OF 2012)

5 **BYARUHANGA YOZEFU.....APPELLANT**

VERSUS

KAHEMURA PATRICK.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

10 **Judgment**

This is an appeal against the decision of Her Worship Agnes Nabafu, Senior Grade Magistrate one, delivered on the 11/3/2016.

Background:

The Appellant instituted a Civil Suit against the Respondent for;

- 15 1. An order for a declaration that the suit land belongs to the Plaintiff/Appellant.
 2. An order that the Defendant/Respondent is a trespasser.
 3. An order for a permanent injunction.
 4. An order for eviction.
 5. Costs of the suit.
20 6. Any other relief.

25 The Appellant alleged that the suit land belonged to him having acquired it from the local authorities in 1972. He occupied the same and in 1980 went to look for money only to come back and find that the Respondent had tampered with the boundaries. The matter was settled and the Appellant again left for Kenya to work and upon return he came and found that the Respondent had again removed the boundary marks. The matter was litigated before the Local Council Courts until it came on appeal to the Chief Magistrate’s Court and a retrial was ordered.

30 The Respondent on the other hand denied the Appellant’s allegations and averred that he bought the suit land in 1978 from Matayo Rwaheru and an agreement was executed to that effect. He prayed that the suit be dismissed with costs.

Issues for determination in the lower Court were:

1. Who is the lawful owner of the suit land?
2. Whether the Defendant is a trespasser on the suit land?

3. What are the remedies available to the parties?

35 The matter was litigated before the local authorities and eventually came to the Chief Magistrate's Court on appeal which ordered a retrial. A fresh suit was instituted and the trial Magistrate found that the suit land belonged to the Respondent as the lawful owner and he was not a trespasser. The Appellant's case was dismissed with costs.

The Appellant being dissatisfied with the above decision instituted the instant appeal and the
40 grounds of appeal as per the amended Memorandum of appeal are;

1. That the learned trial Magistrate Grade 1 erred in law and fact in finding that the Respondent's ownership of the suit land was confirmed merely because the suit land was in the Respondent's possession as a tenant by occupancy.
- 45 2. That the learned trial Magistrate Grade 1 erred in law and fact in finding and holding that the Appellant's claim had been caught up by limitation.
3. That the decision of the learned trial Magistrate Grade 1 was therefore erroneous in law and fact and occasioned a miscarriage of justice to the Appellant by depriving him of his land.

Representation:

50 Counsel Cosma Kateeba appeared for the Appellant and Counsel Bwiruka Richard appeared for the Respondent. By consent both parties agreed to file written submissions.

The law:

Appeals are a creature of statute. Therefore they are provided for by law.

Section 220 (1) of the Magistrates Courts Act states that subject to any written law and
55 except as provided in this section, an appeal shall lie;

"a) From the decrees or any part of the decrees and from the orders of Magistrate's Court presided over by a Chief Magistrate or Magistrate Grade 1 in the exercise of its original civil jurisdiction to the High Court.

60 *b) From the decision, Judgment and orders of a Magistrate's Court, whether interlocutory or final presided over by a Magistrate Grade II and III to a Court presided over by a Chief Magistrate.*

c) From decrees and orders passed or made in appeal by a Chief Magistrate, with the leave of the Chief Magistrate or of the High court, to the High Court."

In the case of **Attorney General versus Shah No. 4 of [1971] EA P.50**, Spry Ag. President
65 stated that;

"Appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction."

The same was also observed in the Judgment of Tsekooko JSC (as he then was) in the case of **Baku Raphael Obudra and Obiga Kania versus the Attorney General, Supreme Court Constitution Appeal No.1 of 2005.**

In that same case B.J Odoki, CJ (as he then was), also noted as follows;-

“It is trite law that there is no such a thing as an inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied.”

The Appellate Court such as in the instant case therefore derives its Appellate jurisdiction from the law as elucidated above.

Sections 101, 102, 103 and 106 of the Evidence Act, place the burden of proof on the party who asserts the affirmative of the questions or the issue in dispute. The Sections impose the burden of proof upon a person who alleges the facts to exist.

In the instant case it was therefore the duty of the Appellant to prove his case and the Respondent to defend himself against the allegations of the Appellant.

Duty of a first appellate Court:

This is a first appeal from the decision of the learned Magistrate. The duty of the first Appellate Court was outlined by Hon. Justice A. Karokora (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke versus Sam Galiwanga, SCCA No. 48/1995** where he held that;

“...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity...”

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion as per the case of **Banco Arab Espanol versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

The powers of the High Court as an appellate Court are stipulated in **Section 80** of the **Civil Procedure Act Cap 71**. The High Court accordingly has power to determine the case finally, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

According to **Section 80 (2)** of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.

Preliminary objection:

Counsel for the Respondent raised a preliminary objection to the effect that the Appellant had filed the amended Memorandum of appeal without leave of court contravening **Order 43 Rule 2(1)** of the Civil Procedure Rules, which provides that the Appellant shall not, except

by leave of Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Thus, the amended memorandum of appeal should be struck out with costs.

Counsel for the Appellant in rejoinder submitted that failure to seek leave to amend the memorandum of appeal was an irregularity but that the appeal be considered on its merit as per **Article 126(2) (e)** of the Constitution of the Republic of Uganda, 1995. Counsel for the Appellant also cited the case of **Mawji versus Arusha General Store [1970] E.A 137**, where it was held that, an irregularity in relation to the rules of procedure does not vitiate the proceedings if no justice has been done to the parties.

Further, that the Respondent did submit on the grounds in the amended memorandum of appeal. That **Section 33** of the Judicature Act together with **Section 98** of the Civil Procedure Act do empower this Court in exercising its inherent jurisdiction to grant any orders or reliefs necessary for the ends of justice to be achieved.

Counsel for the Respondent also submitted that ground 3 is too general and offends the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules and should be struck out.

I have addressed my mind to both submissions and I find that failure to apply for leave to amend the memorandum of appeal is an irregularity but this does not prejudice either of the parties and the Respondent also submitted on the grounds as per the amended memorandum of appeal. In the interest of justice I will look at the merits of the appeal and invoke the provisions of **Article 126(2) (e)** of the Constitution of the Republic of Uganda, 1995.

In regard to Ground 3, Counsel for the Appellant directed Court on the gist of the ground; I will therefore maintain Ground 3 for purposes of resolving the instant appeal.

The preliminary objections as raised by Counsel for the Respondent are accordingly overruled. The merits of the appeal will be considered to aid in determining the same.

Resolution of the Grounds:

The grounds are discussed separately.

Ground one: That the learned trial Magistrate Grade 1 erred in law and fact in finding that the Respondent's ownership of the suit land was confirmed merely because the suit land was in the Respondent's possession as a tenant by occupancy.

Counsel for the Appellant submitted that the instant appeal revolves around two equitable interests and for one to be a tenant by occupancy they had to be tenants on registered land and not unregistered land.

Section 1(dd) of the Land Act (as amended) defines a tenant by occupancy to mean a lawful or bona fide occupant declared to be a tenant by occupancy by **Section 31**. That **Sections 31, 33, 34, 35, 36, 37** and **38** of the Land Act all presuppose the existence of a registered owner. Thus, the Respondent could not enjoy any security of tenure as a tenant by occupancy on unregistered land.

140 Secondly, that the Respondent cannot claim to be a bonafide occupant because the Appellant
had actual possession of the suit land in 1972 before the Respondent bought from Matayo
Rwaheru. That it is trite law that a person in possession of land in the assumed character of
owner and exercising the ordinary rights of ownership has perfectly good title against the
whole except the rightful owner. That the Appellant did not abandon the suit land, he only
145 went to work with intentions of returning. Thus, the trial Magistrate was wrong to assume
that the suit land is part of the land that the Respondent purchased from Matayo Rwaheru.

Counsel for the Respondent on the other hand submitted that the evidence as to how the
Appellant acquired the suit land is unreliable and uncorroborated. That on the other hand the
Respondent told Court that he bought the suit land from Matayo Rwaheru in 1978 and
150 executed a sale agreement and the witnesses are still alive. That the Respondent's occupation
of the suit land was not interfered with until 1993 when the Appellant trespassed on the same
by clearing the forest.

Further, that DWII confirmed to Court having sold the suit land to the Respondent and this
piece of evidence was not challenged by the Appellant. That the same was also confirmed by
155 PW11 and PW111 that the Respondent was occupying the land that was formerly for DWII.

Furthermore, that during locus it was confirmed that the Respondent was and had been in
occupation of the suit land and there were developments there on. The Respondent was found
to have been on the suit land for about 24 years without being challenged by the Appellant.
That the trial Magistrate also acknowledged the long usage of the Respondent of the suit land.
160 Thus, the trial Magistrate was right to find that the Respondent was the lawful owner of the
suit land and had purchased the same, which decision did not occasion a miscarriage of
justice.

Counsel for the Appellant in rejoinder submitted that the Appellant gave reliable and concrete
evidence against the Respondent's evidence however, all that was ignored by the trial
165 Magistrate.

Analysis of Court:

In the instant case the trial Magistrate found that the Respondent was the owner of the suit
land by virtue of being in possession of the same and having stayed on it for long.

It is my considered opinion that the possession alone does not confer rights to the land to the
party occupying it. In the instant case though the Respondent was found in occupation of the
170 suit land, the Appellant had acquired his equitable interest in 1972, occupied the land then
left to go and work. In 1985 he came and found his land had been sold off by Dennis
Bagambo whereof he refunded Karugaba Kirokimu the purchase price and redeemed the suit
land. It was in 1985 after redeeming the Appellant's land that the Respondent then trespassed
175 on the suit land. The matter was amicably resolved but then the Respondent still went on to
trespass on the suit land after the Appellant left to go work in Kenya.

The trial Magistrate found that the Respondent had stayed on the suit land for long and thus, a
tenant by occupancy. I find that that decision was wrong with all due respect and do concur

180 with the submissions of Counsel for the Appellant and the law cited therein in that regard that
a tenancy by occupancy is only possible where there is a registered proprietor and in the
instant case the suit land is unregistered.

The Appellant clearly gave evidence to the effect that he had been litigating over the suit land
since 1993 to date. Whereas the Respondent also did adduce evidence as to how he acquired
185 the suit land and even brought the vendor to support his case, I find that the same land as
purchased was not proved at the locus in quo.

The Appellant and the Respondent do not deny being neighbours and it is on that premise that
the Appellant alleges that the Respondent trespassed on the suit land.

Locus was visited and both parties were present and from the findings I observe that the only
190 person in common as a neighbour to the two parties Kafuuzi. Kafuuzi according to the
Appellant is the one that was present when the Appellant was planting the boundary marks.

The Respondent produced a sale agreement in Court supporting his purchase however, all the
boundaries as per the sale agreement were not observed at the locus in quo. The only
conclusion in my opinion is that the suit land cannot belong to the Respondent because the
description of the suit land is different from allegedly what the Respondent purchased as per
195 the sale agreement that was tendered in Court and the boundaries expressly therein indicated.
The sale agreement indicates Kafuuzi as the neighbour in the North to the Respondent and
the locus in quo he is indicated as a neighbour in the south to the suit land.

I therefore, find that the learned trial Magistrate Grade 1 erred in law and fact in finding that
the Respondent's ownership of the suit land was confirmed merely because the suit land was
200 in the Respondent's possession as a tenant by occupancy.

This ground succeeds.

**Ground 2: That the learned trial Magistrate Grade 1 erred in law and fact in finding
and holding that the Appellant's claim had been caught up by limitation.**

Counsel for the Appellant submitted that it is trite law that trespass is a continuing tort and
205 the Appellant has litigated over the suit land since 1994 to date. Counsel cited the case of
Maniraguha Gahuma versus Sam Nkundiye, CACA, No. 23 of 2005, where Hon. Justice
Kenneth Kakuru cited learned authors Winfield and Jollowicz on Tort, 11th Edition, Sweet &
Maxwell, London, 1979 at page 342 and stated that;

210 *“Trespass, whether by way of personal entry or by placing things on the Plaintiff's land may
be ‘continuing’ and give rise to actions **de die in diem** so long as it lasts. In **Holmes versus
Wilson, (1839) 10 A & E 503**. Highway Authorities supported a road by wrongfully
buttresses on the Plaintiff's land, and they paid full compensation in action for trespass. They
were nevertheless held liable in a further action for trespass, because they had not removed
the buttresses. Nor does a transfer of the land by the injured party prevent the transferee
215 from suing the Defendant for continuing trespass.”*

Counsel for the Appellant went on to submit that the Respondent had been a trespasser on the Appellant's land since 1978 and 1985 and each day constituted a fresh cause of action. Hence, the Appellant had the right to sue since the trespass was continuous. The Appellant could therefore, exercise that right immediately after the trespass commenced, or any time during its continuance or after it had ended as stated in the case of **Petero Balaba & Others versus Kagaba Mosess, HCCS No. 1417 of 1999.**

Counsel for the Respondent on the other hand submitted that the Respondent told Court that he bought the suit land from Matayo Rwaheru in 1978 and Rwaheru confirmed so to Court. That the Respondent had even planted mangoes, avocado, jackfruit which was all observed during the locus visit.

Further, that from 1978 to 1994 is over 12 years and the Appellant's claim was barred by limitation as provided for under **Section 5** of the Limitation Act and the case of **Badru Mbazira versus Abasagi Nansubuga (1992-1993) HCB 241**, where it was held that the Limitation Act also applies to customary land holdings. Thus, the Respondent had acquired the suit land through adverse possession.

Counsel for the Appellant in rejoinder submitted that it was not true that the Respondent had stayed on the suit land for 24 years unchallenged. Hence, the Respondent does not qualify to be a tenant by occupancy nor an adverse possessor of land that he had allegedly purchased. That the Respondent's occupation has been challenged since the 1980's.

235 **Analysis of Court:**

The Appellant in his evidence told Court that the Respondent started trespassing on the suit land in 1985, amicable means were used to resolve the matter only for the Respondent to again trespass on the suit land and this time the matter was reported to the LC1 Court in 1993 and litigation has been ongoing ever since. The instant case in my considered opinion is not one that falls under the ambit of **Section 5** of the Limitation Act and is therefore not statute barred. The Authority as cited by Counsel for the Respondent is therefore not applicable in this case.

Counsel for the Respondent also submitted that during the locus visit it was observed that the Respondent had planted mangoes, avocados, and jackfruit. I respectfully disagree with this submission because the sketch map that was drawn at locus has none of those observations.

It is also trite law that trespass is a continuing tort, and in the case of **Justine E.M.N. Lutaya versus Sterling Civil Engineering Company Ltd, SCCA 11 of 2002**, it was held inter alia, that;

"...where trespass is continuous, the person with right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended ... in a suit for tort, the date when the cause of action arose is particularly material in determining if the suit was instituted in time. The commencement date is also material ... in other continuing torts that date is of little significance ... trespass to land is a continuing tort..."

255 I therefore, find that the trial Magistrate wrongly concluded that the instant case was statute barred and besides trespass is a continuing tort.

This ground therefore succeeds.

Ground 3: That the decision of the learned trial Magistrate Grade 1 was therefore erroneous in law and fact and occasioned a miscarriage of justice to the Appellant by depriving him of his land.
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Counsel for the Appellant submitted that the trial Magistrate ignored the exhibits of the Appellant and relied on only those of the Respondent. That had the Magistrate judiciously considered all the evidence she would have found that the Appellant's equitable interest came first before that of the Respondent. That even at the locus the boundaries as stated in the agreement of 1978 were different from what was found on ground.
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Counsel for the Appellant went on to submit that the trial Magistrate relied on wrong principles of the law in decreeing the land to the Respondent and this caused a miscarriage of just as per the cause of **Matayo Okumu versus Francisko Amudhe & Others (1979) HCB 229.**

270 I reiterate my earlier findings on grounds 1 and 2 above. I find that the Appellant ably proved his case through both oral and documentary evidence, thus, the trial Magistrates erred in finding the Respondent as the lawful owner of the suit land.

This ground also succeeds.

In a nut shell, this appeal succeeds on all grounds. The decision of the lower Court is set
275 aside. Costs are awarded in this Court and the Court below. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

280 **JUDGE**

14/12/2017

Judgment delivered in open Court in the presence of;

1. Counsel Cosma Kateeba for the Appellant.
2. Counsel Richard Bwiruka for the Respondent.
- 285 3. In the absence of both parties.
4. Beatrice Court Clerk.

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OYUKO. ANTHONY OJOK

290 **JUDGE**

14/12/2017