THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL APPEAL No. 0010 OF 2016

(Arising from Yumbe Grade One Magistrate's Court Civil Suit No. 0004 of 2013)

AMIN AROGA ……..…….…..…… APPELLANT

VERSUS

HAJI MUHAMMAD ANULE ……..…..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant for a permanent injunction to issue restraining the appellant, his agents and workmen from interfering with the appellant's quiet enjoyment of the land in dispute. The land in dispute measures approximately three hectares situated at Onjiri village, Aliapi Parish, Kululu sub-county in Yumbe District. The respondent's case was that he inherited that land from his late father, Unia who in turn inherited it from his father in 1914. Both the plaintiff's deceased father and grandfather are buried on that land. During or around 1987, without any claim of right the appellant forcefully entered onto and took possession of the land and began growing crops thereon. During the year 2012, the respondent complained to the elders about the appellant's forceful occupation of the land and they decided in the respondent's favour. He prayed for judgment to be entered in his favour.

In his written statement of defence, the respondent contended that suit was bad in law as it was time barred. In the alternative, he averred that he had at all material time been in quiet possession of the land, having acquired it from his father, Musa Amanga. He has since constructed his residence and planted fruit trees, trees for timber and a coffee plantation thereon. He contended further that the land in dispute is situated at Meroba village, Meroba Parish, Kululu sub-county in Yumbe District and not at Onjiri village, Aliapi Parish, Kululu sub-county in Yumbe District. He prayed for a dismissal of the suit.

In his testimony as P.W.1, the respondent, stated that he is a veteran that served in the "Uganda Army" and came to know the appellant in 1993, following his retirement from the army. The respondent's father, Safi Maradadi, had lived on the land in dispute since 1914 but had fled into exile to the Sudan during the 1979 war. In 1986, he returned from exile with his father and settled at Onjiri village on the disputed land. Shortly thereafter, he had to travel to Rwanda to collect his family, thereafter he made a pilgrimage to Mecca and subsequently he was arrested and imprisoned at Luzira Prison and it was during his incarceration in the year 2002 that the appellant forcefully entered onto the land. The trees on the land which the appellant claims to have planted were instead planted by the respondent's sister. The appellant had forcefully planted only Mairungi (khat) shrubs and Teak trees. When he was released from prison in the year 2004, he found the appellant on the land. He reported the encroachment to the elders who issued an order stopping the appellant from continuing with his activities on the land but the appellant ignored that order.

P.W.2, Shaban Saidi, the respondent's cousin, testified that he saw the appellant construct a house on the disputed land which is located at Onjiri village. The land belonged to the respondent's father for he used to see them graze cattle there. He too used to graze cattle there from 1958 - 1960. The appellant came onto the land during the time the respondent had been imprisoned an planted coffee and Teak trees thereon. Some of the trees on the land were planted by the respondent's sister. P.W.3 Alahai Azubile, the respondent's son in law testified that the land in dispute originally belonged to their family but is was then given to the respondent's father, Onia. At one time the appellant's uncle Musa Amanga occupied and cultivated crops on the land. P.W.4 Juma Doka testified that the appellant is the son of his cousin, Asuman Yega. He was the Parish Chief of the area from 1972 and he knows the land in dispute to be situated in Aliapi Parish and he had known it to belong to the respondent's father who had been in occupation since 1943. When a dispute over the land arose between the respondent and the appellant, the appellant was summoned to appear before them as elders but he did not. the appellant lives in Merowa Parish while the respondent lives in Alliapi Parish on the land in dispute.

P.W.5, Yassin Amis, the respondent's nephew, testified that the land in dispute belongs to the respondent. The respondent's family had lived on the land before they fled to Sudan during the war of 1979. On their return from exile in 1986, the land was still vacant but they settled in Kuru where the respondent put up a commercial building. When the respondent was arrested and imprisoned, the appellant came onto the land in 1993 and constructed a house thereon. Upon the respondent's discharge from prison, he found the appellant on the land and complained to the elders who decided on his favour. P.W.6, Abdu Omar, the respondent's cousin, testified that the land in dispute belonged to the respondent's father. He is one of the elders who summoned the appellant for settlement of the dispute between him and the respondent but the appellant did not respond. That was the close of the respondent's case.

In his defence, the respondent who testified as D.W.1 stated that the land in dispute is situated at Meroba village, Meroba Parish, Kululu sub-county in Yumbe District and he knows the respondent as a neighbour to that land. The land originally belonged to his grandfather Amanga Ada who when he died it was inherited by the appellant's father Musa Amanga, who then gave him the land during 1980. He fled into Sudan because of the war, from where he returned during 1985. He has since then lived on the land, cultivated crops thereon and planted fruit trees and tress for timber. The respondent has never lived on the land but rather in Omba Parish at Kuru. D.W.2 Ayile Musa, the appellant's maternal uncle and neighbour at Meroba, testified that he knows the land as his. It was neither given to him nor did he purchase it but he has been living there for more than eighty years. It is him who gave the land to the appellant. The witness was born on this land in 1927 to his father Amanga Vuvule. The respondent's father Onia lived on the other side and not on the land in dispute. The appellant began living with him in 1958 until he gave him the land in dispute in 1980 before they fled into exile. When they returned from exile, in 1987 the appellant re-settled on the land while the respondent went elsewhere. The appellant has since then lived on the land. That was the close of the appellant's case.

At the *locus in quo,* the court estimated the land in dispute to measure about two acres. The local authorities indicated the land was situated at Orinji village and not Merowa village. The two villages are separated by a road. The court then received evidence from P.W.2 Shaban Said who stated that the land in dispute is located at Merowa village and it belonged to Olinga, the

respondent's father, who died in 1957. P.W.6 Abdu Omar testified too that the land belonged to the respondent's father but it is after their return from exile that the appellant began using it. P.W.2 Fadhul Saidi on his part testified that the appellant came from the Lomunga clan to take over the land. The respondent's father was buried on the land in dispute under a Kulukuyi tree which the appellant had cut down. P.W.4 Juma Doka, a former Parish Chief too explained that the late Oninga had planted a number of trees on the land which the appellant had subsequently cut down.

In his judgment, the trial magistrate found that the land in dispute is situated at Orinji and not Merowa village. the entire piece of land the respondent had inherited from his late father as seen during the visit to the *locus in quo*, was estimated at ten acres. There were coffee trees, teak trees, and eucalyptus trees which the court estimated to have been planted not more than ten years prior to its visit. There were also gas-thatched houses on the land. The court a couple of very old mango trees on the land which the witnesses stated had been planted by the respondent's father. The appellant's father Iyenga Asuman had never lived on the land. P.W.3 had stated that the appellant's trespass on the land began in 1990 while P.W.5 said it was during 1993 while the respondent was in prison. At the locus in quo, the appellant had insisted that the land in dispute is located at Merowa village and that the trees and houses thereon were his. He planted the trees in 1989 up to 1991. The appellant was born at Lomunga and grew up with his mother at Merowa village but there was no one from that village to support his claim yet all the respondent's witnesses were elderly people from Orinji village and supported his claim. The evidence of D.W.2 was contradictory in so far as he claimed to have found the land vacant and lived thereon for the past eighty years and in the same breath claimed that his father had lived on the land before him. He claimed to have given the land to the appellant and then retracted that and said it had been given to the appellant by his brother, Amanga. This witness also evaded the *locus in quo* visit. None of the appellant's immediate neighbours testified on his behalf.

On the other hand, the respondent was under a disability occasioned by the flight to exile and his subsequent imprisonment. His action therefore was not time barred. Not having any developments on the land did not deprive the respondent of his rightful claim to the land much as the appellant's activities thereon could not confer title unto him. The appellant adduced credible

evidence of elders to prove that the land in dispute formed part of the bigger customary land he inherited from his late father, Onia. The evidence shows that Amanga grabbed the land forcefully and later gave it to the appellant. the court therefore found on the balance of probabilities that the land in dispute belongs to the respondent. Having found so, the court further held that the appellant was a trespasser on the suit land. The court therefore made an order of vacant possession, enforceable after three months to enable the appellant leave the land peacefully before then, failure of which all his property on the land would revert to the respondent. The appellant having utilised the land for over three decades, he was ordered to pay the respondent shs. 5,000,000/= in general damages and the costs of the suit.

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

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence bon record and this came to a wrong conclusion that the plaintiff is the lawful owner of the suit land.
2. The learned trial Magistrate erred in law and fact when he held that the plaintiff did not recover the suit land earlier because he was under a disability yet the same was not pleaded by the plaintiff in his pleadings and evidence.
3. The learned trial Magistrate erred in law and fact when he held that the defendant did not prove his case because he did not bring any independent witnesses to support him.
4. The learned trial Magistrate erred in law and fact when he believed the evidence of the plaintiff and his witnesses and ignored the contradictions in the said evidence, thereby occasioning a grave miscarriage of justice to the defendant.
5. The learned trial Magistrate erred in law and fact when he found that the defendant is a trespasser on the suit land in the absence of any evidence to prove that.
6. The learned trial Magistrate erred in law and fact when he held that the suit land is in Onziri village in the absence of any evidence to prove that.
7. The learned trial Magistrate erred in law and fact when he awarded costs to the plaintiff against the defendant.

Submitting in support of those grounds of appeal. Ms. Daisy Patience Bandaru, counsel for the appellant argued that disability was not pleaded. In paragraph 7 of the plaint, the respondent averred that the appellant gained entry onto the land during 1987. Nowhere in the plaint did he state that he was unable to state his claim from 1987 until 2013 when he filed the case in court. In the course of hearing, the respondent by way of departure alleged that the appellant had trespassed on the suit land in 2002. He went ahead and narrated the events from the time when he joined the Uganda Army to the end of his subsequent discharge. On the other hand P.W.5 Yassin gave evidence which contradicted that of the respondent when he testified that the appellant entered onto the suit land in 1993. It makes the respondent's case as to when the cause of action accrued unreliable. His claim was time barred wither way.

The trial magistrate found a disability in that by 1966 the respondent had joined the Uganda Army, worked therein up to 1979 when he fled to exile from where he returned in 1985 and joined Museveni's Regime and that as such he could not pursue his claim. Counsel argued that this does not amount to a disability. Section 1 (3) of *The Limitation Act* provides that a person is under a disability if an infant or of unsound mind. This was not the situation. This finding was erroneous and cannot stand. All evidence points to the fact that the suit filed by the plaintiff / respondent was time barred as it had been filed out of time.

With regard to the rest of the grounds, the main complaint is the manner in which the evidence in the trial court was evaluated. The evidence on record shows the respondent is not in occupation of the suit land. P.W.2 Shaban Saidi told court that from 1972 to the date of his testimony the respondent was living in Kuru Trading Centre and not on the disputed land. The respondent lied on oath claiming he had a home with three grass thatched houses on the suit land. P.W.4 Juma Doka told court that the respondent lives on the suit land whereas not. When Court visited the locus, it was confirmed that the respondent had no house there and was no living in the neighbourhood but rather in Kuru Sub-county instead it was his nephew who lives as a distant neighbour to the land.

On the other hand the appellant has been in occupation of the suit land since 1980 to-date with five grass-thatched houses and had planted trees on the land which at the time of the visit were

big enough and he acquired the land from his paternal uncle and foster father Musa Amanga D.W.2. In his testimony, P.W.2 Shaban Saidi admitted that the appellant had planted cassava, Mairungi etc. on the land. Both defence witnesses confirmed the aspect of occupation. Court saw all his when it visited the locus. Even before the appellant gained occupation it was under the occupation of Musa Amanga, his foster father and paternal uncle. This is from the evidence of P.W.3 Alahai Azubile. The fact of occupation was not challenged even at the time of the locus visit. Surprisingly the trial magistrate entered judgment for the respondent for trespass. This was an error. The respondent had no possession and he therefore could not sue in trespass. It was the appellant who had been in continuous possession from 1980 to the date of the suit.

She therefore prayed that all the grounds of appeal succeed, the appeal be allowed and the judgment and orders of the learned trial magistrate be set aside. The appellant be declared the owner of the suit land. An injunction be issued to restrain the respondent, his agents and servants from interfering with the appellant's quiet enjoyment and costs of the appeal and the lower court be awarded to the appellant.

In reply, the respondent who appeared without counsel, argued that it was during the year 2001 that he discovered that the land had been taken. He was soon thereafter imprisoned at Luzira where he was kept in custody for four years, charged with murder. He was released in 2004 whereupon he established that the appellant had encroached on his land in 1991. He reported a case to the L.C.1 - III. He was in the army, and in 1979 fled into exile. In 1986 he returned from Sudan and got the appellant on the land and he sued him immediately but the court file disappeared. He then went to Rwanda to pick his family. Musa whom the appellant called to testify had disappeared. He lived seven miles away from the land in dispute at that time. He prayed that the appeal be dismissed with costs.

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 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.

The second ground of appeal assails the decision of the court below on basis of the manner in which the trial magistrate dealt with the issue of limitation. In his plaint, the respondent indicated that the appellant's trespass on the land commenced in 1986. However in his testimony, he stated that it was in the year 2002 that the appellant forcefully entered onto the land. On his part, P.W.2 Shaban Saidi, testified that the appellant came onto the land during the time the respondent had been imprisoned. P.W.5 Yassin Amis, testified that when the respondent was arrested and imprisoned, the appellant came onto the land in 1993 and constructed a house thereon.

The respondent's evidence therefore stipulated two time frames when the trespass occurred; the first is 1986, and the second places that occurrence to have taken place around the mid 1990s to the late 1990s during his incarceration but certainly by 2002 by the time of his release from prison. What is not in doubt is that he filed the suit on 19th April, 2014. When reckoned from 1986, that was 27 years after the trespass occurred but when reckoned from the mid 1990s, (the respondent testified that he spent four years in prison and this would mean that it was around 1998) the suit was then filed at least 15 years and possibly up to about 18 years after the trespass occurred. I have chosen to take the most favourable position to the respondent and deem the trespass to have occurred after 1998 but before 2000, hence at most 18 and at least 13 years before he filed the suit. Actions for recovery of land have a fixed limitation period stipulated by *section 5 of The Limitation Act,* which 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;

> 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).

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 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.

If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. Therefore if a person is under no legal disability when the right to sue accrues to him but a legal disability intervenes before expiry of the limitation period, then such person can avail himself or herself of the provisions of section 21 (1) (c) of *The Limitation Act*. This section applies to those persons who suffer from a legal disability subsequent to the time when they are entitled to institute a suit, and the concession made to them by the Legislature is that they are entitled to file a suit within six years after the disability has ceased.

What section 21 (1) (c) does is not to give a fresh starting point of limitation, but to extend the period of limitation prescribed in section 5. The section shows that, though time begins to run against minors, lunatics and persons under disability, an extended period of limitation is given. The provision that the suit may be filed within that period after the disability has ceased does not mean that limitation will not run at all during the continuance of the disability. What Sections 21 (1) (c) postulates is an extension of the period of limitation from the cessation of disability and not a postponement of the starting point to the cessation of disability.

Whereas the tort of trespass to land is a continuing tort, such that the law of limitation does not apply to it in the strict sense (*Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10*) maintenance of that action is available to a person in possession, yet the evidence adduced by the respondent showed that he had last been in possession of the land in dispute in 1979, before he and his

family fled into exile. 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* 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.

However, with actions for recovery of land, where 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 possessory rights, 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.

Although the respondent had pleaded that the trespass occurred in 1986, the evidence on record consistently showed that it occurred while he was in prison, which was sometime after 1998 since the respondent testified that he spent four years in prison and was released in 2002 only to discover the trespass. The implication is that section 21 (1) (c) of *The Limitation Act* automatically conferred upon the respondent an extension of six years from the date the facts were discovered, hence up to 2008, yet he filed the suit in 2013, five years out of time.

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 plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law. The appellant in the instant case did not any plead disability that occurred after 2002 that would have justified extension up to the year 2013 when he filed the suit.

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.

In the circumstances, the trial court came to the wrong conclusion when it decided in the respondent's favour on account of disability. A plaint that does not plead disability where the cause of action is barred by limitation, is bad in law. The trial magistrate should have rejected the claim. I therefore find that the trial magistrate misdirected himself when he came to the conclusion that he did. That being the case, I find it unnecessary to consider the rest of the grounds which more or less relate to the manner in which the evidence was evaluated. In the final result, I do find merit in the appeal. It is accordingly allowed and the judgment and orders of the court below are herby set aside.

The appellant having acquired the property only by dint of adverse possession, it is only fair that each party bears the costs of this appeal and of the court below.

Dated at Arua this 22nd day of March, 2018

……..
Stephen Mubiru
Judge,
22nd March, 2018.