IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

Coram: Oder, Tsekooko, Mulenga, Kanyeihamba, Kato *J J* .S.C.

CIVIL APPEAL No.11 of 2002

Between

***J*USTINE E.M.N. LUTAYA :: APPELLANT**

And

STIRLING CIVIL ENGINEERING COMPANY LTD ::::::: RESPONDENT

(Appeal against the whole decision of the Court of Appeal (Okello, Mpagi-Bahigeine, Engwau, JJ.A.) at Kampala dated 25.7.01, in Civil Appeal No.62/99)

JUDGMENT OF MULENGA, *J*.S.C.

Justine E.M.N.Lutaya, the appellant, sued Stirling Civil Engineering Co. Ltd., the respondent in the High Court, claiming damages for trespass on land comprised in mailo Register Kyaggwe Block 191 Plot 34 at Bwawanya, "the suit land". The High Court dismissed her suit, and subsequently the Court of Appeal dismissed her first appeal. She now appeals to this Court.

The appellant purchased the suit land in 1981, for purposes of stone quarrying. She was registered as sole mailo owner of the suit land on 16 June '81. In 1984, she granted a lease of the suit land for 49 years, to Timber and Tools Ltd., "TT company", in which she was a shareholder. Her son Mulangira Lutaya, Karia and the said Karia's father were also shareholders in TT Company. By virtue of its shareholding, TT Company was non-African. The lease was registered as an encumbrance on the mailo title. TT Company was to carry out the quarrying business on the suit

land. However, owing to insecurity in the area at the time, TT Company did not move onto the land immediately. In 1988, Mulangira Lutaya discovered that the respondent was carrying out quarrying operations on the suit land, excavating stone, gravel and murram, for road construction. The respondent had entered onto the land, without the appellant's consent or knowledge. Mulangira Lutaya tried to stop the respondent's operations, but in vain. He instructed advocates to take out court action. Two suits were taken out in the name of TT Company as lessee. The first, Civil Suit No.M39/88, was filed in the Chief Magistrate's Court at Mukono. That court granted an injunction restraining the respondent but the respondent apparently ignored it. The second, Civil Suit No.475/91, was filed in the High Court, but appears not to have been pursued. Initially, when contacted, the respondent contended that it entered upon the suit land and carried out the said operations under licence given by one Ruth Sirimuzawo, who it took to be the owner of the land.

In the meantime, Ruth Sirimuzawo instituted in the High Court, Civil Suit No.897/88, against the appellant, TT Company and two others. In its judgment dated 10 June '94, the High Court held that the appellant was the lawful owner of the suit land. It also declared that no leasehold title ever vested in TT Company, because the agreement to lease, was made before obtaining the Minister's consent. Subsequent to that judgment, the respondent agreed to negotiate with the appellant on what it should pay for the materials it had excavated from the suit land. Unfortunately, no agreement was reached. In May '95, the appellant decided to commence the suit from which this appeal emanates.

In the plaint, she pleaded that she was the registered proprietor of a mailo estate in the suit land and that a lease she had granted to the lessee company was nullified. She prayed for, *inter alia*, general, exemplary and aggravated damages for trespass, and for the value of materials excavated from the suit land, as well as for interest and costs. The respondent, while admitting that it carried out the operations complained of under licence of Ruth Sirimuzawo, pleaded that the appellant suffered no loss, and in the alternative that she had no capacity to institute the suit, and that she was precluded from suing, while the suits by TT Company on the same matter, were still pending. At the trial, five issues were framed for determination, but the suit was eventually decided on the first two, which were framed thus:

1. ***whether the suit land belongs to the plaintiff;***
2. ***whether the defendant trespassed on the plaintiffs land.***

The trial court answered both issues in the negative. The first appeal was on 11 grounds of appeal, but the Court of Appeal decided it on one ground only. It held that notwithstanding her ruling, on a preliminary objection, that the plaint disclosed a cause of action, the learned trial judge, after hearing evidence, rightly found that the appellant had no cause of action, and so lacked the capacity to sue. She was not bound by the holding on the preliminary objection, which was based on an assumption that the averments of facts in the plaint were true. According to the Court of Appeal, the holding that the appellant lacked capacity to sue, was enough to dispose of the appeal.

The appeal to this Court is on four substantive grounds. What purports to be a fifth ground is a verbatim reproduction of the grounds of appeal that were preferred in the Court of Appeal. It is an attempt to amplify the fourth ground, which attempt grossly offends r.81(l) of the Rules of this Court. I shall not consider it as a ground of appeal. In brief, the four grounds are that ***The learned Justices of Appeal erred***

1. ***- in failing to re-evaluate and appreciate all the evidence in the trial court and subject it to fresh and exhaustive scrutiny and for those reasons came to an erroneous conclusion that the appellant had no locus standi;***
2. ***- in holding that a joint owner cannot sue on her own in trespass;***
3. ***- when they held that the appellant was a joint owner of the suit property and failed to deduce.....that for the period under consideration the appellant was the sole registered owner; and***
4. ***- when they disposed of the appeal on one ground only and failed to consider and make a finding on all the other grounds in the Memorandum of Appeal.***

At the hearing of the appeal, Mr. Lule, counsel for the appellant, chose to address the Court on the case generally, without dividing his submissions on the lines of the grounds of appeal. He

criticised the Court of Appeal for upholding the trial court decision, that the appellant had no *locus standi* to sue, when the trial had proceeded on the premise, that she had a cause of action. He submitted that this denied the appellant fair trial. His core submission, however, was that the holding that the appellant did not have capacity to sue, was a result of misdirection on the appellant's cause of action. He pointed out that the court based its decision on the fact that the appellant filed the suit when she was no longer owner of the suit land, but erroneously failed to appreciate that she was entitled to sue in respect of trespass committed while she was the mailo owner of the suit land. He submitted that apart from a minor typing error in the plaint, the rest of the record clearly showed that the appellant's suit was restricted to the trespass committed when she was the registered mailo owner. Counsel indicated that early in the trial he had drawn the trial court's attention to the minor error in paragraph 3 of the plaint where it reads, "plaintiff is the registered proprietor" and asked court to amend it to read, "plaintiff was the registered proprietor". He maintained that, all along the respondent knew this. In the notice before suit, which the respondent admitted in the statement of defence, it was clearly stated that the appellant had already transferred her interest in the suit land.

Mr. Lule also contended that throughout the material time, the appellant had legal possession of the suit land, and was therefore, entitled to sue for trespass on it. He argued that since the lease she had granted was of no legal consequence as declared by the High Court in Civil Suit No. 897/88, TT Company did not at any time, have lawful possession of the suit land.

Mr. Mutaawe, counsel for the respondent, submitted that the grant to the TT Company was lawful and was still subsisting, as is evident from its registration as an encumbrance on the certificate of title annexed to the plaint. Counsel argued that upon granting that lease, the appellant parted with possession of the suit land, and could not sue for trespass on it. He further submitted, that the fact that TT Company filed the two suits, against the respondent, in regard to the same subject matter, confirmed that it, and not the appellant, was in possession of the suit land from the commencement of the lease in 1984.

I should observe at the outset, that Mr. Lule's assertion that the record clearly shows that the plaintiffs suit related to only the trespass that occurred while she was mailo owner, is not entirely accurate. True, the record confirms that, in the notice before suit, which notice was admitted in the statement of defence, the respondent was informed that the appellant had already transferred the land. The record also confirms that during submissions on the preliminary objection on the appellant's capacity to sue, the appellant's counsel asked the trial court to amend the plaint in paragraph 3 by substituting "was the registered proprietor" for "is the registered proprietor". For reasons not apparent on the record, however, the amendment was not effected. Elsewhere, the record does not support Mr.Lule's assertion. There is where it appears that the appellant's claim is restricted to damage to her reversionary interest only, and where it appears to extend to trespass committed after she transferred the suit land. Thus, it is averred in paragraphs 5 and 7 of the plaint, respectively, that -

"5...the defendant also continues to exploit the plaintiffs land depleting the stone, gravel, and murram reserves" and ***"7...the plaintiff.....has incurred and continues to incur extensive financial loss by being deprived of the income realizable from the murram, gravel, aggregate and other stone products from the rock excavated and blasted."***

Secondly, part of the prayer in the plaint relates to materials taken after she transferred her title. Thirdly, the appellant's counsel has not been consistent in his submissions on the appellant's *locus standi*. In this appeal, he is assertive that the appellant sued as the mailo owner who was in legal possession during the material period, because the purported lease was a nullity. During the preliminary objection in the trial court, he contended, and was upheld by the learned trial judge, that the appellant was suing for damage caused to her reversionary interest in the suit land. That position appears to me to be tacit acceptance that TT Company was in possession during the material period. In the Court of Appeal, counsel was equivocal on the issue. In the written submissions, he made the point that after the High Court decision in Civil Suit No,897/88 declaring the lease a nullity, and dismissing Ruth Sirimuzawo's adverse claim, all interest in the suit land was vested in the appellant. However, the main thrust of the submission was that the Court of Appeal should uphold the trial court's preliminary finding that the appellant sued in respect of her reversionary interest.

The foregoing may well have led, or substantially contributed, to overshadowing of the real question in controversy, and to its remaining unresolved in the end. **I** should add, however, that the framing of the issues also did not help. The issues were unnecessarily focused on ownership of the suit land, without a time frame, or identification of the trespass under consideration. It is obvious that in answering the first two issues in the negative, namely that the suit land does not belong to the appellant, and that the respondent did not trespass on the appellant's land, the trial court focused on the time when the suit was filed, rather than the time when the trespass was committed. In upholding the trial court decision, the Court of Appeal reiterated that the appellant had ceased to be sole owner of the suit land. Both courts held that the appellant had no capacity to sue because she was not the owner of the suit land when she filed the suit. Neither court considered the appellant's capacity to sue for the trespass committed while she was still the owner of the suit land.

Whether or not this resulted from the misleading aspects in the pleadings and submissions of the appellant's counsel, which I have indicated, and/or from inadequate framing of issues, in my view upon proper evaluation, the real question for determination is discernable from the jungle of pleadings. The appellant came to court, by way of a suit in trespass, to recover against the respondent, damages as compensation for unauthorised exploitation of her land, over a period. The respondent admitted the exploitation, but disputed the claim for compensation, mainly on the ground that no cause of action had accrued to the appellant as she had not incurred loss. According to the respondent, the appellant having leased out the suit land, she was only entitled to rent due from the lessee, and was not deprived of earnings from quarry business. As I have indicated, the courts below did not consider the dispute from that perspective. I think therefore, that it is necessary and appropriate for this Court to consider the appellant's claim in respect of the trespass and exploitation that occurred before she transferred the suit land. I proceed to do so.

Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless

to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession, who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage. Where trespass is continuous, the person with the 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. Similarly subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.

For purposes of the rule, however, possession does not mean physical occupation. The slightest amount of possession suffices. In **Wuta-Ofei v Danquah** (1961) 3 All E.R.596, at p.600 the Privy Council ...put it thus -

"Their Lordships do not consider that, in order to establish possession, it is necessary for the claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient." In two leading authorities in East Africa, it was held that a person holding a certificate of title to land, has legal possession of that land. In **Moya Drift Farm Ltd v Theuri** (1973) E.A. 114, the Court of Appeal for East Africa considered the issue in light of Kenyan statutory provisions. The trial court had dismissed a suit by the registered proprietor of land, on the ground that at the time of the unlawful entry complained of, the proprietor was not in possession. On appeal, counsel for the proprietor argued that while the decision may have been in conformity with the English law, it was

inconsistent with s.23 of the Registration of Titles Act of Kenya. In his judgment, Spry, V.P. said at p.115 -

"I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor on registration and, unless there is any other person lawfully in possession such as a tenant, I think that title carries with it legal possession; there is

He noted that s.23 of the Kenya statute was similar to s.56 of the Registration of Titles Act of Uganda, and said -

"I think the decision in Moya's case represents what the law should be in Uganda. It is an authority. I therefore, hold that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass."

Mr. Mutaawe submitted that both **Moya's case** (supra) and **United Cultivated case** were wrongly decided, and he invited this Court not to follow them. He contended that the latter case was inconsistent with s.61 of the RTA of Uganda, as well as the current protection the Constitution accords to untitled but legitimate and *bona fide* occupants of land. With due respect, I do not agree with counsel's contention. I do not see any inconsistency between the decision in **United Cultivate's case** (supra), and the provisions of s.61 of the RTA, or Art. 237 Clause (8) of the Constitution. The import of the decision in that case, as in **Moya's case** (supra), is that in absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser. I do not think that it is necessary in this judgment, to examine in any detail the protection given to legitimate and *bona fide* occupants of land by the said statutory and constitutional provisions to which counsel referred. Clearly, the provisions are not intended to protect a trespasser, which the respondent was. I would therefore, hold that **Moya's case** (supra) and **Uganda Cultivate's case** (supra) still correctly reflect the law.

In the instant case the courts below did not make clear findings on possession of the suit land at the material time. In particular, the Court of Appeal did not advert to the link between capacity to sue in trespass, and possession of the land trespassed on, though counsel on both sides addressed it on the issue. The appellant in the instant case, was sole registered mailo owner of the suit land from 16 Aug. '81, until 27 April '95. During that period she was its absolute and indefeasible owner. As long as no other person was lawfully in physical possession, she had legal possession of the land, with the capacity to sue in trespass. It is in that connection, that counsel for the respondent forcefully argued that during the material period, the appellant was not in possession of the suit land. He submitted that TT Company had the legal possession of the suit land by virtue of the 49 years lease granted to it in 1984, and continued to have it, as long as the lease continued to be registered on the certificate of title.

According to the evidence, TT Company, never acquired physical possession of the suit land. It sought to do so, through court action that I referred to earlier in this judgment. However, despite obtaining from the Chief Magistrate's court an order of injunction against the respondent, it did not succeed to gain physical possession. That leaves for consideration, whether by virtue of its registered lease, the company had legal possession of the suit land. The circumstances surrounding the lease were not subject of much evidence in this case. However, in the judgment of the High Court in Civil Suit No.897/88, which was produced in evidence as Exh.D3, Mpagi-Bahigeine J., as she then was, found that the lessee was a non-African company, and that it did not obtain the Minister's consent prior to the agreement, as was required by law. The learned judge held that therefore, ***"the property did not vest in the company but reverted"***(sic) to the appellant. As those facts were apparently undisputed, I agree with the holding, because these facts rendered the purported lease an illegality under the Land Transfer Act (Cap.202), which the court cannot overlook. In the instant case, the learned trial judge observed that in the earlier suit, the court made no order to cancel the lease, and she seems to have placed significance on the continued appearance of TT Company's name on the certificate of title, as lessee. In my view, however, the omission, by the court in the earlier suit, to order cancellation of the lease, and the continued appearance of the company name on the register as lessee, did not legalise or validate

the lease. It was illegal and therefore, void *ab initio.* The purported lessee could not derive any lawful benefit or right from the illegal grant or contract. It follows therefore, that apart from failing to secure physical possession, TT Company did not acquire legal possession of the suit land either. In the circumstances, I find that while the appellant was still the registered mailo owner, no other person was in lawful possession of the suit land. In his submissions Mr. Mutaawe urged this Court not to interfere with the concurrent finding of the trial court and first appellate court that the appellant had no right to sue. With due respect, I think that argument might be more persuasive but not necessarily binding, in regard to a concurrent finding of fact. The holding in question was on a legal point, and as I have already indicated, it was erroneous. On the authorities I have cited, I would hold that, by virtue of her certificate of title, the appellant had legal possession of the suit land, and therefore, the capacity to sue in trespass.

There was no serious dispute on the respondent's trespass on the suit land. Earlier in this judgment, I described the trespass that the appellant complained of, and which the respondent admitted. However, I am constrained to briefly comment on the findings of the courts below for clarity, in view of the order I intend to propose. The trial court held that trespass was not proved to the required standard. The principal ground for this holding appears to be that the appellant failed to show in pleadings or to prove by evidence, the date when the cause of action arose. The court made no reference to the respondent's virtual admission of the trespass. On the other hand, the Court of Appeal held that the admitted trespass was of no legal consequence, because the appellant did not have the capacity to sue at the time she filed the suit.

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 where, in a continuing tort such as unlawful detention, the duration of the tort is a factor in the assessment of damages. In other continuing torts, that date is of little significance. If it is outside the time limit, such part of the continuing tort as is within the time limit, is severed and actionable alone. Trespass to land is a continuing tort, when an unlawful entry on the land is followed by its continuous occupation or exploitation. Proof of such continuous unlawful occupation, is sufficient proof of trespass,

even if the date it commenced is not proved. With due respect to the learned trial judge, she erred in holding that in the instant case, trespass was not proved to the required standard. Given that the trespass was admitted, there was no legal requirement for further proof. But as it is, there was sufficient proof by the uncontradicted evidence of the appellant and her witnesses, that between 1988, when Mulangira Lutaya first discovered the trespass, and April 1995, when the appellant transferred the suit land, the respondent continued the quarrying operations without the appellant's consent.

I also respectfully disagree with the holding by the Court of Appeal, that the admitted trespass was of no legal consequence. Upon the respondent committing the trespass while the appellant was the owner of the suit land, there accrued to the appellant, a cause of action, which she retained as *a chose in action.* She did not forfeit that *chose in action* when she subsequently transferred the suit land, as appears to be implicit in the judgment of the Court of Appeal.

In view of all the foregoing, I am satisfied that ground 1 ought to succeed.

Although counsel did not advert to the other grounds, in their respective addresses to this Court, I have to consider them briefly, because they were not expressly abandoned. Grounds 2 and 3 are complaints of little significance to the merits of this case. In the leading judgment, Okello J.A. erroneously stated that at the time of instituting the suit, there were three registered mailo owners of the suit land, including the appellant. In reality, however, there were only two, namely Mulangira Lutaya, and Pradip Karia. The certificate of title shows that only those two were registered as proprietors on 27.4.95 under Instrument No.MKO54813. The holding by the Court of Appeal that the appellant was a joint owner, and that she could not sue in respect of the suit land on her own, was a factual error. However, it was an immaterial error which did not go to the root of the court's decision.

Ground 6 offends r.81 (1) of the Rules of this Court, for failure to specify the points alleged to have been wrongly decided. In my view, the ground as framed cannot succeed. It is not sufficient to simply complain that a ground of appeal was not considered. If a lower appellate court decides a point wrongly because of omitting to consider a ground of appeal, the proper way to frame the ground for the next appeal, is to specify the point so wrongly decided as a result of the omission. What is more, omitting to consider and/or decide on a ground of appeal *per se*, is not an error. While an appellate court has a duty to consider all grounds of appeal before it, it is not obliged in every case, to make findings and decisions on each ground. It is lawful for an appellate court to omit deciding any ground of appeal if it is satisfied that the appeal is properly disposed of by the decision on any other ground, or grounds. If, in the instant case, the Court of Appeal was correct to hold that the appellant had no cause of action or capacity to sue, its decision would be upheld, notwithstanding the omission to consider the other grounds of appeal. However, I am constrained to say that it is preferable for an intermediate appellate court, to make its findings on all material grounds of appeal, so that the final court of appeal gets advantage of its views on all aspects of the case. That leads me to another matter, which I should comment on, before taking leave of this appeal.

The learned trial judge made no finding on what remedy she would have awarded to the appellant if the suit had succeeded. It appears that the practice of a trial court making such findings has fallen into disuse. I think, that is a regrettable trend, which ought to be reversed. Undoubtedly the practice has the advantage of saving time, and of ensuring that the assessment of the appropriate remedy is done by the trial judge who heard the evidence first hand. Although under S.8 of the Judicature Statute, 1996, this Court has power to make the award, which the trial court could have made, circumstances may require that in the interest of justice, a case be remitted back to the trial court for such assessment. In my opinion, the circumstances of the instant case are regrettably such. Neither at the hearing of this appeal, nor in the trial court, did counsel for either party make submissions on the issue of remedy. The evidence pertaining to the appropriate remedy, was not evaluated by the trial court. Indeed, part of it, in form of a valuation report, was not received

because of the trial judge's inexplicable refusal of a brief adjournment to enable the appellant to pay stamp duty due on that report.

For the reasons I have indicated, I would allow this appeal, and set aside the judgments of the High Court and the Court of Appeal. I would instead enter a judgment for the appellant on her claim for trespass on, and exploitation of the suit land, by the respondent, while she was the registered mailo owner thereof. I would remit the case to the High Court for assessment of the appropriate remedy, and order that the court rehears and receives from either party, all admissible evidence that will enable it to reach a just decision. Finally, I would award to the appellant, costs of this appeal and in the courts below.

JUDGMENT OF ODER J.S.C.

I have had the advantage of reading in advance the judgment just delivered by my learned brother Hon. Mr. Justice Mulenga, JSC. I agree with the judgment and the orders he has proposed. Since the other Hon. Justices of the Supreme Court, Tsekooko, Kanyeihamba and Kato JJ.S.C also agree with him, the orders shall be as proposed by Mulenga, J.S.C

JUDGMENT OF TSEKOOKO, JSC.

I have had the advantage of reading in advance the judgment which my learned brother the Hon. Mr. Justice Mulenga, JSC, has delivered. I agreed with the judgment and the orders he has proposed.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment of my learned brother Mulenga, J.S.C, and I agree with him that this appeal ought to be allowed.

I also agree with the orders he has proposed. I would award to the appellant costs of this appeal and in the courts below.

***J*UDGEMENT OF C.M. KATO, JSC.**

I have had the advantage of reading draft judgment of my brother Mulenga, JSC. I agree with his findings that this appeal should be allowed.

I would allow it with costs to the appellant.

Dated at Mengo this 11th day of November 2003