THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL APPEAL NO. 038 OF 2018

(Arising from the Chief Magistrate's Court of Iganga; Civil Suit No. 64 of 2013)

1. **MBEIZA CECILIA**
2. **WAISWA MATIYA**
3. **KABALEGA PAUL**
4. **ISOOBA FRED**
5. **THERESA NABIRYE**
6. **KIBWIKA MUHAMAD :::::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

KWATULIRA JANE :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

JUDGMENT

Background

The Appellants were sued in the Chief Magistrate Court of Iganga at Kaliro by the Respondent for a declaration that the suit land located at Isooba-Male LCI, Muyira Village, Buluya Parish, Nawaikoke Sub-County, Kaliro District forms part of the estate of the late Isooba Abdu Keeri, vacant possession of the suit land, permanent injunction, general damages, mesne profits and costs of the suit land. The Appellants being dissatisfied with the judgement appealed giving rise to this appeal.

Summary of the Appellants' claim

The 1st ,2nd, 3rd & 5th Appellants claim that part of the suit land which they occupy belongs to the estate of the late Bwire John and they are beneficiaries therein and the part occupied by the 4th & 6th Appellants belongs to the estate of the late Tengere Vicent (father of the 4th and 6th Appellants) who inherited it from Siringi Venetiyo.

Summary of the Respondent's claim

The Respondent contends that the suit land belonged to her late husband, Isooba Abdu Keri who inherited it through family succession in the 1960's. The late

04-09-2023

Isooba Abdu Keri lived on the suit land with his family inclusive of the Respondent until 1972, when the family relocated to Mbale District at the work station of the late Isooba Abdu Keri. That at the time of relocation, the said Isooba Abdu Keri entrusted the suit land to a one Bwire John to care take of it, who together with his family, including the 1st, 2nd, 3rd and 5th Defendants entered upon and started utilising the suit land which the Late Isooba Abdu Keri did not object to since it was generally understood that the utilisation and living on the suit land was only temporary and a consideration for the said Bwire John for care taking the land. That in 2012, after the death of Isooba Abdul Keri, the Respondent and her son Lubogo Isaac approached Mr. Bwire John and asked him to hand over the suit land. However, Bwire John objected to the handover of the suit land and instead claimed ownership of the same.

The matter was reported to the L. C1 Chairman of Isooba Male who forwarded the same to Buluya LCII Court that delivered judgment in favour of the Plaintiff and the same judgment was confirmed on appeal by Nawaikoke subcounty LCIII Court in favour of the Respondent but that the Appellants refused to vacate the suit land.

The trial Court framed three issues for determination.

1. Whether the suit land forms part of the estate of the late Isooba Abdu Keri.
2. Whether the defendants are trespassers on the suit land.
3. What remedies are available to the parties.

The trial Court found that the suit land belonged to the late Isooba Abdu Keri and accordingly, the disputed land forms part of the estate of the late Isooba Abdu Keri. That the Respondent being the widow as well as beneficiary of the late Isooba Abdu Keri, had locus to sue, that the Appellants are trespassers on the suit land. The trial court ordered the Appellants to give vacant possession of the suit land to the Respondent.

A permanent injunction was issued restraining the Appellants, their agents, servants or workmen from further trespass and the Appellants were ordered to pay costs. Dissatisfied with the judgement of the lower Court, the Appellants lodged this appeal on the following grounds.

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record there by arriving at a wrong decision.
2. The learned trial magistrate erred in law and fact when he failed to consider the time the appellants have been in quiet possession of the land thereby arriving at a wrong decision.

04.09.2023

3. The learned trial magistrate erred in law and fact when he failed to make a finding that the suit was time barred, thereby arriving at a wrong decision.

Representation

The Appellants were represented by Counsel Julius Naita of Musimami & Co. Advocates while the Respondent was represented by Counsel Jacob Osillo of Okoth – Osillo Advocates.

Both counsel filed written submissions which have been considered in the determination of this Appeal.

Submissions

Counsel for the Appellants argued all the three grounds consecutively. He reminded this Court of its duty as the first Appellate Court. Counsel then submitted that the Respondent testified at page 4 line 10 of the record of proceedings that the Appellants had trespassing on the suit land when she left the suit land and went to Mbale with her children. That it was her evidence that she left for Mbale in 1972 and that the land was entrusted to the husband of the 1st Appellant to care take.

That the Appellants started trespassing when her husband was still alive and that according to the Plaint, the Respondent's husband died in 1997 and that the suit was instituted in 2018 roughly 16 years since the cause of action arose. That since 1972, the Respondent has not been in use of the suit land save for the appellants through Bwire John, the husband to the 1st Appellant, Vicent Tegere and the other appellants. That the plaint sought to recover estate property acquired customarily but that the trial magistrate had held that the Limitation Act does not apply to land held under customary law wherein he wrongly misapplied the case of **Justine EMN Lutaaya Vs Stirling Civil Engineering Company SCCA No. 11 of 2002**.

Counsel argued that the Limitation Act applies to registered land and if the 12-year period lapses, land cannot be claimed by the previous owner, in this case the Respondent. That the wording of **Section 5 and 20 of the Limitation Act** are couched in mandatory terms and that there is nowhere that the respondent pleaded limitation but only chose to ignore the same and hide under a case which does not have a bearing on the issue of limitation, as in this case, but only on trespass being a continuous tort yet this claim is not brought under trespass. That it is settled law that action for trespass to land can only be brought by a person who has been in possession not a person who has not been in possession of the land since 1970, for a duration close to 40 years. Counsel argued that the trial magistrate ought to have considered such evidence and also taken into account the amount of time that the defendants have been utilising the suit land. He relied on the case of

04.09.2023

Justine EMN Lutaaya Vs Stirling Civil Engineering Company SCCA No. 11 of 2002 and that prayed that grounds 2 & 3 of the appeal succeed.

Counsel further argued that the Respondent in her evidence stated that the suit land was entrusted to Zijja in her examination in chief and during cross examination, she changed the position and claimed that the same was entrusted to Bwire John, the husband of the 1st Appellant in 1972. She did not know which year the appellants came to the suit land. Counsel claimed that PW2 was 14 years or less in 1970 and as such he was not in position to appreciate the affairs on the suit land at the time. That no single document of care taking the land was ever produced in Court by the Respondent as proof that the late Isooba Abdul Keri handed over the suit land to Bwire John to care take. That since both Abdul Keri and Bwire John were now deceased, the issue as to whether John Bwire was a caretaker of the suit land remained an allegation without any proof.

Counsel further submitted that the Appellants evidence is well corroborated as they have lived on the land all their lives save for the 1st appellant who came to marry on the land contrary to the evidence of the respondent and her witnesses. That the family of Vicent Tegere and the family of Bwire John got their land separately and from different people and that both Tegere and Bwire were buried on the suit land. That Tegere was buried in 1999 and Bwire in 2012. That although many people in Busoga do not have titled land and depend only on boundary marks, the same situation prevailed over the suit land and that there was no dispute when their parents were alive.

In reply, counsel for the respondent submitted that the issues raised by ground 2 and 3 of the appeal were neither pleaded in the Appellants' two written statement of defence nor were they raised before the trial court by way of trial issues or submissions by the Appellants and thus the same cannot be properly raised as grounds of Appeal since they were not adjudicated upon.

Counsel further submitted that the Appellants' long stay on the land was only lawful up to 2012 when the Respondent and her family asked the Appellants to handed over the land and the Appellants refused and started claiming ownership of the same. Counsel argued that **Sections 5 and 20 of the Limitation Act** which form the basis of the Appellants' grounds of appeal are cited out of context and misapplied to the facts of the instant case. That the import of **S. 5 of the Limitation Act** is that a claimant of land cannot set forth his claim after the expiry of twelve years from the date of the cause of action.

That the cause of action of trespass accordingly arose in 2012 and continues for as long as the trespass does not cease. Counsel relied on the case of **Justine E.**

04.09.2023

M. N Lutaaya Vs Stirling Civil Engeering Co. Ltd (supra). In respect of the Appellants' argument that the Respondent and her family had not been in possession of the land since the 1970's when the same was entrusted to Bwire Jihn to care take, , Counsel for the respondent relied on the case of **Justine E. M. N Lutaaya(supra)** and submitted that the aspect of possession was defined in that case to mean a person who is either in actual or constructive possession of the land and that even in circumstances where the owner has parted with possession, he/she can still sue where the trespass threatens ownership. That the Supreme Court in the Lutaaya case (supra) stated that "An exception is that where the trespass results in damage to the reversionary interest, the land owner would have the capacity to sue in respect of that damage, where the trespass is continuous, the person with the right to sue may subject to the law of limitation of actions, exercise the right immediately after the trespass commences or anytime during its continuance or after it has ended. Similarly, subject to the law on limitation of action, a person acquires a cause of action after parting with possession of the land.

Counsel also argued that **Section 20 of the Limitation Act** is irrelevant as it applies to situations where a beneficiary seeks or fails to claim his or her share of the estate from either an executor of a will or Administrator of an intestate's estate and thus the said provision of law has no relevance or application to the instant case where the Respondent is seeking to protect the estate from trespassers. Counsel concluded that in addition to grounds 2 and 3 of this appeal not being properly before Court, they are devoid of merit and the same should be dismissed.

In respect of the 1st ground of appeal, counsel argued that nothing in the Appellants' memorandum of appeal or submissions directly demonstrates how the learned trial magistrate failed to evaluate the evidence on record. That the Appellants haphazardly picked up spontaneous facts where they did not agree with the trial magistrate's conclusions but failed to make up a coherent or consistent argument to demonstrate any error of judgement or evaluation that could have altered or changed the verdict or final decision of the Court particularly in line with the agreed issues of trial.

That the Appellants apart from over stating their overstay on the suit land which facts have also been well explained in the context of trespass under the fore going grounds failed to highlight or point to any compelling evidence inconsistent with or contradicting the Respondent's claim of right.

04.09.2023

Duty of Court

The legal obligation on a first appellate Court is to reappraise evidence. On a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as law. In case of any conflicting evidence, the appeal court has to make due allowance for the fact that it neither saw nor heard the witnesses. It must weigh the conflicting evidence and draw its own inference and conclusions. **(See Fr. Narcensio Begumisa & Ors Vs Eric Tibebaga SCCA No. 17 of 2002.)**

Analysis

In his written submissions, Counsel for the Appellants argued the grounds concurrently however, for a systematic flow, I chose to handle them in the order in which they were presented.

Ground 1

The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record there by arriving at a wrong decision.

The Appellants faulted the trial magistrate for failing to property evaluate the evidence on record. This being a first appeal, I have analysed the evidence on record and found it to be straight forward. To begin with the boundaries of the land were not in dispute and neither was the Appellants' occupation of the suit land disputed. What was in dispute then was ownership of the suit land.

The uncontroverted evidence of PW1 (the Respondent) was that she was brought on the land in 1963 by her husband the late Abdu Keri Isooba. That her husband was an army man(soldier) who was transferred to Mbale and left with his family to in 1972. That the late Abdu Keri Isooba, in the presence of the Respondent left the suit land to Bwire John to care take. After the death of Bwire John, the Respondent replaced him with Ziija.

This evidence was well corroborated with the evidence of PW2, PW3 and PW4 who were are all above 55 years and all confirmed that Abdu Keri was the owner of the suit land and had witnessed him giving the land to John Bwire to care take. PW3 (Gladys Naluweluyo) confirmed she bought a portion of her land in 1959 from the Respondent's late husband Abdu Keri Isooba. The witnesses also knew Tengere Vicent the son of Siringi Venatio who was also staying on the suit land.

The Appellants did not challenge the Respondent's evidence and neither did they adduce evidence of how they got onto the land. DW1, DW2, DW3 and DW5 all confirmed they are living on Bwire John's land but they all did not know how

04.09.2023

Bwire John got the land. All the Appellants confirmed to Court (on oath) that they did not know how Bwire John and Tengere Vicent got the land.

Court visited the locus and got a clearer picture.

Counsel for the Appellants faulted the trial judge on taking the evidence of PW1 who stated that the suit land was entrusted to Zijja to care take and later in cross examination changed the story and said the same was entrusted to Bwire John by her husband.

I find that although the Respondent first mentioned Ziija as the care taker, she clarified the same in cross examination that the land was initially left with Bwire John to care take and was later handed over for care taking to Ziija after Bwire's death. Her evidence on the suit land being left with John Bwiire was corroborated with the unshaken evidence of all the other Respondent's witnesses.

The Appellants claimed to derive title from the late Bwire John and Tengere Vicent. The trial magistrate found that there was no credible evidence on the side of the defendants/appellants confirming or providing legal / ownership with whom I agree.

Save for the oral testimonies of the witnesses for both parties, no documentary evidence was adduced by either side to prove their ownership. It is the Appellants' words against the Respondent's word. Nevertheless, the Court is not allowed to sit on the fence. It has to find for one side. In such scenarios, the burden of proof comes to Court's rescue.

In that regard, the trial magistrate rightly directed himself to Section 101, 102 and 103 of the Evidence Act on the burden of proof.

The question of whether the Plaintiff (respondent in this appeal) discharged the burden of proof on a balance of probabilities depends not on mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is more probable. **(See Oyoo Francis Vs Olanya Martin C.A NO. 0005 OF 2017).**

I take note that balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence before it, the occurrence of the event was more likely than not. **(See Re H & Ors (minors) [1995] UKHL).**

When the Respondent presented her case, she together with her other witnesses elaborately and with consistency explained how the Respondent's husband acquired the suit property and how the Respondent together with her husband left

04.09.2023

the suit land under the care of John Bwire in 1972. Although some witnesses testified that they left in 1970, I considered the difference in the years as a slight oversight. I also note that all the 4 witnesses that were produced by the respondent were of relatively advanced age. Considering that the witnesses were of advanced age, I leave allowance for the exact year when they departed from the suit land. I am convinced that the Respondent and her husband left the suit land in the 1970's.

To buttress the late Abdu Keri Isooba's ownership, PW3 who is aged 76 years and well known by all parties as their neighbour testified as to how she bought a portion of her land from Abdu Keri. This evidence was not challenged.

On the other hand, save for the graves of Bwire John and Tengere Vicent being located on the suit land and the fact that the Appellants have been in occupation of the suit land for a long time, the Appellants adduced no evidence of how Bwire John and Tengere Vicent from whom they claim title came to the suit land. All the Appellants' witnesses confirmed to Court that they did not know how John Bwire got the land.

I find the Appellants' evidence as a puzzle with a missing joint, the missing joint being how Bwire John came on to the suit land. However, the puzzle was fixed by the respondent's evidence when she asserts that the suit land was left to Bwire John to take care of it by her late husband. I have no reason to doubt the respondent's unshaken evidence that Bwire John was a care taker on the suit land who could therefore not pass a better title to the Appellants.

As for Tengere Vicent, the appellants did not know how he acquired the land. It was PW2's unchallenged evidence that Tengere was living on Abdu Keri's land which is the suit land. Tengere was a nephew to Abdu Keri. Since neither of the Appellants did not rebut the assertions it, I am convinced it is the truth.

I further find that the Appellants were in lawful occupation of the suit land by virtue of their father being a care taker of the land up to the 2012 when the family of the late Abdu Keri 's family approached Mr. Bwire John to hand over the suit land who for the first time claimed ownership of the suit land. I thus concur with the trial magistrate that the suit land forms part of the estate of the late Abdu Keeri Isooba. This ground thus fails.

Ground 2

The learned trial magistrate erred in law and fact when he failed to consider the time the appellants have been in quiet possession of the land thereby arriving at a wrong decision.

04.09.2023

On the ground of failure to consider the time the appellants have been in quiet possession of the land, from the judgment of the lower court, the trial magistrate noted in his judgement that at the locus, apart from the graves of Bwire John, there was no old settlement in terms of the courtyard and that the houses therein were new. I disagree with the trial magistrate on this. All the witnesses in the case testified that Bwire John was on the land in the 1970's. The houses on the suit land being new does not take away that uncontested fact.

The issue according to this ground of appeal is whether the long stay on the suit land conferred title to the Bwire's and Tengere's ownership of the same. This in my opinion would make the appellants adverse possessors of the suit land.

In **Hughes Vs Griffin (1969) 1 ALL ER**, Romer L. J observed that;

"It seems to me that one can in addition to looking at the position and rights of the owner legitimately look also at the position of the occupier for the purposes of seeing whether the occupation is adverse. In my opinion, if one looks at the position of the occupier and finds that his right of occupation is derived from the owner in the form of permission or grant, it is not adverse but if it is not so derived it is adverse."

From the foregoing, where one is permitted occupancy by the owner, the possession cannot be adverse and the time spent on the land is immaterial. Therefore, for the appellants to have stayed on the suit land for a long duration of time did not in any way extinguish Abdu Keri's interest therein since they stayed thereon with his permission. This permission was acquiesced by Abdu Keri's family until 2012 when the family reclaimed their land from Bwire John. In conclusion, I find no merit in this ground.

Ground 3.

The learned trial magistrate erred in law and fact when he failed to make a finding that the suit was time barred thereby arriving at a wrong decision.

The third ground is on limitation period. Counsel for the respondent submitted that this was never an issue in the lower court and as such should not be a ground for appeal. Although it was not an issue for determination in the lower court, I find that in his judgement at page 4, the trial magistrate referred to the case of **Justine E. M. N Lutaaya vs Sterling Civil Engineering Company CA No. 11/2002** where of he observed that pursuant to that authority, the Limitation Act does not apply to land held under customary tenure.

I believe that was the basis upon which this ground was raised by the appellants. Having earlier found that the Appellants were in lawful occupation of the suit

04.09.2023

land by virtue of their father being a care taker of the land up to the 2012 when the family of the late Abdu Keri 's family approached Mr. Bwire John to hand over the suit land who then, for the first time claimed ownership of the suit land, I agree with counsel for the respondent that the trespass started in 2012 and therefore the cause of action arose in 2012. The suit having been filed in 2013, the issue of limitation cannot arise.

Counsel for the Appellants submitted that it is settled law that action for trespass to land can only be brought by a person in possession and not by a person who has not been in possession of the land since 1970 close to 40 years plus down the road. The trial magistrate ought to have considered such evidence and the time the defendants have been on the land. **(Justine EMN Lutaaya Vs Stirling Civil Engineering Company SCCA No. 11 of 2002)**

Counsel for the respondent went on to define possession to mean a person who is either in actual or constructive possession and that even in circumstances where the owner has parted with possession, he or she can still sue where the trespass threatens ownership rights.

It is therefore my opinion, that in the instant case, the respondent was at all times in constructive possession of the suit land through Bwire John the care taker until 2012 when Bwire claimed to be owner of the suit property.

On the applicability of **Section 20 of the Limitation Act** to this case, I entirely agree with counsel for the respondent's submission that the section is irrelevant as it applies to situations where a beneficiary seeks or fails to claim his or her share of the estate from either an executor of a will or Administrator of an intestate's estate which is not the matter in this appeal.

I find no merit in this ground.

Since this appeal has failed on all the grounds, I find no merit in it wherefore I herein dismiss the same with costs.

The judgement of the lower Court is upheld.

I so order.

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JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

01/09/2023.