The Republic Of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 0058 of 2022

(Arising from Katakwi Chief Magistrates Court Civil Suit No. 027 of 2015)

1. Olibaileng Ignatius Okello
2. Otim Francis ::Appellants

Versus

1. Tino Hellen
2. Oridokoi Charles ::Respondents

(An appeal from the judgement and orders of the Chief Magistrates Court of Katakwi holden at Katakwi delivered on the 7th day of October 2022 by H/W Owino Paul Abdonson)

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement on Appeal:

1. Introduction:

This appeal arises from the judgement and orders of the Chief Magistrates Court of Katakwi holden at Katakwi delivered on the 7th day of October 2022 by H/W Owino Paul Abdonson.

2. Background:

Tino Hellen and Oridokoi Charles who are the respondents here filed Civil Suit No. 027 of 2015 in Katakwi Chief Magistrates Court at Katakwi against Olibaileng Ignatius Okello and Otim Francis, who are the appellants herein for the recovery of 30 gardens of land found at Achome village Aeles Parish, Katakwi sub county Katakwi District.

The respondents claim in the head suit was that at all material times they owned the suit land with their family members which they inherited from their maternal grandparent called Opeeny Pakarasio.

The respondents further claimed that their mother and themselves were born on the suit land with their other brothers and sisters also similarly born there and that they lived on the same peacefully without any persons laying claims on the suit land up to the time of the insurgency caused by the rebels in 1987 which forced them to move away from the suit land search for safety and refuge.

That when they returned to the suit land in 1999 they found that the appellants had occupied their land without any colour of rights and had since deprived them of the use of their land on the basis that the appellants alleged that they were occupying the suit land on the basis that they had inherited the same from their late fathers in addition to the suit land having been given to them by court and had placed on it the grave belonging to their grandfather called Otim Ourien Opara since 2014.

Further, the respondents claimed that they had on several occasions approached the appellants to stop any development on the suit land to no avail as all their pleas were all in vain.

The appellants in their joint Written Statement of Defence filed in the lower trial court denied the allegations of the respondents and contended that they had legal interest in the suit land which they had inherited from their late father called David Olibaileng who unfortunately died on the 5th May, 2010 and that before his death, the late David Olibaileng used and occupied the suit land to the exclusion of any person including Opeeny Pakarasio, after having inherited it from his late fathers Yonosani Otim Opara and Okello Elia. That even the graves of their relatives dating as far

back as1949 were on the suit land together with old homesteads and that the mother of the respondents got married to Omoding Okure who was their late father and had children including the respondents in a place called Aleles which was three (3) km away from the suit land.

The trial magistrate after considering the pleadings and evidence before him and evaluating the same entered judgement for the plaintiffs now respondents and issued the following orders;

a) The Plaintiffs are declared to be the rightful owners of the suit land.
b) An order of vacant possession issues against the defendants.
c) Permanent injunction doth issue against the defendants, their agents or servants from interfering with the suit land in any way whatever.
d) The plaintiffs are awarded general damages of shs. 10,000,000/= for infringing their rights.
e) Costs of the suit is awarded to the plaintiffs.

The appellants were dissatisfied with the judgement and orders of the lower trial court and thus appealed to this 1st appellate court on the following grounds;

a) The learned trial Magistrate erred in law and fact when he heard and decided a suit which was clearly statute barred.
b) The learned trial magistrate erred in law and fact when he held that the respondent's suit was not *res judicata*.
c) The decision of the trial magistrate has occasioned a grave miscarriage of justice.

3. <u>Duty of the 1st appellate court:</u>

This court is the first appellate court in respect of the dispute between the parties as pleaded.

An appellate court is a higher court that reviews the decision of a lower court. It does so by hearing an appeal from a lower court. The primary function of an appellate court is to review and correct errors made by a trial court. In addition, an appellate court may deal with the development and application of law. In carrying out its duty, the appellate court can do one of the following:

a) Review decisions made by lower trial court;
b) Affirm the decision of the trial court, in which case the verdict at trial stands;
c) Reverse the decision to the trial court, in which case a new trial may be ordered;
d) Modify an order or a decree;
e) Remand the case back to the lower court for further proceedings;
f) Dismiss the case.

This Honourable Court as the first appellate court in respect of the dispute between the parties is obligated to reexamine and re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was pointed by the Supreme Court of Uganda in the case of ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236.***

Additionally, the duty of the first appellate court as was well stated by the Supreme Court of Uganda in its landmark decision of ***Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007*** is that;

> ***"...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The***

appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance to the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. ***See: Lovinsa Nakya vs. Nsibambi [1980] HCB 81.***

In considering this appeal, the above legal provisions have been taken into account.

4. Representation:

The appellants were represented by M/s Engulu and Co. Advocates while the respondents were represented by M/s Engwau and Co. Advocates. This appeal proceeded by way of written submissions by counsels for which I am grateful and which I have taken into account together with the proceedings, judgment and orders of the lower trial court in the determination of this appeal.

5. Determination:

a. *The learned trial Magistrate erred in law and fact when he heard and decided a suit which was clearly statute barred.*

Counsel for the appellant submitted that the respondent's suit was barred by limitation and the suit ought to have been rejected from the onset. That the respondent's plaint which was filed in the lower court indicates that they sought to recover approximately 30 acres of land from the appellants which they took possession of in 1999 and given that the suit was filed in 2015 a period of 16 years had since passed.

He further submitted that the appellants were on the suit land uninterrupted for this entire period and under section 5 of the Limitation Act a person is barred from filing a suit for recovery of land after 12 years from when the cause of action accrued.

Counsel additionally submitted that Order 7 rule 11 (d) of the Civil Procedure Rules it was requirement that a plaint which appears to be barred by any law be rejected, yet in the instant case, the trial court having read the plaint of the respondents and better still heard their evidence did not reject the plaint.

Counsel relied on the case of ***Gawubira Mankupias vs Katwiita Stephen CA No. 130 of 2008*** and ***Odyek Alex and Ochen Constantino versus Gena Yokanani and 4 Others CA No. 0009 of 2017*** in support to this assertion this ground and then prayed that this ground be resolved in the affirmative.

On the other hand, Counsel for the respondents in reply submitted that the issue of limitation was never litigated upon in the lower court and counsel for the appellants was now seeking to introduce a new point of law in respect of limitation of action yet that was never argued during trial yet according to the holding in ***William Twakirane vs Viola Bamusede HCCA No. 46 of 2007*** which cited with approval holding in the case of ***Alwi Abdulreman Saggaf vs Abed Ali Algeredi [1961] EA 767*** where a point was not taken at a trial, then it could not be taken on appeal.

Without prejudice to the above holdings, counsel further submitted that the actions for the recovery of land was based on a claim which is essentially in the nature of an out-of-possession claimant asserting his or her title or ownership, that is, proprietary title, as distinct from possessory rights.

That in essence, this was an action for recovery of land founded on a special form of trespass based upon a wrongful dispossession. Counsel relied on the holding in ***Odyek Alex and Ochen Constantino versus Gena Yokanani and 4 Others CA No. 0009 of 2017*** in making this assertion.

Counsel additionally submitted that in any event, disability was pleaded in paragraph 4(c) of the plaint when the respondents stated that the appellants took advantage of the insecurity to occupy the suit land and further under paragraph 5 of the plaint, the respondents stated that on several occasions they approached the appellants to stop developments on the suit land but all in vain hence this suit.

That they further stated under paragraph 4(f) that in 2014 the appellants placed graves on the suit land claiming the same to belong to their grandfather prompting the respondents to file a criminal case of fabrication of evidence against the appellants for which the 2nd appellant pleaded guilty.

Counsel submitted that in ***Odyek Alex and Ochen Constantino versus Gena Yokanani and 4 Others CA No. 0009 of 2017,*** it was held that for one to plead limitation period, one has to prove that he enjoyed the land uncontested and undisputed which is not the case for the appellants and the respondents who have been through a series of disputes. He prayed court find no merit in this ground.

In rejoinder counsel for the appellants submitted that the case of ***William Twarikane*** *supra* was cited out of context by counsel for the respondents as the decision therein had been made on a ground not supported by any pleaded facts.

That in the instant case the issue of limitation can clearly be deduced from the pleadings which were filed in the trial court under paragraph 4 (c & d)

the respondents categorically state that the appellants took possession of the suit land in 1999 and have been in occupation until the time when the respondents filed their suit in 2015.

Counsel for the appellants further rejoined that limitation of actions is a creature of statute and ignoring it would amount to sanctioning an illegality.

That the appellants have brought an illegality to the attention of this honourable court and the same ought to be corrected.

Counsel relied on ***Makula International Limited vs His Eminence Cardinal Nsubuga & Reverend Dr. Father Kyeyune CACA No. 4 of 1981.***

I will first determine the issue raised by counsel for the respondents that the question of limitation is a new issue raised on appeal and as such cannot be dealt with.

In the case of ***Alwi Abdulreman Saggaf vs Abed Ali Algeredi [1961] EA 767*** this issue was discussed at length with the court then holding that;

"The circumstances in which a point of law which has not been argued in the court below may be taken on appeal were considered by the Privy Council in Perkowski v. City of Wellington Corporation (2), [1958] 3 All E.R. 368.

This was an appeal from a decision of the Court of Appeal of New Zealand. The facts of the case are not material, but the appellant there sought to base her case both before the Court of Appeal of New Zealand and before the Privy Council on a submission which had not been made at the trial. The Court of Appeal of New Zealand decided that, the point not having been taken at the trial, it could not be taken on appeal.

Their Lordships of the Privy Council said (at p. 373 of the report):

"In Connecticut Fire Insurance Co. v. Kavanagh, [1892] A.C. 473, Lord Watson, in delivering the judgment of their Lordships' Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said (ibid., at p. 480):

But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.'

A similar statement will be found in Lord Herschell's speech in Tasmania (Ship Owners & Freight Owners) v. Smith etc., City of Corinth (Owners) The Tasmania (1890), 15 App. Cas. 223 at p. 225.

"In an appeal in a case tried with a jury, the appellate court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain. Apart from this principle, the matter is one of discretion for the appellate court, and their lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

There is a further consideration referred to by Lord Birkenhead, L.C., in North Staffordshire Railway Co. v. Edge, [1920] A.C. 254 at p. 263:

'The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are

increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.'

These observations should be read subject to the qualification stated in the speeches of Lord Atkinson and Lord Buckmaster in the same case, but they appear to their lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt."

On the question of pleadings, in Esso Petroleum Co. Ltd. v. Southport Corporation (3), [1956] A.C.

218 at p. 238, Lord Normand said:

"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

In the instant case no facts whatever were pleaded by the respondent which would support a defence under s. 139 of the Contract Act. The only facts pleaded in relation to the Contract Act are those in para. 5 (a) of the written statement of defence, which is set out above. Neither did the issues settled at the commencement of the hearing hint at such a defence. The learned judge said

"the facts upon which the decision qua s. 139 depends were fully given in evidence in the court below . . . it cannot be stated, I think that the trial would have assumed a different character had s. 139 . . . been specifically pleaded as a defence.""

From the above, it can be stated that this court being an appellate court has the discretion to allow new issues to be raised on appeal notwithstanding the fact that the party relying on them did not utilise the opportunity at the trial to do so.

However, for this discretion to be exercised there must be sufficient evidence before the court which upon evaluation this court can determine whether if the matter had been raised at the trial, the lower trial court would have had sufficient material to determine the issue.

In this instance the respondents in their plaint under paragraph 3 state their cause of action as the recovery of 30 acres of land, further under paragraphs 4(c) &(d) they state that the appellants occupied the suit land in 1999 and they have up to the time of filing the suit deprived them of the same.

Further under paragraph 5 they state that on several occasions they approached the appellants to stop development on the suit land but all in vain.

The appellants under paragraph 4 of their joint Written Statement of Defence state that their father David Olibaileng used and occupied the land in issue in exclusion of any person, Opeeny inclusive, after inheriting it from his late fathers.

Under paragraph 6 they state that their late father David Olibaileng returned to the suit land in 1992 and found that the respondents' grandparents had trespassed on the suit land.

Under paragraph 7 they state that their father used the land without interference and so did they after his death till 2014 when a civil suit was filed by the respondents.

Both parties gave evidence regarding when the appellants took over the suit land and the actions that happened till the filing of Civil Suit No. 027 of 2015.

Arising from the above facts, I would conclude and make findings that the pleadings alluded as to the issue of limitation even though the same was not raised by the appellants or their counsel during trial.

I would further find that the evidence on record should have been sufficient for the trial magistrate to determine the issue of limitation but did not do so and as such I will proceed to determine this new issue of limitation raised by the appellants in this appeal.

In regards to the issue of limitations, the respondents stated that the appellants forcefully possessed the suit land in 1999 and deprived them of the same until the filing of the suit in 2015.

Counsel for the appellants' claims that this period of adverse possession amounting to Sixteen (16) years was an uninterrupted and as such the respondents were time barred from recovering the suit land.

The law relating to limitation is anchored under 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.

Section 6(1) of the said law provides that;

Where the person bringing an action to recover land, or some person through whom he or she claims, has been in possession of the land, and has while entitled to it been dispossessed or discontinued his or her possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

Further, Section 11 (1) 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.

Also Section 16of the said Act further provides that;

Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished.

It is important to note that all the above provisions are specific on the issue of limitation of the time as to when a person is entitled to bring an action for the recovery of land.

The effect of the law of limitation on the respondents' claim for the recovery of the suit land must be viewed in the light of the appellants' concurrent claim of title over the same land by adverse possession.

In this instance the respondents sought to recover approximately 30 acres of land which they allude were forcefully dispossessed from them by the appellants.

In ***Adrabo v Madira [2017] UGHCLD 102,*** Justice Stephen Mubiru discussed situations similar to the instant one where there are two conflicting claims, with the learned judge proceeding to hold that;

> ***"...an action for recovery of land is founded on trespass involving a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of land could sue for the specific restitution of that land in an action of ejectment. An action for the recovery of land is the modern equivalent of the old action of ejectment (see Bramwell v. Bramwell, [1942] 1 K.B. 370). It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title."***

The proof of title is subject to the law of limitation and therefore even if one has and proves better title than that of the party in possession, as long as the twelve-year period prescribed by section 5 (supra) has lapsed the title of that person to the land is extinguished by virtue of section 16 (supra).

Of course this limitation period may be extended where there is pleading of disability under section 21 of the Limitation Act.

As regards adverse possession, this was defined in ***Jandu vs. Kirpal & Anor [1975] EA 225 at 323***, in which the court relied on the definition adopted in the case of ***Bejoy Chundra vs. Kally Posonno [1878] 4 Cal.327 at p. 329***; where it was held that;

"By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner."

From the above, it means that in law the uninterrupted and uncontested possession of land for a period of over twelve years while 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 which is a legal doctrine that bars the right of a person to bring a legal action after a certain period of time has passed. On the other hand, one can plead "***laches"*** which is an equitable doctrine that bars a person from bringing a legal action if they have unreasonably delayed in asserting their rights, and this delay has caused prejudice to the other party.

However, while both doctrines deal with delay in bringing legal actions, extinctive prescription is based on the passage of time, while laches is based on the principle of equity and fairness.

In cases of ***"extinctive prescription",*** adverse possession has the effect of terminating the title of the original owner of the land (see: ***Rwajuma v.***

Jingo Mukasa, H.C. Civil Suit 8 No. 508 of 2012) and 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. (See: ***Dramadri and Ors v Yusuf Ibrahim (Civil Appeal No 29 of 2012) 2017 UGHCLD 26***).

The Civil Procedure Rules Order 7 rule 6 provides for the process of bringing a suit upon the expiration of the prescribed period by the law of limitation. It provides and I quote;

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which exemption from that law is claimed.

This provision was discussed in detail in the case of ***Iga vs Makerere University [1972] 1 EA 65 (CAK)***, and it was found that the effect of this provision is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint and no grounds of exemption are shown in the plaint, the plaint must be rejected.

Relating the above to the instant matter, it can be seen that the plaint in this instance shows that the respondents left the suit land in 1987 seeking refuge from the insurgency and when they returned in 1999 they found that the appellants had occupied the suit land based on a claim they had inherited the same from their late fathers and also that it had given to them by a court order.

The respondents argued that their grandfather Openy had stayed on the suit land till 1999 when he was forcefully evicted by the appellants' father. This fact is garnered from the evidence of PW1 Tino Hellen who testified that she got to know the appellants when they entered the land in issue which originally belonged to her great grandfather called Oridokoi who had

produced their grandparents called Openy Pakarasio and Ajenga Filbert amongst others. That her grandparents lived on the suit land till they were forcefully evicted from the suit land by the father to the appellants on allegations of witchcraft.

That since she was young there was no one able to initiate any legal redress so the appellants' father continued to use the suit land.

She testified that she was born on and grew up on the suit land and she lived on the land till the time of the insurgency when she moved away but her grandparents refused to move away and stayed on the land till 1999.

She stated that there is a wetland on the suit land named after her grandfather, old homesteads that are to date visible and graves for her great-grandfather and his three wives, Oselle's grave and that of his wife.

During cross-examination she testified to the fact of none of her relatives living on the suit land as Openy and Osele died and Ajenga who is still alive was too old to act against the appellants and that is why she was forced now to come in. That they filed this suit with Action Aid in 2014 and later with Uganda Land Alliance but Ajenga and Openy did not file any case but the 2nd respondent's father filed a case in police, however, he died before it reached court. That they buried their grandfather Openy elsewhere and not on the suit land because the appellants were too hostile and volatile.

PW2 Oridokoi Charles testified that he sued the appellants because they forcibly built houses on the suit land in 1999 yet the suit land was for his great-grandfather Oridokoi who in turn had inherited from his late father called Ayede Joseph.

That when Ayede died he was not buried on the suit land because the appellants refused them from doing so. That they went to Action Aid in 2014 for help from them so that they could regain their land but when the

appellants were summoned there and they met, the meeting yielded nothing forcing them to contact Uganda Land Alliance, Katakwi where they were required to take witnesses but the appellants refused to do so leaving Uganda Land Alliance to forward their dispute to court.

This witness also stated that the suit land has one old homestead for his great-grandfather and one for Openy his grandfather.

During cross-examination he stated that Ayede Joseph tried to dislodge the appellants from the suit land by reporting the case to police but he died before the case went to conclusion but he had no evidence on the same. That it is the first time since 1999 that this matter was brought to court.

PW3 Ocana Philip testified that the 1st respondent's mother was born on the suit land and that by the 1940s when he was born, he found Openy on the suit land and his father Oridokoi died long ago and was buried on the suit land. He further stated that Openy having been chased from the suit land took refuge at his brother's place and died before he could take any action.

That the suit land belongs to the Ikaribwok clan which did not receive the appellants, whose clan he does not know their clan, when they came to the suit land, he they just came and just started staying on the land.

During cross-examination he stated that since Openy was chased away from the suit land, none of his relatives stayed on the suit land.

PW4 Kedi Filbert aged 79 in 2019 testified that the appellants were born in Aliakamer village and that is where they came from and occupied the suit land. He stated that the suit land belonged to Oridokoi, the great-grandfather of the respondents who died when he was about 10 years old and after his death, his sons Openy, Osele, Onyait, Ajenga Filbert and Opus were on the land and that is where they were all buried save for Openy

who was buried elsewhere and Ajenga who is still alive. He testified further that the father of the appellants entered the suit land in 1999 when Openy was still alive and on the suit land and that Openy did not welcome the appellants because their father was staying on the neighbouring land.

That the allegation that the land was theirs because the father was buried on the suit land was true but that the fact was that the appellants' father was buried on the suit land by force.

During cross-examination he stated that Openy died in 2005 but his house and that of Filbert had been destroyed by the appellants whose father then freely occupied the suit land.

PW5 Iwonyut Charles Kenneth testified that indeed Aede died and was buried on the suit land and that between 1999-2000 there was a case in Katakwi Court instituted by Openy because his home had been demolished. And that the LCs never handled the suit concerning the suit land in their courts.

That there was a case reported to the police in 2016 when Olibaileng secretly buried Opara on the suit land and cemented grave with an inscription **"Born in 1845 and died in 1945"** yet before 2014 that grave was not there.

That Olibaileng used that act so he could claim the land was his.

That he even told the appellants father to vacate the land but he did not listen and he died about 2009/2010 and he could not intervene when he was buried.

He agreed that indeed by the time Olibaileng David died, he was staying on the suit land with Aede dying in 2002/1 and Onyait also being buried on the suit land.

He concede that before Openy died he did not try to send away the appellants but insisted that the appellants had migrated from a place called Aliakamer to the suit land and even built houses on it, cultivated as well as excavating it for sand. He denied knowledge of the appellant's clan, their relatives or clan mates.

He conceded that Openy died in 2005 and he was not buried on the suit land.

The appellants on the other hand claimed in their Written Statement of Defence that they had legal interest in the said property after inheriting it from their late father David Olibaileng who died on the 5/5/2010.

That before his death, the late Olibaileng used and occupied the land in issue in exclusion of any person including Openy Pakarasio, after inheriting it from his late fathers Yonosani Otim Opara and Okello Elia.

DW1 Olibaileng Ignatius Okello testified that his father Olibaileng died on 5/5/2010 and no one objected to his burial on the suit land and his father acquired the suit land because his father Yonason Otim Opara was buried on the suit land.

That indeed before Olibaileng died he lived at Aliakamer where his mother was born and he acquired the suit land because his father Yonason was buried on the same.

That his father returned to the suit land in 1992 and found the grandfather of the respondents staying on the suit land and he sued him in 1995 in Katakwi Grade II Court.

That he himself began staying on the suit land from 1992 to date.

He further stated that Openy and Ajenga Filbert never came back to stay on the suit land and more so that Ajenga never came to warn them about staying on the suit land since he was evicted and that the respondents'

relatives have never stayed on or cultivated the suit land and they have no activity on the suit land. He added that the suit land has the old homesteads belonging to their grandfather Yonason and his father Olibaileng. He also told court that his grandfather was buried on the suit land in 1949, and even his father's grave was also on the suit land.

During cross-examination he stated that he contradicted his earlier testimony of his grandfather having been buried on the suit land when he said he himself buried his grandfather on the suit land while they were in Aliakamer where their father but they knew the suit land was for their father.

DW2 Otim Francis also stated that they started using the suit land in 1992 which they had inherited from their father David Olibaileng and no one was utilizing it before 1992 and that the respondents had never stayed on the suit land to date.

He told court that had three homes on the suit land which he constructed in 1992 and that there are seven graves on the suit land, including those of Alupo Norah (1995), Alupot Irene (2007), Olibaileng David (2010), Aurien Sam (2007) Yonasani Otim Opara whose date of death he does not know, Isiret (unbaptized) and that of another child who died at birth.

That there were three old homesteads belonging to Olibaileng on the land.

During cross-examination he stated that he came to the suit land when he was 38 years old and he denied threatening the respondents when they were burying Olibaileng on the suit land. He also did not know how long the respondent's grandparents stayed on the suit land.

The above constitutes the summary of the evidence received in court.

The locus notes on record indicate that both parties showed court old homesteads and grave yards on the suit land, however, the dates of death

and burial for the respondents were not indicated in the notes yet the dates for the graves shown by the appellants were indicated in the locus notes with the earliest being 28th January 1995 for one Alupo Norah.

The locus map indicated that the old home belonging to Olibaileng and one Oselo Alfred father to Tino Hellen.

From the above evidence it is clear that both the appellants and respondents are claiming ownership of the suit land through inheritance from their forefathers.

It is also clear that both parties have occupied the suit land at a certain point with the respondents claiming to have occupied the same till 1987 when they sought refuge from the insurgency though their grandfather stayed on the land till he was evicted in 1999.

The appellants do not dispute that the respondents' grandparents Openy and Ajenga were on the land up to 1999. They only dispute the capacity in which they occupied the suit land.

The appellants on the other hand claim to have come to the land in 1992 when their father returned from Aliakamer.

However, from the evidence on record, it is apparently clear to me that they only came to occupy the land after evicting Openy in 1999 and as such my findings and conclusions is that their occupation of the suit land began in 1999 as there is no evidence on record to prove that the appellants carried out any activity on this land prior to 1995 which is the year when one Norah was buried on the suit land.

As regard to the grave of the late Yonasoni Opara who the 1st appellant claimed was buried in 1949, that fact was a subject to a police dispute as stated in paragraphs 4 (e) and (f)of the plaint and admitted by them in paragraph 8 of the Written Statement of Defence and as such cannot be

relied upon to establish that the appellants prior to 1999 had occupied the suit land.

Arising from the above facts, it can be safely concluded without any iota of doubt that prior to 1999 it was the respondents who were in occupation and possession of the suit land where they first they lived on until 1987 when they had to seek refuge but left their grandfathers who on it who to occupy the same till 1999 when they were forcibly evicted by the appellants.

It is only at this point that the respondents were forcibly dispossessed of the suit land and as seen and confirmed from their evidence and even that of the appellants, the respondents have never since then returned to the suit land with the appellants and their father till his death being in its possession by constructed homes on it and even using the land for cultivation.

It is also clear to me that after the respondents were dispossessed of the suit land through their grandfathers Ajenga and Openy no action was taken to recover the same till 2014 when the respondents engaged Action Aid and Uganda Land Alliance and by this time the limitation period for recovery of land had long lapsed.

The respondents in their evidence stated that before their claim in court (2015), Aede Joseph father to the 2nd respondent tried to dislodge the appellants from the suit land and even filed a police case however he died in 2001 before its completion but no evidence was led in this regard.

PW5 also stated that the respondents' grandfather sued the appellants father in Katakwi Grade II Court for the eviction.

A court register of 1995 was produced by the appellants in court which showed the fact of a case registered as Case No. 46 of 1995 between

Olibaileng sued Ajenga Gilbert and Others, though no evidence of a court's judgment was adduced in lower trial court to prove this fact, the assertion by the appellants that indeed there was litigation in 1995 goes on to show that prior to 1999 when the grand parents of the respondents were forcibly evicted by the appellants from the suit land, already the appellants father Olibaileng David Aleles was in court disputing the respondents' relatives claim to the suit land which fact goes on to prove that indeed there was a dispute over the suit land in court which affects the adverse possession claim.

Therefore, arising from that fact and the respondents' pleadings under paragraph 5 of their plaint which was unrebutted, it is clear to me that there was a dispute over the appellants' occupation of the suit land which action exempted the respondents from the limitation period.

Thus the occupation of the suit land by the appellants from 1999 when they dispossessed the late Openy of the same though uninterrupted since then, cannot be categorized as adverse possession of the same for as was rightly found by the learned trial magistrate, there was prior to that period an unresolved contention as to the ownership of the suit land which means that the respondents' claim for recovery of land was not time barred by virtue of section 5 of the Limitation Act as clearly there was incapacity.

So the filing of the head suit in 2015 which was 16 years after the appellants continuously possessed the same, in my considered view, did not extinguished the respondents' claim to the suit land as provided for under section 21 of the Limitation Act. This ground is thus resolved in the negative.

b. *<u>The learned trial magistrate erred in law and fact when he held that the respondent's suit was not res judicata</u>*.

Counsel for the appellants submitted that it was the appellants' contention that their father litigated with the respondent's father over the suit land and judgement was given in favour of their father.

That the appellants produced the plaint, eviction order and court register to this effect.

That the trial magistrate in his judgement concluded that the respondents' suit was not *res judicata* because there was no judgement and that he could not consider the eviction order and the plaint since the same were admitted for identification.

That the trial court failed in its duty to investigate the allegation of ***res judicata*** as the documents presented were from the same court should have taken initiative to confirm their authenticity.

Counsel then submitted on the law on ***res judicata*** relying on section 7 of the Civil Procedure Act and ***Mansukhal Ramji Karia and Anor vs Attorney General and Others (SCCA No. 20 of 2002) [2004] UGSC 32.***

Counsel for the respondent in reply submitted that the burden of proof of facts alleged by the appellants lay on them and not the court as averred by counsel for the appellants as per section 101(2), 103 and 104 of the Evidence Act.

That the copies of the plaint and eviction Order marked PID1 and PID2 could not be relied upon by court to conclude that the matter was ***res judicata. (Uganda Vs Okwanga Anthony (2001-2005) HCB 36-38)***

The appellants in their WSD stated that their father litigated over the suit land with the respondents' grandfather Openy Pankarasio, Ajenga Filbert and Arot Joyce in Civil Suit No. 46/1995 in Katakwi Chief Magistrates Court

and a decision was entered in favour of their father. They presented photocopies of the plaint and eviction order which were marked as identified pending tendering of the originals. They also tendered in the court register marked as DEX1.

The trial Magistrate in his judgement having discussed the law on *res judicata* found that the plea of *res judicata* could not stand in absence of a court judgement, decree and record of proceedings and the entry on the court register cannot amount to a judicial decision without proof of a court record. I agree.

Section 7 of the Civil Procedure Act provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

The Court of Appeal in ***Ponsiano SSemakula v Susanne Magala and others (1993) KALR 213*** explained the doctrine of *res-judicata* as follows; -

> ***" The doctrine of res-judicata, embodied in*** *s 7 of the Civil Procedure Act,* ***is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim:*** *'nemo debt bis vexari pro una et eada causa'* ***(No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be***

concluded forever between the parties. The test whether or not a suit is barred by *res-judicata* ***appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of*** *res-judicata* ***applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".***

The broad minimum requirements under that provision were stated by the Supreme Court in ***Karia and Another v Attorney General and Others [2005] 1 EA 83 (SCU)*** to be that;

(a) There has to be a former suit or issue decided by a competent court

(b) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

(c) The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

However, to give effect to the plea of *res judicata*, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit

(see: ***Lt David Kabarebe v Major Prossy Nalweyiso C.A Civil Appeal No.34 of 2003 as cited in Boutique Shazim Ltd v Norattam Bhatia & Anor (Civil Appeal No. 36 of 2007) [2009] UGCA 45***).

For the doctrine to apply there must have been a decision on the merits of the case, the doctrine is inapplicable except where the earlier suit was decided on merit.

In the instant case the appellants in their WSD claimed their father David Olibaileng litigated with the respondents' grandparents Openy and Ajenga as well as a one Arot vide CS No. 46 of 1995 in Katakwi Court and an eviction order was given.

The appellants in their WSD claimed to have attached a copy of the said judgement and eviction notice, however, the judgement was actually not attached.

What was attached was a copy of the plaint and an eviction notice which were admitted as identified documents pending production of the originals or certified copies but these were never brought.

DEX1 which is a court register for Katakwi court was tendered in evidence and it has there an entry for CS No. 46/1995 for recovery of land by David Olibaileng against Openy, Ajenga and Arot registered on 22/3/1995 before Alex Ajiji Grade II, (As he then was) with the result of the judgement per the register entered as being in favour of Olibaileng with the 3rd defendant (Arot) to remain in the land of her husband.

This register was tendered in by DW4 Oumo Anthony Felix who was a clerk, in-charge of record and interpreter in Katakwi Court from 2015 to 2021. He told court that he came across the register for civil cases for 1995 and was called to give evidence on the same though he was not the court clerk in 1995.

DW3 James Okiror was an office attendant at Katakwi Court at the time the matter was heard and he stated that the matter was before Magistrate Ajiji and the Olibaileng won.

While these testimonies could be stated to prove the existence of Civil Suit No. 46/1995, *res judicata* could not be proved by oral evidence as was held in the case of ***Maniraguha v Nkundiye (Civil Appeal No. 23 of 2005) [2014] UGCA 1)***

The law is very clear that for a matter to be found as *res judicata,* **then** the matter in issue should identical in both suits, the parties in the suit should substantially the same, there is a concurrence of jurisdiction of the court, the subject matter is the same and finally that there is a final determination as far as the previous decision is concerned.

In the instant case it can be found that though the parties could be said to be substantially the same as their claim is through David Olibaileng and Openy who were parties to the Civil Suit No. 46 of 1995, however, the issues resolved in said suit cannot be determined as was rightly pointed out by the trial magistrate in this matter for the final determination by way of a certified court judgement were not availed in the court below.

Accordingly, without a certified judgement indicating what issues were before court and how they were finally resolved as well as the orders given therein I am unable to determine whether Civil Suit No. 27.2015 was *res judicata*. This ground accordingly fails.

c. <u>The decision of the trial magistrate has occasioned a grave miscarriage of justice:</u>

A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence adduced to find that a miscarriage of justice has occurred and if it finds so an order setting aside the lower court amongst others may be given.

In the instant case having found that the claim filed by the respondents was not time barred, the entering judgement in their favour of the respondents by the trial court did not occasioned a miscarriage of justice to the appellants.

Though I also noted that the trial magistrate did not properly conduct *locus in quo* in accordance with the provisions of Practice Direction No I of 2007 which under paragraph 3 provides for locus in quo that;

During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:

a) Ensure that all the parties, their witnesses, and advocates (if any) are present.

b) Allow the parties and their witnesses to adduce evidence at the locus in quo.

c) Allow cross-examination by either party, or his/her counsel.

d) Record all the proceedings at the locus in quo.

e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

I find that proceedings at the ***locus in quo*** was as near as possible in form to those recorded by the trial magistrate during the hearing in court.

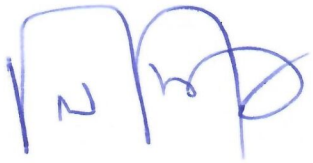
In the instant case the trial magistrate visited locus in quo on the 24/03/2022 and while the locus sketch map drawn did not indicate all features the magistrate noted as shown by the parties in the notes available which hindered use of the locus proceedings in the determination of this appeal, there was sufficient material for the trial magistrate to make his conclusions as he did based on his observations therein. This ground fails.

6. Conclusion:

This appeal fails in respect of all grounds with the judgement and orders of the trial magistrate declaring the respondents as the rightful owners of the land, the orders granting them vacant possession, then orders grating a permanent injunction as against the appellants and the orders for general damages confirmed.

The respondents are further awarded the costs of this appeal and in the court below.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

12th October 2023