

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI  
CIVIL APPEAL NO. 0056 OF 2020  
ARISING FROM MASINDI CHIEF MAGISTRATES COURT CIVIL SUIT NO. 0054 OF 2018

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VUYIRA SERAFINO..... APPELLANT

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VERSUS

MANGWI LUIS GOYI ..... RESPONDENT

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BEFORE: Hon. Justice Isah Serunkuma.

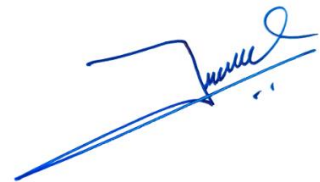
JUDGEMENT

20 This is an appeal against the whole ruling of Her Worship Biwaga Selsa delivered on the 1<sup>st</sup> day of December 2020.

The background of this appeal is that the appellant lodged Civil Suit No. 0054 of 2018 against the respondent for trespass to land, a declaration of ownership of land, damages for loss of property as a result of the defendant's actions, costs, interest thereon and to secure a permanent injunction. According to the appellant, he enjoyed ownership of land at Chankadi village, Kabango parish, Budongo sub-county, Bujenje county, Masindi district measuring approximately 17 acres after purchasing it from Mzee Ozale Deogratius who had acquired the same by way of inheritance from his father Agoti Norasi in 1970's and Mzee Omika in 1974 and 1976 respectively.

30 The appellant begun utilizing the suit land uninterrupted for cultivation and allowed Avunya Francis, Timothy Lawrence and Akello Rema to settle on the suit land temporarily. That around 1981 the respondent joined the appellant and both lived on the suit land until 1985 when the appellant went to stay in Moyo district for fear of the guerrilla war and left the suit land under the care of the respondent until the year 2000 when the appellant attempted to rent out the suit land to a one Mr. Uzzi Anthony. The respondent refused to hand over the suit land. On the 13<sup>th</sup> day of July 2018, a family meeting was held aimed at settling the matter but the respondent refused.

35 The appellant reported the acts of trespass to his land to the lower council authorities but they could not adjudicate on the issue and thus the respondent has continued to trespass on the suit land. That



the respondent's conduct on the suit land is wrongful and has caused the appellant untold anguish, discomfort and inconvenience.

The respondent denied the appellant's allegations and stated that he purchased the suit land measuring approximately 10 acres from Ochaya Constantino in 1982 and that he had lived with the appellant at Kinyara staff quarters for approximately one year and has never lived on the suit land with the appellant.

At the hearing in the lower court, the respondent's counsel raised a preliminary objection that the said Civil Suit was barred by time as per Section 5 of the Limitation Act. In her ruling, the learned trial magistrate dismissed the suit with costs to the defendant for being time barred under the Limitation Act. Aggrieved by the decision of the learned trial magistrate, the appellant lodged this appeal on two grounds namely;

1. *The learned trial magistrate erred in law and fact when she found that the appellant's claim in Civil Suit No. 0054 of 2018 is barred by limitation of time.*
2. *The learned trial magistrate erred in law and in fact when she dismissed the appellant's Civil Suit No. 0054 of 2018 without a hearing.*

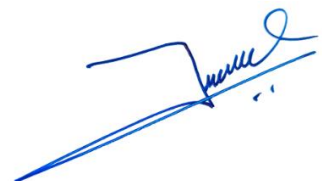
The appellant further prays to this court that;

- a. The appeal be allowed.
- b. The ruling or orders of the Chief Magistrate's Court of Masindi at Masindi delivered on 1<sup>st</sup> December 2020 in Civil Suit No. 0054 of 2018 be set aside and substituted with an order directing that the suit be heard before a different magistrate on its merits.
- c. An order awarding the costs of this appeal to the appellant.

### ***Representation & hearing***

The appellant was represented by Counsel Nabirye Gertrude holding brief for Kasangaki Simon of M/s Kasangaki & Co. Advocates whereas the respondent is represented by counsel Zemei Suzan of M/s Zemei, Aber Law Chambers. Both parties were directed to file their written submissions and the same have been considered herein.

### ***Appellant's submissions***



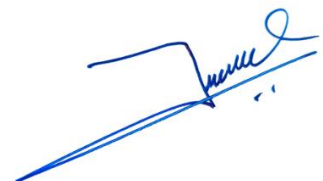
Counsel for the appellant submitted that it is the duty of this honorable court on first appeal to re-examine and re-evaluate evidence on record to make its own inference of facts. Counsel relied on several cases such as *Father Nansensio Begumisa & 3 Ors Vs Eric Tiberaga; SCCA 0017 of 2000 [2004] KALR* which shall be considered in this court's determination. Counsel argued both grounds  
5 concurrently as hereunder;

Counsel submitted that the learned trial magistrate erred in law and fact when she dismissed Civil Suit No. 0054 of 2018 as being statute barred by limitation without affording the appellant a fair hearing nor disposing of the suit on its merits. Counsel added that from a clear scrutiny of the appellant's pleadings, he was under a disability and the same matter was still under negotiations before the family  
10 members and the lower council authorities till when the respondent refused to hand over the same on the 13<sup>th</sup> day of July 2018 thus prompting the appellant to file a civil suit on the 31<sup>st</sup> day of October 2018.

Counsel relied on the case of *Nyeko Smith & 2 Ors Vs Attorney General; SCCA No. 001 of 2016* where it was held that, "this court has on two occasions pronounced itself on dismissing actions on preliminary  
15 objections". Also, in *Wycliff Kiggundu Vs Attorney General; Supreme Court Civil Appeal No. 027 of 1992* where the high court had dismissed the appellants' suit on a preliminary objection that the plaint did not disclose a cause of action. This court set aside the holding of the trial judge and held once questions of fact arise then the issue must surely go".

Counsel submitted that from the appellant's pleadings in paragraphs 4(C-F) reveal that the respondent  
20 occupied the suit land with his permission until 2018 when he refused to hand over the land thus prompting the institution of the civil suit. Counsel relied on Section 5 of the Limitation Act which provides for the timeframe within which actions for recovery of land should be brought and Section 5 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act which provides instances when the limitation period can be extended in cases of disability and the same shall be considered herein.

25 Counsel submitted that the issue of limitation needs to be examined further before it can be properly determined whether the appellant was barred by limitation or not which would necessitate the hearing by the trial magistrate of both parties on the evidence and arriving at an appropriate determination which was not done in this matter. Counsel added that the suit was filed in trespass which is a



continuous tort and that the lower court erred in law and fact when it held that the plaintiff's/appellant's suit founded on trespass as a cause of action was time barred.

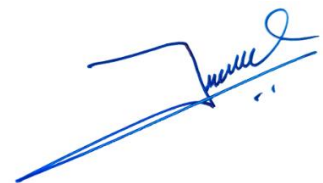
Counsel further submitted that a continuous tort is an exception to the above principle of law of limitation. Counsel relied on the case of ***Abram Kitumba Vs Uganda Telecommunications Corporation; KALR 11 126/1994*** where it was held that, "an action in trespass was not time barred because trespass was the continuing tort for which the injured party can sue from the date of cessation of the wrong and this wrong had not ceased".

Counsel also relied on paragraph 3 and submitted that the instant suit is a subject of trespass and as such there was no basis for the learned trial magistrate to hold that the appellant's suit was time barred by reason of the Limitation Act.

#### ***Respondent's submission***

Counsel for the respondent submitted that the learned trial magistrate rightly dispensed the position of the law in reaching the conclusion she did and that there is no error in law and fact that was occasioned. Counsel relied on Order 7 rule 11 of the Civil Procedure Rules which empowers a trial court to reject a plaint for being frivolous, barred in law like the instant case. Counsel further submitted that it was the appellant's averments under paragraph 4 (d) of the plaint that the appellant lived with the respondent on the suit land until 1985 when the appellant went to stay in Moyo district for fear of the guerilla war and left the suit land under the care of the defendants. Counsel added that in the year 2000, the appellant attempted to rent the suit land to a one Mr. Anthony Uzzi but the respondent refused to hand over the same to the appellant.

Counsel further submitted that according to the plaint, the suit against the respondent was only filed in 2018, about 18 years after the alleged cause of action against the respondent first arose. Counsel argued that the dictates of Section 5 of the Limitation Act are couched in very strict terms. Counsel relied on the case of **Civil Appeal No. 0272 of Kiwanuka Fredrick Kakumutwe Vs Kibirige Edward** where the court of appeal dismissed an appeal whose ground was that the learned appellate court erred in law and fact when he held that the appellant's suit was barred by limitation and could not stand thereby causing a miscarriage of justice. Counsel added that at page 9 the court held that;



*“..... the principle of continuous tort of trespass could not aid the plaintiff whose cause of action was barred by limitation. That the plaintiff cannot set up the issue of continuous trespass which was not part of his pleadings.....”*

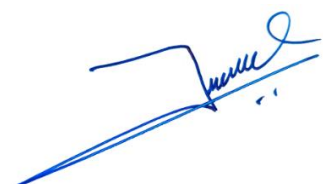
5 Counsel submitted that the appellant’s suit was statute barred in as far as the appellant sought to be declared the owner of the suit land after the expiration of 12 years since the alleged cause of action against the respondent arose in the year 2000. Counsel added that the appellant’s claim was for recovery of land and the fact that he had included trespass as a cause of action, the same could not suffice to qualify as an exception to the law of limitation on recovery of land.

10 Counsel relied on ***Bramwell Vs Bramwell (1942) 1 KB 370***, where an action for recovery of land was defined therein as an action by which a person not in possession of land can recover both possession and title from the person in possession, he or she can prove his title.

15 Counsel added that the nature of right sought by the appellant in his suit was proprietary in nature rather than possessory hence the same was for all intents and purposes an action for recovery of land of which the appellant contended that he was unlawfully deprived by the respondent. Counsel further submitted that trespass is a possessory action where if remedies are to be awarded, the plaintiff must prove the possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action in trespass. Counsel added that if the appellant intended to sue the respondent for trespass, he should have brought the tort of trespass alone as a cause of action against the respondent but in the circumstances of this appellant’s case, his claims were majorly  
20 proprietary rights in the land and not possessory rights.

Counsel further argued that the appellant’s suit was barred by time as the same was for recovery of land and since he was not in possession of the suit land, an action in trespass was never available to him. Counsel added that the expiration of the period prescribed by the Limitation Act for any person to bring an action for recovery of land automatically extinguishes title to that land plus the remedies.

25 In conclusion, counsel submitted that the appellant in his pleadings did not plead by any reason or disability upon which he could claim exemption under Section 5 of the Civil Procedure and Limitations (Miscellaneous Provisions) Act and makes no mention of when it ceased since the cause of action arose in the year 2000. Counsel prayed that the appeal be dismissed with costs to the respondent both in this court and the court below.



### **Court Analysis**

It is trite law that this court being a first appellate court, has an obligation to subject the matter at hand under fresh scrutiny and re-appraise all the evidence on record together with the proceedings undertaken in the lower court before coming to its own conclusion. This is explicitly laid out by the supreme court in *Father Nanensio Begumisa and 3 Ors vs Eric Tiberaga; SCCA 17/20 (22.6.04 at Mengo from CACA 47/2000 [2004] KALR 236*. The court observed that;

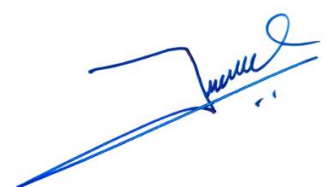
“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions”.

I have perused the pleadings, submissions and authorities applied by both counsel and found that the main ground for consideration by this court revolves around the Limitation Act which is; ***Whether the learned trial magistrate erred in law and fact when she found that the appellant’s claim in Civil Suit No. 0054 of 2018 was barred by limitation of time.*** This ground as per both counsel’s arguments stems from the cause of action that was raised by the appellant in his pleadings. The same is also reflected in the ruling of the learned trial magistrate at page 2 where she held that;

“Preliminary objections should generally raise only pure points of law which are argued on the face of pleadings..... In this case, I have read the plaint. Whereas the plaint pleads trespass to land as the cause of action, the particulars provided in para 4 that explains the cause of action, do not sustain the claim of trespass. The particulars disclose a claim for recovery of land.

I entirely agree with the submissions of defence counsel that trespass is a possessory action where if remedies are to be awarded, the plaintiff must prove the possessory interest in the land. It is the right of the person in possession to exclusive possession that is protected by an action in trespass.....

The cause of action as disclosed in this plaint arose in 2000 when the plaintiff returned to the suit land and attempted to take possession by renting it out but failed. The plaintiff in this case sat on his rights for 18 years. 6 years have passed ever since his cause of action was



*extinguished. He has not pleaded any disability and hiding this case under a claim in trespass has failed”.*

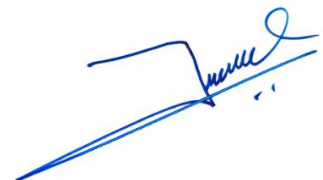
According to the respondent, counsel submitted that the action of the appellant in the lower court was brought in 2018 and yet the cause of action arose in the year 2000. Counsel also argued that the  
5 appellant’s claim was for recovery of land and the fact that he had included trespass as a cause of action, the same could not suffice to qualify as an exception to the law of limitations.

In reply, the appellant’s counsel submitted that the lower court civil suit was filed in trespass which is a continuing tort and could not be barred by limitation. Based on the above facts, this court has to ascertain what cause of action the facts in the appellant’s plaint constitute.

10 Paragraph 4 of the appellant’s plaint lays out the facts constituting the cause of action;

- a) *“That the plaintiff enjoyed ownership of land located at Chankadi village, Kabango Parish, Budongo sub-county, Bujenje county, Masindi district measuring approximately 17 acres clearly marked with known boundaries which he acquired by way of purchase from Mzee Ozale Deogratius who had acquired the same by way of inheritance from his father Agoti Norasi in  
15 the 1970’s and Mzee Omika in 1974 and 1976 respectively.*
- b) *That after the purchase, the plaintiff begun utilizing the suit land uninterrupted for growing crops and allowed Mr. Avunya Francis, Timoyi Lawrence and Akello Rema to settle on the suit land temporarily and also, they utilized it for agricultural purposes.*
- c) *That in 1981, the plaintiff was joined by his brother-in-law (defendant) who had brought the  
20 plaintiff’s second born son called Vuyira Jurugo James from Moyo District where the family of the plaintiff was also settled at the time.*
- d) *That the plaintiff lived together with the defendant on the suit land until 1985 when the plaintiff went to stay in Moyo district for fear of the guerrilla war and left the suit land under the care of the defendant until the year of 2000 when the plaintiff attempted to rent the suit land to Mr.  
25 Uzzi Anthony but the defendant refused to hand over the suit land to the plaintiff.....”*

Trespass to land was defined in the Supreme Court decision of **Justine E. M.N Lutaaya vs Starling Civil Engineering Co. Limited; SCCA No. 0011 of 2002** as;



*“When a person makes an unauthorized entry upon land and thereby interferes, or portends to interfere, with another person’s possession of the land.”*

The Court further held that,

5 *“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.”*

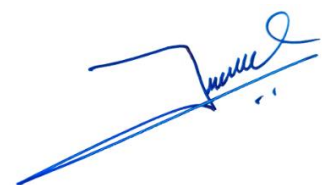
Therefore, the action of trespass to land applies only where an individual is in possession of the suit land and is an action for enforcement of possessory rights rather than proprietary rights. (**Odyek Alex & Anor v. Gena Yokonani & Ors; Civil Appeal No. 0009 of 2017**).

10 Where questions arise as to the rightful ownership of the suit land, that becomes an action for recovery of land. Recovery of land has been defined as an action by which a person not in possession of land can recover both possession and title from the person in possession of the land if he or she can prove title. (See: **Nyombayabo William v. Bundibugyo District Local Government; Civil Suit No. 008 of 2020**).

15 As can be established from the Plaintiff, one of the prayers of the Plaintiffs is for a declaration of ownership of the suit land, which prayer is only achievable by examining and determining the ownership of the said land. It has further been noted that there is a dispute as to the actual ownership of the suit land between the Applicants and Respondents. Therefore, I agree with the Applicants that the questions in court transcend the issue of trespass.

20 The plaintiff/Appellant highlighted in paragraph 3 of the plaintiff in which he sought inter alia; a declaration of ownership of suit land, damages for loss of property as a result of the defendant’s actions, special damages for trespass to land and loss of property as a result of the Defendant’s actions, costs, interest thereon and to secure a permanent injunction to restrain the defendant and his agents from further trespassing onto his land or in any other way interrupting the plaintiff’s user and enjoyment of the suit land. This was therefore not an action for trespass to land but rather, for recovery  
25 of land and was therefore affected by limitation of action and outside the limitation period.

It is trite that an action where there are two competing interests in the land as is the case herein, such a matter cannot be tried as a matter of trespass as the issue then becomes one for declaration of the ownership of that land.






In the case of **Kawaga Lawrence, Sulaiman Nteezi and Namusamula Sarah v. Ziwa & Sons Property Consultants Limited; HCCR No. 0004 of 2018** it was held that there is need to draw a distinction between trespass to land as provided for in Section 207 (1)(a) of the Magistrates Courts Act and the action of recovery of land; and that where the court is meant to determine and make a declaration on the ownership of the land, that shall be considered as an issue arising under recovery of land as a distinct cause of action.

In that regard, I find that the learned trial magistrate rightly arrived at a correct decision and allowed the preliminary objection disposing off MSD-CM-0054-2018 that had been filled beyond outside the limitation period. This appeal therefore fails and it is dismissed with no orders as to costs.

10 I so rule and order.

Dated and delivered on this 13th day of October 2023.

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Isah Serunkuma  
JUDGE