

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 34 OF 2011

- 1. RUTH SEMAMBO**
- 2. SARAH KIKOMEKO**
- 3. EDITH NDIBALWANYA APPELLANTS**
- 4. NELSON KIWANUKA WALONZE**
- 5. ARTHUR J. KATONGOLE**

VERSUS

SHEILA KAWAMARA MISHAMBI RESPONDENT

(An appeal from the ruling of the High Court of Uganda at Kampala (Land Division) before His Lordship Murangira, J. delivered on 12th January, 2011 in Civil Suit No. 055 of 2009)

CORAM: HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY. JUSTICE HELLEN OBURA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA.

This is an appeal from the ruling of the High Court sitting at Kampala (Land Division) in Civil Suit No. 055 of 2009 wherein Murangira, J. dismissed the suit with costs on a preliminary objection.

Brief Background

The appellants and the respondent were the plaintiffs and the defendant, respectively in the High Court. The appellants instituted Civil Suit No. 55 of 2009 in the High Court against the respondent seeking for various reliefs. At the commencement of the hearing of the suit in the High Court, the respondent raised a preliminary objection on points of law, whereupon, the learned trial Judge after considering the preliminary objection, dismissed the suit with costs to the respondent. The trial Court also granted judgment on the counterclaim raised by the respondent/defendant.

Being dissatisfied with the decision and orders of the High Court, the appellants lodged this appeal in this Court on the following grounds:

"1. The learned trial Judge erred in law and fact in holding that the Appellants' suit was time-barred and in further holding that:-

- a) **The Appellants' suit was for recovery of land.**
- b) **Sections 5 and 6 (i) of the Limitation Act, Cap.80 were applicable as against the Appellants.**

2. The Learned trial Judge erred in law and fact in holding that the Appellants' plaint did not disclose a cause of action against the respondent.

3. The Learned trial Judge erred in law and fact in holding that the Appellants did not prove fraud or furnish particulars of the said fraud against the Respondent and Jack Mishambi (Deceased).

4. Alternatively, the learned trial Judge erred in law in upholding the Respondent's preliminary objections on the basis of the alleged fact before hearing and evaluating the evidence of the parties:-

- a) **The Respondent was putting up permanent structures on the suit land.**
- b) **The Late Jack Mishambi bought the suit land in 1991.**
- c) **The Appellants knew that the late Jack Mishambi and the Respondent bought and took possession of the land in 1991.**

5. The Learned Judge erred in law and contradicted himself:-

- a) **In entering Judgment for the Respondent on the Counterclaim before hearing and evaluating the evidence of the parties.**
- b) **In ordering the immediate eviction of the Appellants from the suit land:-**
 - i. **When the said order was not sought and or prayed for by the Respondent in the Counterclaim.**
 - ii. **Having earlier held that the Appellants were not in possession of the suit land."**

Representation

At the hearing of this appeal Mr. Andrew Kabombo, learned Counsel, appeared for the appellants while Ms. Atuhaire Grace, learned Counsel, holding brief for Mr. Habwomugisha Innocent, appeared for the respondent. Counsel for both parties filed written submissions which they adopted at the hearing.

Preliminary objection by the respondent

In his written submissions, counsel for the respondent submitted that this appeal is untenable, bad in law, incompetent and an abuse of court process because the appellants did not seek leave to file their appeal. He contended that the order appealed from in the instant case could not, by law, be appealed from without leave and in support of this contention, he cited **Section 76** of the **Civil Procedure Act, Cap. 71**, as well as **Order 43 rule 1** of the **Civil Procedure Rules, S.I 71-1** which sets out the orders which are appealable from as of right. In counsel's view, as the appellants did not obtain the requisite leave, the present appeal was rendered incompetent and should accordingly be struck out.

Appellants' reply.

Counsel for the appellants disagreed with the respondent, submitting that the decision of the High Court in the present case was appealable as of right, because it was a decree, which had the effect of finally disposing of the issues in controversy between the parties. He cited **Hwan Sung Limited versus M. and D. Timber Merchants and Transporters Limited, S.C.C.A No. 02 of 2018** for the legal position that if an order has the characteristic and consequence of bringing the whole suit to finality, it is a decree within the meaning of Section 2 (c) of the Civil Procedure Act and is therefore appealable from as of right. Counsel then invited this Court to disallow the preliminary point of law with costs.

Ruling on the preliminary objection.

The major issue for determination in relation to the preliminary objection is whether the decision of the High Court in this case was a decree which was appealable as of right. At the end of his ruling in Civil Suit No. 55 of 2009, the learned trial Judge stated, at page 71 of the Record, as follows:

"In the result, and for the foregoing reasons, given hereinabove, the two (2) preliminary objections raised by Counsel for the defendant are allowed. Accordingly this suit, HCCS No. 55 of 2009 is dismissed with costs to the defendant. In the same vein, judgment on the counterclaim which is based on the above stated preliminary objections is granted in the following terms..."

In **Hwan Sung Limited vs. M. and D. Timber Merchants and Transporters Limited, S.C.C.A No. 02 of 2018, Buteera, JSC** in the lead judgment, citing with approval the holding of Justice Mustafa, in **South British Insce. Co. Ltd. Vs. Mohamedali Taibji Ltd. [1973] E.A. 210** held that:

"If the decision conclusively determines the rights of the parties, then it would be a decree, otherwise it would be an order. If for instance portions of a plaint are struck out as being frivolous or vexatious, or if a suit is stayed, such a decision would be an order, whereas if a suit is dismissed with costs, that would be a decree. A decree is appealable, and an order made in terms of O.6, r. 29 is made appealable as of right also."

The decree which was extracted from the ruling in HCCS No. 50 of 2009 indicates that the suit was dismissed. In my view, that is clear evidence that the said suit had been conclusively and finally determined by Murangira, J. It, therefore, follows, that Section 76 of the Civil Procedure Act, Cap. 71 was not applicable in the circumstances. Instead **Section 66 of the Civil Procedure Act, Cap.71** is relevant and it provides that:

"Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal."

I, therefore, accept the submissions by counsel for the appellant and hold that the decision in Civil Suit No. 50 of 2009 was a decree, which had the effect of conclusively determining the question relating to the ownership of the suit property and was appealable as of right. I, therefore, hereby dismiss the preliminary objection raised by the respondent with costs in the cause. I will proceed to determine the merits of this appeal.

Appellant's case.

Counsel for the appellants argued grounds 2 and 3 together, faulting the learned trial Judge for failing to address his mind to the full particulars of the plaint when he found that the plaint did not disclose a cause of action. He contended that the plaint indicated two distinct causes of action, first, that the appellants' rights as lawful occupants on the suit property had been violated by the respondent who was threatening them with eviction; and,

secondly, that the plaint disclosed that the respondent's predecessor in title had acted fraudulently at the time of securing the lease to the suit land.

Further still, it was counsel's submission that the learned trial Judge took into consideration irrelevant and legally untenable grounds to determine whether the appellants' plaint disclosed a cause of action. He cited the reliance by the learned trial Judge on the wrong premise that failure to sue the Uganda Land Commission, alongside the respondent proved that the appellants had no cause of action. Counsel argued that the appellants had deliberately chosen to institute the suit against the respondent who had threatened them with eviction from the suit land. He also singled out the reliance by the learned trial Judge on the affidavit evidence of one Margaret Byekwaso in a separate application arising from the suit. He then relied on the decision in **Jeraj Shariff & Co. vs. Chotai Fancy Stores (1960) EA 374** and **Mulindwa Birimumaso vs. Government Central Purchasing Corporation [2004] KALR 348** for the proposition that when Court has to determine whether a plaint discloses a cause of action, it need only look at the plaint and its annexures. Counsel maintained that the learned trial Judge went beyond the plaint in ascertaining whether there was a cause of action. Counsel then invited this Court to allow grounds 2 and 3 of this appeal.

On ground 1, counsel contended that the learned trial Judge based his decision that the suit instituted by the appellants was time barred on a wrong premise that the cause of action was for recovery of land. He re-iterated that the suit was based on two distinct causes of action; that there was no specific period of limitation in law for an action based on breach of the lawful occupant's rights to security of occupancy; and on fraud, counsel maintained that the appellants only discovered the fraud by the respondent in 2008. Further still, that, even if the learned trial Judge had been correct in finding that the cause of action was for recovery of land, the period of limitation in respect of the same only started to run in 2008 when the appellants discovered the respondent's fraud in relation to the land they sought to recover.

On ground 4, counsel faulted the learned trial Judge for upholding the preliminary objection raised by the respondent without hearing evidence

from the parties. He cited **Lieutenant Kabareebe vs. Major Nalweyiso CACA No. 34 of 2003** where it was held that the learned Judge erred to determine a preliminary objection prematurely without affording the plaintiff an opportunity to adduce evidence. He then invited this Court to allow this ground of appeal.

On ground 5, counsel faulted the learned trial Judge for certain errors and contradictions in his ruling. He pointed out the learned trial Judge's decision to enter a counterclaim in favour of the respondent without considering the reply to the same by the appellants, as the first error. In counsel's view, as the respondent had not adduced evidence to support the counterclaim, the learned trial Judge should not have ruled on the same. The second error involved making an order of eviction against the appellants yet the respondents never pleaded for the same in their counterclaim. Counsel wondered why the learned trial Judge ordered for eviction of the appellants which was contrary to his earlier ruling that the appellants were not in possession of the suit land. Counsel then prayed that this appeal be allowed and the decision and orders of the lower court be set aside; and High Court Civil Suit No. 55 of 2009 be remitted to the High Court for retrial before another Judge; and costs in this Court and the lower court be ordered against the respondent.

Respondent's case.

On grounds 2 and 3, counsel for the respondent supported the ruling of the learned trial Judge, submitting that the appellants could not claim to enjoy rights of lawful occupants on the suit land yet they had never occupied it. On a related note, she contended that the appellants failed to plead any instances of fraud which could be attributable to the respondent. Counsel relied on **Kampala Bottlers vs. Damanico (U) Ltd SCCA No. 22 of 1992** and **FJK Zaabwe vs. Orient Bank and 5 others SCCA No. 45 of 2006**, and argued that there was no act of dishonesty attributable to the respondent and neither had the respondent intentionally perverted the truth to conceal the status of the appellants as lawful occupants on the suit land. In support of this argument, he pointed out that, neither the respondent nor her predecessor in title, had notice, whether constructive, implied or actual of the interests of the appellants in the suit land at the time of registration

of their interest. Further, that the only fraud pleaded by the appellants was blamed on the Uganda Land Commission and not the respondent. Counsel then invited this Court to dismiss grounds 2 and 3 of this appeal.

On ground 1, counsel maintained that the respondent's predecessor in title, the late Jack Mishambi, bought the suit land in 1993, twelve years earlier than the appellants' suit which was instituted in 2009. He disagreed with the appellants' submission that the fraud of the respondent suspended the limitation period until 2008 when the said fraud was discovered by the appellants, arguing, that neither the respondent nor the predecessor in title were party to any fraud. Counsel re-iterated the arguments made for the respondent in the lower court that the suit was time-barred. She therefore supported the dismissal of the suit by the learned trial Judge.

On grounds 4 and 5, it was the contention of learned counsel that the submissions for the appellants were baseless because the learned trial Judge had considered evidence and the submissions made on behalf of the respondent and the appellants before ruling on the preliminary objections. He further submitted that the counterclaim by the respondent was rightly upheld once the plaint was found to disclose no cause of action. Counsel then prayed to this Court to dismiss this appeal and affirm the decision of the High Court.

Resolution of Court.

I have carefully considered the submissions of both counsel, the Court record and authorities and the law cited. I am alive to the duty of this Court as a first appellate Court which was aptly summarized in **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997** as follows:

"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."

See also: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.

As a first appellate Court, we have the duty to reappraise the evidence before the trial Court and come up with our own inferences. A consideration of these two issues, will, in my opinion achieve the aforestated purpose:

1. Whether the appellants' plaint in the High Court disclosed any cause of action against the respondent.

2. Whether the appellants' suit in the High court was time barred

I will proceed to resolve each issue in turn;

Issue 1: Whether the appellants' plaint in the High Court disclosed any cause of action against the respondent.

In order to resolve this issue, I have found it pertinent to reproduce the contents of the plaint at page 7 of the record, below:

"3. The plaintiffs bring this suit seeking the following orders:

- a) **Cancellation of the lease and certificate of title to the suit property on grounds of fraud;**
- b) **A declaration that the plaintiffs and other beneficiaries of the estate of Stanley Sebuufu Semambo are lawful occupants and are entitled to enjoy security of occupancy of the Suit Property;**
- c) **A permanent injunction restraining the defendant from evicting the plaintiffs and other beneficiaries of the estate of the Late Stanley Sebuufu Semambo from the suit property.**
- d)
- e)

4. The Facts constituting the cause of action are herein below:

- (i) **On or about 13th June 1984, Stanley Sebuufu Semambo (deceased) purchased a "kibanja" interest measuring approximately one and a half (1 ½) acres over the whole of the Suit Property together with developments thereon from a one Gerald Nyanga. Attached hereto marked "RS-2" is a copy of the Memorandum of agreement of sale of land.**
- (ii) **At all material times since the said date, the plaintiffs and other beneficiaries of the estate of the late Stanley Sebuufu Semambo have been in possession and or occupation of the**

Suit Property as tenants by occupancy. The fourth plaintiff has since the 13th day of June 1984, been residing within the Suit Property;

- (iii) On or about 16th June 1993, after the death of the said Stanley Sebuufu Semambo, a lease was illegally/ fraudulently issued by the Uganda Land Commission to Jack Mishambi (deceased). Subsequently a certificate of title was fraudulently issued over the suit property to the said deceased person;**
- (iv) Upon the death of Jack Mishambi, the defendant and a one Sam Kwesiga were appointed as administatrix/ administrator of the said deceased's estate and were further registered as proprietors of the Suit property in the said capacity. Attached hereto marked "RS-3" is a copy of the certificate of title of the Suit Property.**
- (v) Sam Kwesigwa, the joint administrator of the estate of the late Jack Mishambi has since died and a copy of the death certificate is here to annexed as "R-4"**
- (vi) The lease over the Suit Property and the said Certificate of Title were procured through illegality/ fraud;**

PARTICULARS OF ILLEGALITY/ FRAUD

- a) Despite having notice that the plaintiffs and other beneficiaries of the estate of Stanley Sebuufu Semambo were in possession and or occupation of the suit Property, Jack Mishambi (deceased) falsely declared to the Uganda Land Commission in the application for a lease that the Suit Property was unoccupied;**
- b) Failing to notify and or seek the consent of the Plaintiffs and other occupants of the Suit Property during the application for a lease and issue of a certificate of title over the suit property.**
- c) Failing to comply with all the requirements of the law concerning the grant of a lease and certificate of title over public land such as the suit property.**

d) **Knowingly providing false and misleading information in the application for a lease over the Suit Property."**

Order 7 Rule 11 of the **Civil Procedure Rules, S.I 71-1** states:

"The Plaint shall be rejected in the following cases-

(a) Where it does not disclose a cause of action"

The plaintiff must show that the plaintiff had a right, which right was violated by the defendants. **See: Auto Garage and Anor vs Motokov [No.3] [1971] EA 514.**

In Attorney General vs Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997, Wako Wambuzi CJ. cited with approval the following statement from Mulla's Code of Civil Procedure which defined a cause of action as follows:

"A cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words it is a bundle of facts which, taken with the law applicable to them gives the plaintiff a right to claim relief against the defendants. It must include some act done by the defendant since the absence of such an act, no cause of action can possibly accrue....Everything which if not proved, would give the defendant a right to an immediate judgment must be part of the cause of action... the cause of action must be antecedent to the institution of the suit."

In Narottam Bhatia & another vs. Boutique Shazim Ltd, Supreme Court Civil Appeal No. 16 of 2009, Kitumba, JSC. after agreeing with the definition of cause of action in the **Tinyefuza case (supra)** further observed that:

"I respectively agree with that statement that such facts must be alleged in the plaint to decide that the cause of action has been disclosed. One must also look at the plaint and annexures thereto. One must also assume that the facts as alleged are true."

Upon review of the plaint and its annexures in the present case, the case for the appellants was that they were successors in title to the late Stanley Sebuufu Semambo, who was a lawful occupant on the suit land, at the time the respondent's predecessor in title acquired a lease from Uganda Land Commission in 1993. The appellants further pleaded, that the respondent's predecessor in title had through some fraudulent and/or illegal act or omission obtained a certificate of title for the suit land, with an aim of defeating their interests as lawful occupants, on the suit property. A perusal of the plaint indicates that the appellants brought out a number of particulars of fraud in their plaint, which the trial Court ought to have inquired into. I, therefore, find, that the appellants disclosed a cause of action against the respondent contrary to the findings of the learned trial Judge. Grounds 2 and 3 would, therefore succeed.

Issue 2: Whether the appellants' suit in the High court was time barred

Having found that the appellants' cause of action against the respondent was for protection of their rights as lawful occupants on the suit land, I will now proceed to determine whether that cause of action was time-barred at the time of the institution of the suit in 2009.

The rights of tenants by occupancy are guaranteed by **Article 237 (8)** of the **1995 Constitution**, as well as, **Section 31 (1) of the Land Act, Cap. 227 (as amended)**. Those provisions are reproduced below:

Article 237 (8) of the **1995 Constitution** provides that:

"Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bonafide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."

Section 31 (1) of the **Land Act, Cap. 227 (as amended)** provides that:

"A tenant by occupancy on registered land shall enjoy security of occupancy on the land."

In his ruling, the learned trial Judge handled the issue of limitation at page 65 of the record as follows:

"In the result, I hold that the suit by the plaintiffs is for recovery of land and sections 5 and 6 (1) of the Limitation Act, Cap. 80 are applicable as against the plaintiffs. The time to bring the suit against the defendant and the late Jack Mishambi started running in 1991 when the defendant and her family bought and occupied the suit property in the presence of the plaintiffs who are saying that they were residing on the suit land. Hence the plaintiffs cannot bring an action to recover the suit land from the defendant in 2009, that is, after 17 years. The plaintiff's suit is incompetent, a nullity and cannot be sustained against the defendant as it is time barred..."

I am inclined to accept the submissions by counsel for the appellants that the learned trial Judge based his ruling on the question of limitation on a wrong premise that the appellants' suit was for the recovery of land and was time-barred under the Limitation Act, Cap.80. As I have earlier on found, the appellants' suit was premised on protection of their rights as tenants by occupancy. I am more fortified in my said finding by the reliefs sought by the plaintiffs under paragraph **3 (b)** and **3 (c)** of the plaint which state as follows:

" 3. The plaintiffs bring this suit seeking the following orders:

- a) ...
- b) A declaration that the plaintiffs and other beneficiaries of the estate of Stanley Sebuufu Semambo are lawful occupants and are entitled to enjoy security of occupancy of the Suit Property;**
- c) A permanent injunction restraining the defendant from evicting the plaintiffs and other beneficiaries of the estate of the late Stanley Sebuufu Semambo from the suit property"**

The appellants pleaded that the respondent had shown them a lease title to the suit property in 2008, and had thereafter threatened to evict them from the said property. The truth or otherwise of this is to be proved in evidence. And if the appellants brought a suit for the protection of their security of tenure as tenants by occupancy, the issue of limitation could not have arisen.

I accept the submissions by counsel for the appellants that the Limitation Act, Cap. 80 was not applicable to the present case.

I further note that the security of tenants by occupancy is guaranteed by the 1995 Constitution and the Land Act, Cap. 227 which are silent on the issue of limitation. In my view, had it been the intention of parliament at the time of passing the Land Act, Cap. 227, that there was a limitation period for suits for protection of the security of tenure of tenants by occupancy, they would have expressly stated so in the Act. For the above stated reasons, I, find that the appellants' suit was not time barred at the time it was instituted and in the result, ground 1 of this appeal, too, hereby succeeds.

The above findings are sufficient for me to find merit in this appeal and order that High Court Civil Suit No. 55 of 2009 be sent back to the High Court, to be placed before another Judge for hearing on its merits. I also find that the above findings render consideration of grounds 4 and 5 of this appeal academic. Hence I find it unnecessary to resolve them.

Accordingly, I would allow this appeal with costs.

I would order that the file be sent back to the High Court for trial before another Judge.

Dated at Kampala this 19th day of July, 2019.



.....
Elizabeth Musoke
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke & Obura, JJA]

Civil Appeal No. 34 of 2011

(Arising from High Court Civil Suit No. 055 of 2009)

BETWEEN

1.Ruth Semambo
2.Sarah Kikomeko
3.Edith Ndibalwanya
4.Nelson Kiwanuke Walonze
5.Arthur J. Katongole



Appellants

AND

Sheila Kawamara Mishambi=====Respondent

(On appeal from a decision of the High Court of Uganda (Murangira, J.) delivered on 12th January 2011)

Judgment of Fredrick Egonda-Ntende, JA

- [1] I have had the opportunity of reading in draft the judgment of my sister, Musoke, JA., and I agree that this appeal should succeed. The facts have been ably set out in her judgment and I need not repeat them.
- [2] I wish only to add that on the pleadings before the trial court this matter could not have been determined on a preliminary objection without hearing the evidence in the case. Time started to run, if at all, only when the appellants became aware that the respondent's predecessor in title had laid claim to the land they were occupying which was in 2008.

[3] It is not until the evidence in the case would have been heard and considered by the learned trial judge that it would have been objectively possible to determine whether or not the plaintiff's claims were true or false with regard to this matter.

[4] I agree that the appeal in this case ought to succeed.

Decision

[5] As Obura, JA, agrees this appeal is allowed with costs. The ruling of the High Court is set aside. The matter is remitted back to the High Court for trial before another judge.

Dated, signed and delivered at Kampala this 19th day of July 2019


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 34 OF 2011

(Appeal from the ruling of High Court of Uganda at Kampala (Land Division) before Murangira, J delivered on 12th January 2011 in HCCS No. 055 of 2009)

1. RUTH SEMAMBO
2. SARAH KIKOMEKO
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4. NELSON KIWANUKA WALONZE
5. ARTHUR J. KATONGOLE:.....:APPELLANT

VERSUS

SHEILA KAWAMARA MISHAMBI:.....:RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment prepared by my learned sister, Elizabeth Musoke, JA. I concur with her findings and order that the file be sent back to the High Court for trial before another Judge.

Dated at Kampala this.....19th.....day of.....July.....2019.



Hellen Obura

JUSTICE OF APPEAL