

5

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

Coram: Owiny-Dollo DCJ, Kakuru & Tuhaise, JJA

Civil Appeal No. 118 of 2018

10

Rose N. Namukasa,
Administrator of the estate of the
late M.N Sesiriya (suing through
her lawful attorney
Nelson Dhibikirwa) Appellant

15

Versus

- 1. Simbwa Isaac**
- 2. Namutumba Construction Ltd**
- 20 **3. Geo Oils (U) Ltd Respondents**
- 4. The Commissioner Land Registration**
- 5. Buyanga Multiservices Ltd**

[Appeal arising from the ruling of Bashaija Andrew J, delivered on 5th March 2018, in High Court Civil Suit No. 31 of 2014]

25

Judgment of the Court

The background to this appeal is that the appellant, who was the plaintiff at the High Court, filed Civil Suit No. 31 of 2014 against the defendants, now respondents, in 2014. She later amended the
30 **plaint on 12th February 2015, where she sought recovery of land formerly known as plot 27 Katabi Busambaga, now comprised in FRV 1006 folio 13 plot 8A-12A Busambaga Crescent herein referred to as the suit land.**



5 When the trial commenced, the 5th respondent's counsel raised a preliminary objection on a point of law that the suit was barred in time. It was upheld by the trial Judge. The appellant was dissatisfied with the ruling and she filed this appeal, on the following grounds:-

- 10 1. The learned Judge erred in law and in fact when he held that the suit was barred by time.
2. The learned Judge erred in law and in fact when he held that the plaintiff had no cause of action against the defendants.
- 15 3. The learned Judge erred in law and in fact when he dismissed the suit and granted costs to the defendants.

Representation

At the hearing of this appeal, Mr. Mukuve Mugagga Karemire, learned Counsel, represented the appellant. Mr. Adubango Richard, learned Counsel, represented the 2nd and 3rd respondents. Mr. Abraham Mpumwire, learned Counsel, represented the 5th respondent.

Submissions for the Appellant

Mr. Mukuve submitted that the learned trial Judge arrived at the finding that the suit was barred by limitation by looking at the facts pleaded in the plaint, to the effect that it was brought to the appellant's attention that there was a person attempting to encroach on the land, and she took steps which saw that person's successful removal from the property; that subsequent to that, the 1st 2nd and 3rd defendants came in and perpetuated what was alleged as fraud; and that the land was originally customary land until the 1st, 2nd and 3rd defendants brought it under the Registration of Titles Act.

Counsel submitted that the 2nd and 3rd respondents do not claim their title from Khalid Masanga, the first person to encroach on

5 the suit land, but rather, from the 1st respondent. He maintained
that the 2nd and 3rd respondents took the suit land in 2011; and
that the suit was filed on 21st day of January 2014. According to
Counsel, the cause of action occurred in 2011, which was within
10 the 12 year period; that therefore the learned trial Judge erred in
law and fact when he held that the suit was barred by time.


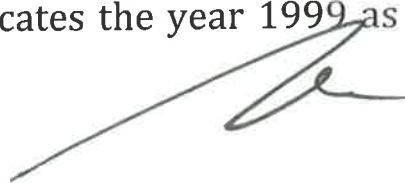

Counsel also submitted that the appellant never sued Khalid
Masanga who encroached on the suit land in 2000, because
Masanga abandoned his quest to encroach on the land.

15 Counsel referred this Court to paragraph 6 (m) of the amended
plaint which states that in May 2011, Nabuuma stole copies of the
documents and used them to apply for registration of property in
favour of the 1st defendant. He submitted that this indicates when
the chain started. He argued that the respondent's title is not
rooted in Khalid Masanga the person who first encroached on the
20 suit land. He maintained that the respondents themselves in their
written statement of defence stated that Khalid Masanga has
never been on this land and what he was alleging is air, which is
why they cannot now claim that they are connected to him.

25 Counsel further submitted that the basis for the learned trial
Judge's dismissing the suit was that he agreed with the 5th
respondent's submissions that the plaintiff should have in actual
sense sued Khalid Masanga, that because she did not sue him in
the year 2000, then her action is time barred. Counsel maintained,
however, that the respondents' title is not rooted in Khalid
30 Masanga.

Submissions for the 2nd and 3rd Respondents

Mr. Aduango submitted that the learned trial Judge did not err
when he dismissed the suit. He referred this Court to paragraph 6
(f) of the plaint which indicates the year 1999 as the time when


3


5 the appellant became of age; and paragraph 6 (g) which refers to
2000 as the time when she discovered that Khalid Masanga had
put up a school on the land. Counsel submitted that the 1st
respondent is the one who sold the suit land to George Kibwika;
that apparently the appellant has never been in occupation of the
10 suit land; and that there is a case between Simbwa Isaac and some
other 4 defendants. According to Counsel, this shows that the 1st
respondent also was laying claim against the 4 respondents in
this appeal. He maintained that this is what paves way to George
Kibwika taking over the land. Counsel wondered where the
15 plaintiff has been all this time.

Submissions for the 5th Respondent

Mr. Mpumwire submitted that, in paragraph 6 (g) of the amended
plaint, the plaintiff states the facts that set out the cause of action
clearly; that in 2000 upon visiting the land, she discovered that a
20 one Khalid Masanga had taken over the suit land. According to
Counsel, the plaintiff pleads that she had been dispossessed of the
suit land in 2000. He argued that under section 6 (1) of the
Limitation Act, time starts running when one is dispossessed of
the land. He also submitted that Khalid Masanga is not anywhere
25 in the proceedings before court.

Counsel further submitted that they signed a consent before the
learned trial Judge in which the 2nd and 3rd respondents had
pledged the suit land to the 5th respondent as security; that the 2nd
and 3rd respondents were undertaking to pay the mortgage to the
30 5th respondent; and that the 5th respondent is only interested in
securing the interest of the mortgagee to recover the money
under the mortgage.

Consideration of the appeal.

5 At the hearing of this appeal, learned Counsel made oral
submissions for the respective parties they represented. We
allowed the appeal immediately after listening to the submissions
of the parties to the appeal. We informed the parties and their
respective counsel that we would give the reasons for the
10 decision on notice, which we now proceed to do.

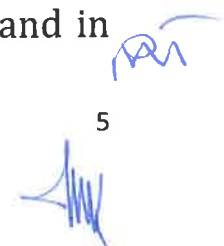
Ground 1

The issue for determination on this ground is whether High Court
Civil Suit No. 31 of 2014 is barred by time.

15 It is evident at pages 8 and 9 of the learned trial Judge's ruling, on
record, that he relied on paragraph 6 (g) of the amended plaint to
identify the date on which the cause of action arose. The said
paragraph states as follows:-

20 *6 (g) "The plaintiff thereafter started visiting the kibanja
every so often to check on its status. In 2000 upon one such
visit she discovered that certain individual had encroached on
the land. A one Khalid Masanga had put up a school on the
kibanja and had been allowing other people to cultivate
thereon. He had also demolished the developments that the
late Sesiriya had made on the kibanja and razed her grave
25 marks using a grader."*

According to the learned trial Judge, the cause of action started in
2000 when Khalid Masanga encroached on the suit land.
However, as is evident from the amended plaint on record, that
the said Khalid Masanga was not a party to the suit. As a matter of
fact, the same plaint in paragraph 6 (m) to (aa), in a narration,
30 pleads that the defendants (respondents in this appeal) entered
on the suit land in 2011 through the appellant's sister, a one
Harriet Nabuuma, who approached Isaac Simbwa the 1st
defendant (1st respondent in this appeal) to register the land in



5 their own names, after which certificates of title were issued to the 1st defendant (1st respondent) who subsequently transferred to the 2nd defendant (2nd respondent) then the 3rd defendant (3rd respondent).

10 Paragraph 6 (p) of the amended plaint specifically pleads as follows;-

15 *6 (p) "In May 2011, shortly after jointly being introduced, the 1st defendant and Kibwika George then reappeared and purported to initiate negotiations for compensation with certain individuals who had previously been identified by the plaintiff as encroachers on the kibanja...."*

20 Thus, it is very clear that Khalid Masanga, though mentioned in the plaint as an encroacher since 2000, is not indicated in the plaint by the appellant as being the person through whom the respondents claim their title. The respondents, in their pleadings, do not claim their title through him either. The 2nd and 3rd respondents' written statement of defence also plead in paragraph 4, at page 123 of the record of appeal, that they purchased the land from Kibwika George and subsequently became registered owners of the suit land.

25 We find that, the cause of action initially arose around May 2011 when the 1st respondent started conducting negotiations regarding the suit land, subsequently surveying it and registering it in his names, and thereafter transferred the same into the names of the 2nd and 3rd respondents in October 2011.

30 The appellant pleads in paragraph 6 (v) to (z) of the amended plaint that she discovered this encroachment in 2011 with the aid of a one Dhibikirwa Nelson. The record shows that she filed the suit in the Land Division of the High Court in 2014, which is three years after the cause of action arose. This was therefore within

5 the limitation period specified in section 5 of the Limitation Act
Cap 80.

This would therefore mean that *High Court Civil Suit No. 31 of
2014: Rose N Namukasa Administrator of the estate of the late
10 M.N Sesiriya (suing through her lawful attorney Nelson
Dhibikirwa) Versus Simbwa Isaac & 4 Others*, is not barred by
time.

This ground of appeal succeeds.

Ground 2


The appellants faulted the learned trial Judge for finding that the
15 plaintiff had no cause of action against the defendants.

It is now settled law, as set out in *Auto Garage V Motokov (No.3)
(1971) EA 514*, that to establish whether or not there is a cause of
action the plaintiff must show that:-

- i) The plaintiff enjoyed a right
- 20 ii) The right has been violated, and
- iii) The defendant is liable.

The record in this appeal shows that the learned trial Judge based
his faulted finding on the appellant having no cause of action on
his earlier, also faulted, finding that the suit was barred by
25 limitation under section 5 of the Limitation Act, Cap 80, which
curtails the right of the plaintiff to institute actions for recovery of
land after 12 years have elapsed from the time the cause of action
arose.

We have already made a finding in ground 1 above that the
30 appellant's claim was not time barred, which means the learned
trial Judge's finding that it was time barred was an error in law
and in fact.



5 The amended plaint on the face of it shows that the appellant (plaintiff) was the owner of kibanja land; further that, in 2011 the 1st, 2nd and 3rd respondents encroached on her land and registered it in their respective names under the Registration of Titles Act.

10 In that regard, based on the decision in *Auto Garage V Motokov* (supra), the plaint in this case disclosed a cause of action.

We find that, this ground of appeal succeeds.

Ground 3

15 The record shows that the learned trial Judge relied on Order 7 rule 11 (d) of the Civil Procedure Rules (CPR) when he dismissed the suit.

Order 7 rule 11 (d) the CPR provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

20 Thus, the learned trial Judge erred when he dismissed the case instead of rejecting the plaint on grounds that it was time barred. He also erred in law when he awarded costs, because costs should not be awarded on rejection of the plaint.

This ground of appeal also succeeds.

25 **It is therefore hereby ordered that:-**

1. This appeal is allowed with costs to the appellant.
2. The ruling of the learned trial Judge on the preliminary points of law is set aside.
3. The file in High Court Civil Suit No. 31 of 2014 shall be sent
30 back to the trial court to be allocated to another Judge for trial.
4. The costs of this appeal shall be borne by the 5th respondent.

- 5 The Registrar of this court is hereby directed to send back this file to the High Court, Land Division before another Judge for hearing and deliberation of issues raised therein.

Dated at Kampala this 18th day of Feb 2020

10



Alfonse Owiny-Dollo
Deputy Chief Justice

15



Kenneth Kakuru
Justice of Appeal

20



Percy Night Tuhaise
Justice of Appeal

25

