HON. JUSTICE TSEKOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

H.C.CIVIL APPEAL NO.21/93

ERIZEFANI WEKIKYE :: ::::::::::::::::::::::::::::APPELLANT

V E R S U S

1. A. BAMUWAYIRA
2. S. MPAATA
3. E. MPAATA
4. W. MPAATA

::::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: THE HON. MR. JUSTICE C.M. KATO

J U D G M E N T

This judgment is in respect to an appeal by the appellant Erizefani Wekikye, the respondents are: A. Bamuwayira, S. Mpaata, E. Mpaata and W. Mpaata. It is a second appeal, the first having been to the chief magistrate's court at Jinja. The present appellant appeared as the plaintiff in the court of magistrate grade two at Iganga where he won the case and the present respondents lost. They appealed to the chief chief magistrate and they won the appeal, the present appellant being dissatisfied with the judgment of the chief magistrate appealed to this court.

The facts which gave rise to this litigation are to be found in the two judgments of the two lower courts where they (facts) are very well stated. Here it will suffice to give the gist of the matter. The appellant's case is that his grandfather by the name of Mwambala left a piece of land now under dispute to the father of the appellant called Aloni Wekikye who also died leaving the land to the appellant. Later on the respondents started encroaching on the same piece of land when the appellant was staying in a different place.

The case for the respondents has been that the land has never belonged to the appellant's father or grandfather. According to them the land under dispute belonged to their grandfather called Rubale. Rubale left the land to his son called Mpaata and Mpaata in turn left the same piece of land to the present respondents who are his sons.

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The respondents admit that the late Wekikye had a piece of land within that vicinity but when he was moving to another area called Butalango he gave his piece of land to the church of Uganda and the remaining portion he exchanged with a mularo called Ibrahim Luwezi for two cows. The appellants are adamant that the land under dispute is theirs.

One point not in dispute is that the appellant did not grow in that area his father having migrated to Butalango when the appellant was still a child.

The grounds of appeal before this court are three namely:-

1. The learned chief magistrate misdirected herself in law and fact when she failed to consider seriously whether the law of Limitation Act was applicable to the instant case, whereas the respondents only exhibited their adverse claim of right over the said land in 1988 when the appellant visited the land to cement the grave of his grandfather the late Mwambala as owner and customary heir to Aloni Wekikye.

2. The learned chief magistrate erred in law and fact when she failed to consider as to what period did the cause of action arise as between the respondents and the appellants, whereas it was on record that the proceedings in regard to the adverse claim of right by the respondents over the said land were first instituted in RC III court in 1988 which resulted in an order by the chief magistrate exercising her supervisory powers under the R.C. (Judicial Power)/ ordered a retrial before grade II magistrate Iganga, which suit was filed in 1989.

3. The learned chief magistrate misdirected herself in law and fact when she failed to consider seriously that under customary law the burial grounds of a given family/clan is an undisputed property of the family where their dead are buried.

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I will deal with these grounds of appeal according to the order in which they are listed above, starting with the first ground first, needless to say that this being a second appeal the court is more concerned with points of law rather than points of fact. Mr. Kaala who appeared for the appellant strongly argued that the learned chief magistrate was wrong when she failed to consider seriously the question of whether or not Limitation Act applied to the present case, in his view the Limitation Act did not apply to a case of this nature because the parties were not strangers to one another but brothers, he made this point in an effort to distinguish the case of: Florence Joyce Mutesi v Andereya Kinyamule /1976/HCB 4 from the present case. On the other hand Mr. Mutyabule the learned counsel for the respondents was of the view that the Provisions of Limitation Act applied to the present case.

With due respect to the learned counsel for the appellant, I do not agreed with him when he says that the learned chief magistrate did not give a serious thought to the issue of Limitation Act. The learned chief magistrate gave considerable thought to the issue of Limitation at page 4 of her judgment where she held that the Limitation Act applied to customary tenure and therefore to the present case. What may possibly be said with some justification is that she was wrong in her holding that the Act applied to the present case. This being an action in trespass time begins to run against the plaintiff from the day the act of trespass stops, but in the present case the alleged trespass is contineous so long as the respondents have not left the land in question. The best course to adopt when computing time in a case like this one is to ignore the time that is caught by the Limitation Act but take the time which is till running in favour of the plaintiff.

As regards to the case of Mutesi (Supra) upon which the learned chief magistrate based her decision, I have found that authority at times to be rather contradictory in itself because in the same case it was stated that customary law knows no Limitation, at the same time it was held that the

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the same case was caught by the Provisions of section 6 of the Limitation Act. These two conflicting views in the same case puts that authority to some doubt. Mr. Kaala tried to draw a distinction between the present case and Mutesi's case (Supra). I find the distinction rather illogical from legal point of view because I cannot see why the same principle of law should be applied differently simply because parties are related to one another.

Be that as it may, I find that the provisions of the Limitation Act do not apply to the present case which involves an alleged tort of trespass which has not ceased. The first ground of appeal is upheld albeit for different reasons from those advanced by the learned counsel for the appellant. This holding also disposes of the second ground of appeal which was in fact related to the first ground.

That leads me to the third and last ground of this appeal. In that ground it is being said that the learned chief magistrate erred in law and fact when she failed to acknowledge that by custom the burial ground is a family property where members of the family must be burried. On that ground Mr. Mutyabule argued that the appellant did not lodge this suit as a representative of the family but he filed the case in his own capacity. He also opined that there is no kisoga custom which makes a burial ground a family property. It must be pointed out here that existence or none existence of a custom is a matter of fact which must be proved by evidence by the party who wishes to rely upon that custom: Ernest Kinyanjwi Kimani v Muiru Kikanga & another /1965/ EA 735. R v Ndembera s/o Mwandawale/1947/14 EACA 85 and R v Kiswaga /1948/15 EACA 50 (See also sections 100-102 inclusive of the Evidence Act). In the instant case there was no evidence on record to establish that there exists Kisoga customary law which says that a burial ground is a family property.

Even if Mr. Kaala's argument was to be held as having been proved still this ground of appeal would have remained unhelpful to the appellant for two reasons:-

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In the first place of appellant and respondents are third causins, their fathers having been first causins and their grandfather(Rubale and Mwambala) having been brothers which means they share one common great grandfather and that makes them members of the same family. That being the case they would all be beneficiaries of the so-called family property, then what right would the appellant have to complain when that land is being occupied by the same members for whom it is meant to occupy? The second reason which makes the argument self-defeating is that if that family property was intended for burial of all members of the family, then how is it that the appellants' own father was never buried on that piece of land but in some other place at Mutalango?

In the course of his argument Mr. Mutyabule raised a simple but important point when he said that the trial magistrate grade II had felt embarrassed to have made his decision against the respondents in favour of the appellant, that statement has prompted me to have a glance at the long and well reasoned judgment of grade II magistrate. At page 53 of the judgment he said: ".....I do agree with their counsel that it is unfair to evict them and it is contrary to the laws of equity and even common sense" then at page 54 he proceeds to say:
".....I feel it is very difficult and embarrassing for this court to order eviction for the defendants and to separate them from the members of their clan which include the plaintiff and Mutekanga". The trial magistrate having made the above findings it was illogical for him to depart from them (findings) and hold that the present respondents should be evicted, the learned chief magistrate was quite in order when she held that the trial magistrate had come to the wrong decision; in my view the learned chief magistrate correctly applied the decision of this court in the case of:
Alexious Olowo v Ignatiyo Akenya/1974/ HCB 207 to the present case.

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Considering the fact that the appellant did not pay anything for the land; that he did not develop the land at all, that he has never settled on the land since his childhood; that his father abandoned the land as far back as 1920 and he had moved to another place called Butalango where he died and was buried; that the respondents some of whom are over 70 years old have been living on the land since their birth; that the respondents have now developed the area; that the respondents are members of the same clan to whom the land is said to belong; and bearing in mind the old latin legal jargon;

"In aequali jure melior est conditio possidents" (where the legal rights of the parties are equal, the party with possession is in a stronger position) I find that the judgment of the learned chief magistrate is proper and it should not be disturbed, to do so would result in grave injustice and inequity.

The position being what it is the appeal is dismissed with costs of this appeal and courts below to the respondents.

C.M. KATO
JUDGE
5/4/94

5/4/94: Mutyabule for respondents.
Appellant present.
1st and 2nd respondents present.
3rd and 4th respondents absent.
Kaala for appellant absent.
Kiige court clerk.

Court: Judgment is delivered, signed and dated.

C.M. AKTO
JUDGE
5/4/94