IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 106 of 2018

In the matter between

OTTO HILLARY **APPELLANT**

And

1.ACEN SIDONO
2.OKELLO SANTO **RESPONDENTS**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— Limitation — Section 5 and 16 of The Limitation Act — no action may 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 and time begins to run from the date of the adverse possession. Time ceases to run against a claimant when he or she commences proceedings — Section 21 of The Limitation Act — time may be extended whereupon the suit may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability. A litigant takes advantage of the provision when he or she puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim. This disability must be pleaded as required by Order 7 rule 6 of The Civil Procedure Rules, which was not done in the instant case.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery approximately 50 acres of land situated at Otumpili North village, Otumpili Parish, Lokole sub-county, in Agago District, a declaration that the appellant is the rightful owner of the land in dispute, an order of vacant possession, general and special damages for trespass to land, a permanent injunction and the costs of the suit. His claim was that he inherited the land in dispute from his late father Akochi Dalmaso in 1971. During or around the year 1982, he was forced to vacate the land by reason of cattle raids by the Karimojong. He returned to the land in 1984. The respondents without any claim of right, took advantage of his absence and encroached onto the land, thereby cutting down his trees for charcoal burning and thereafter opening up gardens for the cultivation of crops. He sued them before the L.C. Courts which failed to resolve the dispute, hence the suit.

[2] In their joint written statement of defence, the respondents refuted the appellant's claim and averred instead that the land in dispute is located at Ogwari village and not Otumpili North village. It measures approximately 100 acres and not 50 acres as claimed by the appellant. The land belonged to the late Odong Thomas, husband of the 1st respondent who acquired it in 1950 as vacant unclaimed land covered by a thick forest. He lived on the land and had gardens thereon until his death in the year 2014, whereupon the 1st respondent inherited it. The appellant's land is South of the one in dispute and he has no claim to the land. They prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[3] P.W.1 Otto Hillary, the appellant, testified that he inherited the land in dispute form his father the late Akochi Dalmaso in 1971. The dispute over the land began in the year 2015 when the respondent entered onto it, cut down trees for charcoal burning and opened up gardens for growing seasonal food crops. There

are no residences nor graves on the land. During or around the year 1982, he was forced to vacate the land by reason of cattle raids by the Karimojong. He returned to the land in 1984. The respondents without any claim of right, took advantage of his absence and encroached onto the land, thereby cutting down his trees for charcoal burning and thereafter opening up gardens for the cultivation of seasonal food crops. He sued them before the L.C. Courts which failed to resolve the dispute, hence the suit. The 1st respondent's late husband Odong Thomas came to the area in 1963 and obtained two gardens on Saul Labongo's land and that is where the respondents reside to-date.

[4] P.W.2 Odong Alexander, elder brother of the 1st respondent, testified that he is a neighbour to the East of the land in dispute. The 50 acres in dispute was vacant land before the appellant acquired it in 1972. The appellant's grandfather named the land *Bung-Laywee*. The appellant has a home, trees and gardens on the land in dispute. The respondents are not neighbours to the land. The 1st respondent has land at Orina village in Adilang. P.W.3 Otto Livingstone testified that he is one of the neighbours to the land in dispute which in the past belonged to the appellant's late father, Okubu. Upon his death, the appellant inherited it and cultivated it until he was restrained by a court injunction. The respondents live together as mother and son at Ogwari village in Lokole sub-county. The respondents once had gardens on two cares of the land in dispute but were stopped and they left. There are mango trees and former homesteads of the appellant and members of his family, on the land. The 1st respondent was given the two acres by her father, Okidi Apetomoi and se is still occupying that land but had exceeded the boundaries.

[5] P.W.4 Ayo Sofia testified that she is one of the neighbours to the land in dispute. The respondents live together as mother and son at Ogwari village in Lokole sub-county. The land in dispute belonged to the grandfather of the appellant, Okech Joseph. It is the appellant's father the late Akochi Dalmaso who gave the land to him. The respondents took possession of the land yet they live far away from it.

They have gardens on the land. The appellant lived on the land in the past and there are remains of his homestead. The 1st respondent has land at Ogwari village where her husband, the late Odong Thomas, left her. She has never seen the appellant or any of the respondents tilling the land.

The respondents' evidence in the court below:

[6] Testifying in his defence as D.W.1 Okello Santo, the 2nd respondent, stated that the land in dispute is situated at Otumpili village and not Ogwari village. It belonged to his late father Odong Thomas, who left them in possession when he died. He was born on that land and has lived there on all his life. His late father had multiple bee hives on the land. A footpath marks the boundary between their land and that of the appellant. D.W.2 Acen Sidonia, the 1st respondent, testified that the land in dispute belonged to her late husband, Odong Thomas, who acquired it as vacant unclaimed land.

[7] D.W.3 Okot Aquilino, testified that the land in dispute is situated at Ogwari village and not Otumpili North village. By the time he became of age in 1962, he found Odong Thomas in occupation of the land in dispute. The common boundary between the land in dispute and that of the respondents was marked by a footpath and a line of a tamarind tree, an Oduku tree, Kwogo tree and Obedo tree. D.W.4 Labeja Tarasio alias Limdit, testified that he is a neighbour to the land across a stream that serves as the common boundary. The land is located at Ogwari village in Otumpili Parish. By 1958, the late Odong Thomas was in occupation of the land in dispute. It is the late Odong Thomas' children and his widow in occupation of the land.

Proceedings at the *locus in quo*:

[8] The court visited the *locus in quo* on 22nd October, 2018 where the trial Magistrate estimated the land in dispute to be approximately 100 acres. The

appellant stated it was 50 cares and he occupied it for nine years before he vacated in 1980 and re-located to a place about a kilometre away due to insurgency. The 1st respondent was given only two acres of the land. The 2nd respondent stated that the appellant was only a neighbour to the South of the land in dispute where he owns two gardens. He was born on the land in dispute in 1962 and his family has been cultivating it all along. They now use it for cultivation only. A sketch map was drawn indicating the appellant's former homestead is on two acres, 150 meters South of the land in dispute. P.W.2 Odong Alexander and D.W.3 Okot Aquilino are immediate neighbours to the East of the land in dispute, across the footpath to Widyol, while D.W.4 Labeja Tarasio alias Limdit is an immediate neighbour to the North of the land in dispute, across Akworo Stream.

Judgment of the court below:

[9] In his judgment delivered on 5th December, 2018, the trial Magistrate stated that at the *locus in quo*, the appellant conceded that two acres out of the land in dispute belong to the 1st respondent, a fact he never pleaded. It was established at the *locus in quo* that Otumpili North village is a recent creature as a result of the subdivision of Ogwari village but both villages are in Otumpili Parish. There was no evidence of mature trees or homesteads on the land in dispute, it was all bush. The spot showed to court by the appellant as the location of his former homestead was approximately 150 meters away for the approximately 50 acres of land in dispute. The appellant did not adduce any evidence showing that he has ever been in possession of the land in dispute, to the required standard. He admitted that the respondents had occupied part of the land since 1963, with the permission of his late father. The evidence he adduced only showed that he was neighbour to the North of the land in dispute. Although he claims that the trespass occurred in 1984, he filed the suit in 2015, a spell of 31 years after the fact. The suit is accordingly barred by limitation. The respondents have been in adverse possession of the land for that long and their occupation cannot be

disturbed. Whereas the testimony of the appellant and his witnesses was contradictory, that of the respondents was truthful and credible. The respondents cannot be trespassers on their own land. The appellant having failed to prove his case, it was dismissed with costs to the respondents.

The grounds of appeal:

[10] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The trial Court erred in law and fact when it failed to properly evaluate the evidence on record, thereby arriving at a wrong conclusion that the respondents are the customary owners of the suit land.
2. The trial Court erred in law and fact when it held that the appellant's action is barred by limitation and thus the respondents are adverse possessors, thereby occasioning a miscarriage of justice.
3. The trial Court erred in law and fact by failing to properly conduct proceedings at the *locus in quo*, thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[11] In their submissions, counsel for the appellant submitted that the trial Magistrate ignored evidence to the effect that the appellant had used the land for cultivation, he had a former homestead on the land and the respondent had cut down his trees for charcoal burning. The fact that the appellant's former homestead was 150 meters away from the land in dispute should not have been used against him since unlike the respondents who have to travel 2 kms from Ogwari village to Otumpili North village for cultivation only, the appellant was resident on the land. In considering limitation, the period of insurgency should have been discounted. The respondents were not in adverse possession since the appellant admitted that his father had given the 1st respondent's husband only two acres of the land.

There were no bee hives, gardens, former homesteads or other evidence occupation as claimed by the respondents. Instead the court found that the respondents live about 2 kms from the land in dispute, which was approximately 50 acres as claimed by the appellant contrary to the respondent's claim that it was about 100 acres big. The appeal therefore ought to be allowed.

Arguments of Counsel for the respondents:

[12] In response, counsel for the respondents submitted that the first ground is too general and ought to be struck out. The evidence before the trial court showed that the respondents have been in occupation of the land in dispute since 1950 until the appellant filed the suit in 2015. At the *locus in quo*, whereas the appellant's former homestead was found 150 meters North of the land in dispute, the respondents were found in actual occupation, with gardens on the land. The trial Magistrate came to the right conclusion and therefore the appeal ought to be dismissed.

Duties of a first appellate court:

[13] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[14] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the

witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground one struck out for being too general.

[15] In agreement with counsel for the respondents, I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition (especially when there are no reasonable grounds to think that fish of the relevant type are in the pond) at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Ground three; errors in conducting the proceedings at the *Locus in quo.*

[16] By the third ground of appeal, it is contended that the trial court failed to conduct proceedings at the *locus in quo* properly and eventually by not attaching sufficient weight to some of the observations made thereat. Visiting the *locus in quo* is intended to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81).*

[17] Therefore, at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court (see *Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13*). I have perused the record and this is what the court did. Weight is considered as part of general evaluation. There is no merit in this ground and it fails.

Ground two; courts' findings regarding the law on limitation and adverse possession.

[18] In the second ground of appeal, the trial court is faulted for its findings regarding the law of limitation and adverse possession, as it applies to the facts f this case. The appellant's case was that it is during the year 1984 that the respondents, without any claim of right, took advantage of his absence due to displacement by cattle rustlers, and encroached onto the land, thereby cutting down his trees for charcoal burning and thereafter opening up gardens for the cultivation of crops. Section 5 of *The Limitation Act*, provides that no action may 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. The activities complained of were alleged to have begun in the year 2014. According to section 16 of *The Limitation*

Act, time begins to run from the date of the adverse possession. Limitation begins to run from the date of the cause of action to the date of filing the suit (See *Miramago F. X. S. v. Attorney General [1979] HCB 24*). Since it was alleged that the adverse possession began in 1984, a suit filed in the year 2015 would clearly be time barred.

[19] Section 21 of *The Limitation Act* provides for extension of time whereupon the suit may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability. A litigant takes advantage of the provision when he or she puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim (see *Iga v. Makerere University [1972] EA 65).* This disability must be pleaded as required by Order 7 rule 6 of *The Civil Procedure Rules*, which was not done in the instant case.

[20] It is trite law that a plaint that does not plead such disability, where the cause of action is barred by limitation, is bad in law. The appellant in the instant case did not plead any disability that occurred after the year 1984 that would have justified extension of time up to the year 2015 when he filed the suit. In any event, even if a disability had existed, section 21 (1) (c) of *The Limitation Act* places the cap at "thirty year from the date on which the right of action accrued to that person." The suit was filed 31 years out of time.

[21] Time ceases to run against a claimant when he or she commences proceedings (see *Thompson v. Brown Construction [1981] 1 WLR 744* and *Dresser UK Ltd v. Falcongate Freight Management Ltd [1992] 1 QB 502, 517-518*). Had the appellant proved that he filed a suit before a court of competent jurisdiction within the limitation period, the fact that a retrial is subsequently ordered would not alter that fact. Once the suit was originally filed, the cause of action should be revived with an order of a retrial. There was no such proof offered.

[22] Counsel for the appellant argued that the court ought to have taken judicial notice of the fact of the Kony insurgency. Judicial notice has been taken before that the insurgency ended during the year 2006. The concession extended by section 21 (1) (c) of *The Limitation Act* would have entitled the appellant to file a suit within six years after the disability has ceased, hence latest by the end of the year 2012, yet he filed it in the year 2015. What Section 21 (1) (c) of *The Limitation Act* postulates is an extension of the period of limitation from the cessation of disability and not a postponement of the starting point to the cessation of disability. This argument therefore too is misconceived.

[23] Section 16 of *The Limitation Act* provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. 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.* Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*).

[24] 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. This means that since the appellant, by allowing his right to be extinguished by his inaction, could not recover the land from the respondents as persons in adverse possession. Uninterrupted and uncontested possession of land for a specified period, 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*). When the appellant's title to the land was extinguished, if it existed at all in the first place, his ownership of the land passed

on to the respondents and their adverse possessory right got transformed into ownership by operation of the law. The trial magistrate therefore was right in finding the appellant's suit to be time barred.

Order:

[25] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondents.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Obore, Adonga and Ogen Co. Advocates

For the respondent : M/s Oromba and Co. Advocates.