THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
LAND APPEAL NO. 0080 OF 2014

CHARLES MUNYAMBO AND 4 OTHERS ------------------ APPELLANTS

VS

LT. COL. BEN BINTABARA ------------------ RESPONDENT

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

The Lt. Col Ben Bintabara , hereinafter called ' the respondent,' sued the Charles Munyambo, hereinafter called the 1st Appellant, Kasapuri Denis, hereinafter called the 2nd Appellant, Bazirake Fred, hereinafter called the 3rd Appellant , Beyanga Amos , hereinafter called 'the 4th Appellant, and Bahungirehe Silaj, hereinafter called ' the 5th Appellant for trespassing upon his land at Kyamukwege in Kibaale district, herein after called 'the suit land', in the Magistrate Grade I Court at Kibaale. He sought for a declaration that the suit land belongs to him and that the respondents are trespassers, a permanent injunction, general damages and costs of the suit.

Briefly, the Respondent told court that he purchased 100 acres of land in 1978 from Eriya Mbarusha in Kibaale district and thereafter took possession of the land. However, being an army and having joined the national Resistance Army, he left the area to participate in the liberation war in the 1980s. That the 1st Appellant, who is his neighbor, without lawful cause crossed his boundary and trespassed on about four acres of his land. That after trespassing on the land, the 1st Appellant sold the suit land to the 2nd Appellant. The 2nd Appellant then sold the land to the 3rd Appellant. Furthermore, that the 1st Appellant, sold part of the land to the 4th Appellant, who also sold part of the land he had bought to the 5th Appellant.

The Respondent, at various times tried to use peaceful means to evict the Respondents from his land including involving the LCIII of Nalweyo, the Sub County Chief of Nalweyo, the LCI of Kyantale, the Police and court, without success. It is alleged that at all these occasions, the 1st Appellant would vacate the land and later come back necessitate the suit.

The 1st Appellants, from whom all the other Appellants derive title to the suit land testified in court that the suit land is part of his land which he was given in 1970. He told court that he came from Kabale, looking for land and that when he got to this area, he asked the Mutongole Chief and Chairperson of Mayumba Kumi to give him land. He was given a big chunk of land and that in consideration thereof, he gave the villagers local brew in accordance with the customs of the area. With regard to the trespass, the 1st Appellant denied having crossed his boundaries into the Respondent's land. All the Appellants filed a joint written statement of defense.

The trial Magistrate gave judgment in favour of the Respondent and declared the Appellants as trespassers. The Magistrate based his decision on the following factors, namely that:

- On the credibility of the Respondent's witnesses;
- Eriya Mbarusha sold land to the Respondent;
- That the Mutongole Chief who gave the 1st Appellant land did not have authority to give out the land;
- That the 1st Appellant was present and participated during the opening of the boundaries between his land and the Respondent;
- That 1st Appellant agreed to vacate the Respondent's land;
- That the 1st Appellant could not pass valid title to the rest of the Appellants since he did not have valid title to the land.
- The map of the land drawn by LC1 Chairperson of Kyamukwege Kyabeya on 22nd February 2002.
- That the Respondent was a bonafide occupant of the land.
- He also based his decision on the documents that the Respondent attached to his plaint.

The Appellant being aggrieved with the decision of the Magistrate Grade I, filed the present appeal.

The ground of appeal is:

- The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus leading him to a wrong decision;

- The Magistrate erred in law and fact when he failed to dismiss the case against the Appellants on the ground that it was barred by limitation.

As a first appellate court, it is my duty to subject the evidence to fresh evaluation but bearing in mind that I never had the opportunity of seeing and experiencing the witnesses. See: *Uganda Revenue Authority Versus Rwakasaija & 2 Others, Civil Appeal No. 08 Of 2007*.

However, before delving in the grounds of appeal, I will briefly set out the evidence to give context to the appeal.

The Evidence

The Respondent testified that he purchased 100 acres of land from Eriya Mbarusha in December 1978. The boundaries of the land where as follows: in the East, the land bordered Lamu Tukamuhabwa; in the west, the land borders the late Eriya Mberusha; in the north, the land borders Charles Munyambo and in the South, the land borders the late Sirasi Bitarabeho.

He says that in 1982 when, Charles Munyambo, Sirasi Bitarebeho, Robert Kabigumira, David Zirabusha and Eriya Mbarusha trespassed on his land, he reported the case to the Magistrate Grade II Court at Kakindo, where all of them were convicted. He says these people left the land but again returned when he left joined the NRA war liberation war. Later on, in 1992, the Respondent with the help of the RCIII, convened a meeting with the purpose of resolving the land dispute peacefully. According to the Respondent, the trespassers agreed to vacate the land peacefully. It was also agreed that the church and school, which had been built on the Respondent's land should be removed. A document dated 8th December 1992, was signed by all the parties.

Unfortunately, the 1st Appellant, came back to the land. In 1999, another meeting was convened between him and the Appellants to streamline the boundaries. At this meeting, it was established that the 1st Appellant had sold his land to Emmanuel and it was decided that the 1st Appellant gives

Emmanuel another piece of land. 35 people, who included the 1st Appellant signed a document dated 24th November 1999.

Despite this agreement, the 1st Appellant, sold the same piece of land he had earlier sold to Emmanuel to Kisapuli Denis (2nd Appellant) on 22nd February 2002. The 2nd Appellant, later on sold the same land to the 3rd Appellant. The 1st Appellant also cut down the boundary mark tree which the LCs and residents had planted to separate the land between the Respondent and 1st Appellant. He also testified that the 4th Appellant purchased part of his land from the 5th Appellant.

In cross examination by the 1st Appellant, the Respondent told court that he was not present on the village in 1970, when the 1st Appellant got the land. He also admitted that when he bought his land in 1978, the 1st Appellant was not called to witness the transaction. He also insisted that the 1st Appellant was present when the boundary marks were re-opened.

Kasapuri Curpu Mbogo (PW2) testified that the 1st Appellant was present during the opening of the boundaries of the Respondent's land. He also said that the 1st Appellant admitted to have sold part of the Respondent's land to Emmanuel Maririho, whom he agreed to remove from the land. He testified that the Respondent left him and John Mbaraka to care take the land. He testified that after some time, they discovered that the 1st Appellant had sold the Respondent's land to the 2nd Appellant, who also sold the land to the 3rd Respondent. In cross examination, PW2 told court that the testimony he had given related to what happened in 1999, when they opened the boundary marks of the Respondent's land. He also told court that he signed the 1999 documents as witness number 29.

Gabandi Sedrack (PW3) the LCI Chairperson of the Kyamukwege testified that on 24th November 1999, he joined the LCs and residents of the village to open boundaries of the Respondent's land. The 1st Appellant present. He said that on opening the boundaries it was established that the 1st Appellant had sold Samuel Manireho part of the Respondent's land. In cross examination, PW3 maintained that the 1st Appellant was present when the boundaries were opened.

Turyatemba William (PW4), a son to the late Eriya Mbarusha, confirmed that his late father sold land to the Respondent. He also confirmed the boundaries of the Respondent's land. PW4 was 14 years old, when his father sold the land.

The Appellant's case

The 1st Appellant testified that he came to Kyamukwege Village in 1970. He requested for land from Sali Joseph, a *Mutongole* chief and Sentongo Polito, the Chairperson of *Mayumba Kumi*, who gave him land in this village for free save for buying for the villagers, tonto, a local brew. The boundaries of his land are as follows: Abooli, in the East; Late Mbarushay Eriya, in the East; Edward Kamanyire in the North and the Respondent in the South. He did not know the acreage of the land but he described the land as being big. The 1st Appellant testified that he has lived on this land without a problem until the Respondent claimed part of his land in 1999. In cross examination, the 1st Appellant denied trespassing into the Respondent's land. He denied being sued by the Respondent over land. He denied ever participating in the opening of boundaries between his land and that of the Respondent. He also accused the Respondent of forging his signature on some of the documents that were presented in court.

Kasapuli Denis, testified that he bought land from the 1st Appellant. He also testified that he sold this land to the 3rd Appellant. In cross examination, Kasapuli testified that he purchased his land, after the Respondent had opened / cut the boundary and that the land was outside the Respondent's land. Baziraki Fred, testified that he bought land from Kasapuli Denis, measuring 1 and half acres. Beyanga Amos confirmed that he bought an acre of land from Bahungire Siraj, the 5th Appellant. Bahungire Silajji, testified that in 2000, he bought three acres of land from the 1st Appellant for 270,000/=.

Komunda Wilson (DW6) testified that they constructed a church in this area. The Respondent sued the people who had constructed the church. He said the court decided that the area where the church had been constructed was not for the Respondent but Banada Mutusi. He said that the Respondent was claiming land which was his. According to him the Respondent's land does not go up to the road. He testified that the boundaries of the 1st Appellant's land are a tree which has

nails, the swamp, a *muramura* tree in the middle of the boundary, Sirasi Bitatrebeho in the west and the church in the East. In cross examination Komunda told court that he has lived on this village since 1973. He testified further that he knew the boundaries of the 1st Appellant because he was the LCI chairperson. He also told court that the church never litigated with him over the land because the Reverends (religious leaders) feared him as a soldier. Lastly that the Respondent requested for a road (access) in 1984 from the church.

The court visited the locus in qou, where each side stuck to its position.

Consideration of the Appeal

I will now consider the grounds of appeal, which for emphasis are:

- The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus leading him to a wrong decision;

- The Magistrate erred in law and fact when he failed to dismiss the case against the Appellants on the ground that it was barred by limitation.

Arguments of the Appellant

Mr. Baryabanza, counsel for the Appellant argued all the grounds of appeal together

Mr. Baryabanza, counsel for the appellant argued the grounds together and I will also consider them as such. According to him, the main complaints of the Appellants were four , firstly, that the Respondent did not obtain valid title to the land since he did not seek permission from a prescribed authority in accordance with sections 4 and 5 of the Land Reform Decree; secondly, that the Respondent's suit was time barred; thirdly that there was no documentary proof to show that the Respondent purchased land and fourthly that the weight of evidence was in favour of the Appellants and that the documents relied upon by the court to give judgment in favour of the

Respondent were worthless. He specifically referred to the maps drawn by the Respondent and minutes of the local authorities concerning the land. I will now set out his arguments.

Mr. Baryabanza submitted that although the Magistrate held that that there was evidence that the Respondent purchased the suit land in 1978 measuring 100 acres, there was no documentary proof confirming the purchase.

Secondly, Mr. Baryabanza submitted that the purported purchase of the suit land by the Respondent was illegal. He submitted that section 4(1) and (2) of the Land Reform Decree prohibited anyone from selling land. Section 4 of the Land Reform Decree – a holder of any customary tenure on public land may after notice of not less than three months of the prescribed authority or any lesser period as the said authority may approve transfer such tenure by sale or gift inter vivo or otherwise subject to the conditions that such transfer shall not vest any title in the land to transferee except the improvements or developments carried out on the land.

He submitted that Subsection 2 thereof, made any agreement or transfer by a holder of a customary tenure purporting to transfer a customary nature as if it were actual tittle to the land shall be void and of no effect and in addition the person purporting to affect such transfer shall be guilty of an offense.

He submitted that there was no evidence that the Respondent first sought the permission of the prescribed authority before purchasing the land and that as such the Respondent's purchase of the land was void.

He also submitted that there was no evidence to show that the Respondent ever used the land to establish a customary interest in the same and that even if he had done so, section 5(1) of the Land Reform Decree prohibited occupation of public land without permission from the prescribed authority.

He criticized the Respondent for not calling the 1st appellant when he was buying land from Eriya Mbarusha, and that if he had done so, he would have avoided land disputes on over this land.

On the issue of limitation, counsel submitted that the dispute started in 1999 but the Respondent waited until 2003 when he filed the case against the Appellants. He submitted that the Respondent's action for recovery of land was barred by the statute of limitation, as it was brought outside the 12 years period.

Last but not least, counsel submitted that the trial magistrate erred in law when admitted a plan drawn by the Respondent as a plan drawn by Government. Lastly, counsel submitted that if the Magistrate had properly evaluated the evidence he would have found that the suit land belongs to the 1st Appellant who acquired his in 1970 and has used the same uninterrupted until 1999, when the Respondent laid claim to part of the land.

Arguments of the Respondent

Mr. Lubega, counsel for the Respondent strongly denied that the case for the Respondent was statured barred. He submitted that the case for the respondent was not an action for recovery of land but a case pitched in trespass which is a continuing tort and therefore not subject to the 12-year limitation period in the Limitation Act.

He referred the court to annexure C to the plaint, dated 8th December 1992, which showed that a land dispute between the Respondent and the Appellant and other people was resolved and an agreement was reached as to the boundaries between the warring parties. The same agreement was referred to in the document of 24th November 1999, again which related to settlement of land dispute between the parties.

He submitted that the 1st Appellant in 1999 vacated the Respondent's land but gain came back after displacing the caretakers, the Respondent had left on the land.

Secondly, counsel submitted that the Respondent established his case against the Appellant. He made reference to the participation of the 1st Appellant during the opening of the boundaries of the Respondent's land, where he never objected to the Respondent's claim and agreed to compensate Eriho Emmanuel, whom he had sold part of the Respondent's land.

With regard to the Respondent's purchase of the land being barred by the Land Reform Decree, counsel submitted that the Land Reform Decree did not stop people from buying and selling land. The sections referred to were not mandatory but permissive and that's why they are coached in the permissive language of may instead of shall.

He submitted that if the argument of the Appellant was to be accepted then everybody who bought land under the Land Reform Decree, then bought 'air' which cannot be true.

He submitted that while it was true that the 1st Appellant was not present when the Respondent bought land in 1978, his presence during the opening of boundaries in 1999, stops him from laying claim to the Respondent's land, particularly when he was ordered to give another piece of land to the person, he had unlawfully sold the Respondent's land.

He submitted that it was not true that the trial Magistrate solely relied on maps to decide the case in favour of the Respondent. The Magistrate relied on the boundary openings of the land between the respondent and 1st Appellant, the evidence of the respondent's witnesses to make his findings. Lastly, counsel for the Respondent submitted that the Respondent and the 1st Appellant have ever litigated over this land in Kakindu Magistrate Grade II Court.

Arguments of the Appellants in rejoinder

Mr. Baryabanza for the Appellants in rejoinder submitted that the 1st Appellant was not among the people who were present during the opening of the boundaries of the land between him and the Respondent. The 1st Appellant in cross examination strongly asserted that his signature had been forged.

He submitted that it was not true that the church was built on the Respondent's land. He said that according to DW6 the church was built on the land of Bernard Mutusi. I should however, note that this witness in cross examination said the Reverends never sued the Respondent over the land because they feared him as a soldier. This aspect of evidence would seem to suggest that the church was actually built on the land the Respondent had laid claim to.

Lastly, counsel for the Appellant submitted that all the documents that the Respondent had relied on were of no evidential value.

Resolution of the Appeal

The parties argued the grounds of appeal together and the following key issues emerged out of their arguments, which I will consider. The issues for consideration are:-

- Whether the Respondent obtained good title of the land;
- Whether the Respondent's suit was time barred;
- Whether the Appellants trespassed on the Respondent's land

But first, I must remind myself of the duty of the first appellate court, which is well stated in **Father Nanensio Begumisa and three others vs. Eric Tiberaga SCCA 17 of 2000**, where the Supreme Court held that:

It is 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 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 its own inference and conclusions.

Did the Respondent obtain good title to the suit land?

There is no doubt that the Respondent bought land in 1978 from Eriya Mbarusha While the Respondent was not able to produce his agreement which he explained had got lost in Kakindu court, Turyatemba William (PW4), the son of the Eriya Mbarusha, who was present and 14 years at the time his late father sold land to the Respondent confirmed that the Respondent did indeed buy land. Furthermore, all the Respondent's witnesses also confirmed that the Respondent had land in the area. There is no doubt therefore that the Respondent has land in this area. However, what is disputed is whether the Respondent obtained good title to the land.

Did the Respondent acquire good title to this land?

The case for the Appellant is that the Respondent did not acquire good title to this land because he obtained the land without seeking permission and notifying the prescribed authority in accordance with sections 4 and 5 of the Land Reform Decree. On the other hand, the Respondent, while admitting the applicability of the Land Reform Decree to the purchase of the land, he was of the view that it was not mandatory to seek permission from the prescribed authority and that to hold so would be absurd as it would mean that all people who acquired land during the application of the Land Reform Decree bought air.

The Land Reform Decree made all land in Uganda public land including all land held under customary tenure. Accordingly, restrictions and conditions were put on how people could deal with the land. In the case of land held under customary tenure, sections 4 and 5 of the Land Reform Decree were pertinent.

Section 4 of the land Reform Decree provides that:

A holder of any customary tenure on any public land may after notice of not less than three months of the prescribed authority or any lesser period as the said authority may approve transfer such tenure by sale or gift intervivos or otherwise subject to the conditions that such transfer shall not vest any title in the land to the transferee except the improvements or developments carried out on the land[1].

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An article by John Mugambwa, quoted from Journal of South Pacific Law (2007) 11 (1) , A comparative analysis of land tenure reform in Uganda and Papua New Guinea With respect to customary land tenure, the Decree removed the protection customary landowners had previously enjoyed under the *Public Lands Act 1969*. The Decree empowered the government to lease any land occupied by customary tenants to any person (including the occupants) without the consent of the occupants. The government's only legal obligation was to pay compensation for the improvements. The Decree also abolished the right hitherto enjoyed by indigenous Ugandans to occupy in accordance with their customary law any unalienated public land (outside urban areas) without prior permission.[27] The Decree made occupation of any public land without consent a criminal offence. If anyone was in doubt as to the status of customary tenure, section 3(2) of the Decree expressly declared that: 'For the avoidance of doubt, a customary occupation of public land shall be only at sufferance[28] and a lease of any such land may be granted to any

The import of this section is that anyone who wanted acquire a customary interest on public land had to notify and seek authority from the prescribed authority. In **Kampala District Land Board and Another vs. Venansio Babweyaka and others SCCA 2 of 2007**, the court held that restrictions on acquisitions of customary tenure under the Public Lands Act seem to have continued to govern all types of public land acquisitions including customary tenure subject to the provisions of the Decree. Similarly, in **Godfrey Ojwang vs. Wilson Bagonzi 2001- 2005 #HCB 74.**, it was held that a holder of customary tenure on public land had to give notice of not less than three months to the prescribed authority before selling or transferring his or her interest. The transfer would not vest title to the transferee except improvements or developments carried on onto the land. Any agreement or transfer by the holder of any customary tenure without the consent of the controlling authority is void.

The effect of these two decisions read together with section 4 of the Land Reform Decree made is that land held under customary tenure under the Land Reform Decree could not be sold or transferred without the parties give notice to and seeking notice from the prescribed authority or else such sales or transfers would be void. Sales were also limited to developments on the land , as customary tenants became tenants at sufferance as government could take and give away the land after paying for the developments

There was however, one challenge. While the prescribed authority for land held in urban areas was prescribed by the Minister under the Regulations made under the Public Lands Act, no effort was made by the Government t then to define who the prescribed authority was for purposes of giving notice and seeking authority to either buy or transfer a customary interest in the land. This point was recognized by the Supreme Court in **Paul Kisekka Saku vs The Seventh Day Adventist Church Association, SCCA 8 of 1993**, where Justice Odoki (JSC) as he then was observed that it was not very clear who the prescribed authority for purposes of the Decree was in

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person, including the holder of such a tenure, in accordance with this Decree.' Customary landowners retained a right to sell or donate their land, provided the transfer did not vest title in the transferee except over improvements over the land. Any agreement purporting to transfer customary tenure as if it were an actual title was void and constituted a criminal offence punishable by up to two years imprisonment.[29]

respect to customary tenure held in rural areas. The Court, indeed, went ahead and advised the Attorney General to address the lacuna in the law.

In the absence of the Land Reform Decree providing for who the prescribed authority was in sections 4 of the Decree, it is my considered view that sections 4 and 5 in respect of land held in rural areas remained inoperative and therefore people like the Respondent who did not seek the authority or did not notify the prescribed authority , should get the benefit of the doubt as it was not their responsibility to ensure that the law defines who the prescribed authority was for purposes of giving notice or seeking consent to either transfer or buy land held under customary tenure in the rural areas. The Respondent therefore obtained good title to the land by acquiring a customary interest therein which the seller had in the land.

The title of the Respondent in the land is protected by article 237 of the Constitutions which made a departure from the Land Reform Decree in the way land was owned in Uganda. Article 237 provides that:

Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

Paragraph 3 thereof, provides as follows:

Land in Uganda shall be owned in accordance with the following land tenure systems-

a) Customary;

b) Freehold;

c) Mailo and

d) leasehold.

The Respondent, who acquired a customary interest in the land is therefore protected by the Constitution.

Is the Respondent's action suit barred by the Limitation Act?

The case for the Appellant was that the Respondent's suit was barred by the Limitation Act because it was filed after 12 years from the date when the cause of action arose. On the other hand, the Respondent argued that his action was in trespass which is a continuing tort and that therefore, his action was not time barred. Section 5 of the Limitation Act provides that:

No action shall 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 or, if it first accrued to some other person through whom he or she claims, to that person.

While, section 6(1) provides that:

Where the person bringing an action to recover land .... has been in possession of the land, and has while been entitled to it been dispossessed or discontinued his or her possession, the right of action shall be deemed to have accrued on the date of dispossession or discontinuance.

According to the **Limitation Act**, actions for recovery of land must be brought within 12 years from the date when the cause of action accrued. Section 6(1) of the **Limitation Act** provides an exception to the 12-year rule in cases where the person who is bringing an action for recovery of land has either been dispossessed or his action has been discontinued. Such a person's cause of action accrues at the either the time of dispossession or disposition for purposes of calculating the 12 years set out in section 5 of the **Limitation Act**.

In the matter before me the Appellant submitted that the cause of action of the Respondent was time barred since it was brought after more 12 years, from 1999, when it first accrued. The Respondent, denied that the claim and insisted that his cause of action was in trespass. I have looked at the amended plaint which the Respondent filed. The claim is generally in trespass but when you look at paragraph 3(a) thereof, the Respondent asked the court to make a declaration that the suit land was his. Furthermore, the Respondent and all his witnesses all testified that the

land belongs to him and urged the court to restore the land to him. The Respondent's claim is therefore a mixture of two causes of action. In limitation, where a cause of action is mixed up with more than one cause of action and cannot be separated, the court looks at what is the core of the claim to determine where the cause of action falls. In this matter while I agree that there is an element of trespass to land in the Respondent's action, the real heart of the Respondent's action as determined by the weight of evidence and the prayers is for recovery of land and therefore, the Respondent's action must fit within section 5 of the Limitation Act.

Is the Respondent suit time barred?

From the record, I have established that the Respondent and the 1st Appellant have had running land disputes since 1992. In 1992, based on annexure C of the plaint, the dispute between the parties was settled by the RCIII Committee. The dispute again flared in 1999, which resulted in the opening and rectification of boundaries of the Respondent vis a vis the boundaries of the 1st Appellant. According to the evidence, at all the two occasions, the 1st Appellant agreed to vacate the Respondent's land. In 1999, the 1st Appellant vacated the Respondent's land and his land was left in the care of two caretakers, Kasapuri Curpu Mbogo (PW2) being one of them. It was the evidence of the Respondent and Kasapuri Curpu Mbogo (PW2), the caretaker that the 1st Appellant again retuned to the land after 1999. This is why on 21st April 2009, the clerk to the LCIII court of this area, wrote to the 1st Appellant and other people to vacate the Respondent's land. The relationship between the 1st Appellant and Respondent has therefore been one of cat and mouse.

I have laid out the chronology of the dispute between the parties to show that the cause of action first accrued in 1992. However, the parties agreed to solve the matter amicably and so that cause of action ended at that point. Then later on in 1999, the parties had another dispute and as before the 1st Appellant left the Respondent's land and the cause of action was terminated at the point left the land. After 1999, the 1st Appellant again retuned to the Respondent's land after the caretakers were threatened. While it is not clear when the 1st Appellant reentered the land after 1999, I can make reference to 2009, when the LCIII Court asked the 1st Appellant and others to vacate the Respondent's land as being close to when the 1st Appellant re-entered the land.

Therefore, applying section 6(1) of the **Limitation Act**, the cause of action in respect to the Respondent's action, did not accrue in 1999 but accrued at the point when the 1st Appellant re - entered the Respondent's land after he left the land in 1999, which I have ruled must have occurred close to 2009, when the Respondent through the LCs warned the 1st Appellant and others to vacate his land. This period between 2009 and 2013, when the Respondent filed his action is less than 12 years and as such the Respondent's action is not time bared.

Whether the Appellants are in possession of the Respondent's land?

The Respondent and his witnesses testified that the 1st Appellant first took possession of the Respondent's land and he sold the same to the 2nd Appellant, who also sold the same to other Appellants. The case of the Respondent was founded on the following:

- the testimony of the Respondent that he purchased land from Eriya Mbarusha in 1978.
- the knowledge by the Respondent of the boundaries of the land;
- Turyatemba William (PW4, the son to the late Erisa Marisa, was present during the time the Respondent bought the land.
- PW3 , equally confirmed the boundaries of the Respondent's land;
- The presence and participation of the 1st Appellant during the opening of the boundaries of the Respondent's land.
- The maps drawn by the Respondent and the LCs. I did not find merit in these maps and they are of no evidential value in the spirit the Appellants' counsel dismissed them.

The 1st Appellant's case and the other appellants was founded on the following:

- The 1st Appellant having been the first to come and occupy the land in the area, before the Respondent i.e. the 1st Appellant came to the area in 1970 while the Respondent bought his land in 1978;
- The non-participation and involvement of the 1st Appellant when the Respondent bought his land;
- Denial by the 1st Appellant that he never participated in the boundary opening of the Respondent's land in 1999.

- Denial by the 1st Appellant that he was ever taken to Kakindu court in 1992.

I have reviewed the respective cases of the parties and these are my observations:

Firstly, it is a good rule of practice that when purchasing untitled land – especially bibanjas or land held under customary tenure, all neighbors bordering the land being purchased should be involved unless the boundaries marks are very clear and the parties know each other and the area so well. The exclusion of the 1st Appellant when the late Erisa Mburusa sold land to the Respondent, was irregular but not fatal.

Secondly, while it is true that the 1st Appellant came to the area first, in 1970, before the Respondent, it does not mean that he cannot trespass on other persons land although it can be good indication of the fact that those who bought after him, bought land which had remained particularly, where the seller to the parties is the same. In this case, the Respondent bought his land while the 1st Appellant got free land.

Thirdly, although the 1st Appellant strongly denied participating in the boundary opening of the land of the Respondent in 1999, there was credible evidence from the Respondent and his witnesses that the 1st Appellant, who was the source of the conflict that led to the boundary opening was present and actually participated in the opening of the boundaries. It was at the same boundary opening when it was established that the 1st Appellant, had also sold the Respondent's land to compensate Emmanuel Maririho, and was asked to compensate him. See the evidence of Kasapuri Curpu Mbogo (PW2). Furthermore, the claim by the 1st Appellant that the Respondent forged his signature was not supported by evidence suffice to note that on the 1999 document the list of attendees to the boundary opening meeting did not sign but their names were recorded by the secretary of the meeting. Recording one's names is not the same thing as forging their signature. I was satisfied that the 1st Appellant participated in the boundary opening of the land of the Respondent.

On a related point, there was evidence of Komunda, DW6, who claimed that at the boundary opening, the land where the church was located did not belong to the Respondent. Komunda,

however, contradicted himself in cross examination when he said that the Reverends of the Church never took up or sued the Respondent because they feared him as a soldier. This can only mean that the land where the church was built was part of the land that the Respondent reclaimed when he opened the boundaries to his land. This evidence, supports the claim that the Respondent's land was subject of trespass by different persons and entities including the 1st Appellant.

Fourthly , with regard to the over reliance the maps drawn by the Respondent by the trial magistrate, the Appellants were right to discount these maps as falling outside section 87 of the **Evidence Act**. Section 87 refers to information which is published in books, maps and charts of public and general interest and not maps that are written or drawn for personal interest like in this case, where the Respondent drew a sketch map to show his land. The trial Magistrate therefore misinterpreted and misapplied the provisions of section 87 of the **Evidence Act**.

Fifthly, I was satisfied with the explanation given by the Respondent that he lost the agreement under which he purchased the suit land in Kakindu court, Turyatemba William (PW4), the son to the seller, who was present, when the Respondent purchased his land gave credible evidence about the transaction and the boundaries of the land, which I accepted to be true.

Sixthly, I had issues with the way the 1st Appellant acquired his land and specifically with regard to the boundaries. The 1st Appellant says that was given a very big piece of land by the *Mutongole* Chief and Chairman *Mayumba Kumi*, after he gave them and the villager's *tonto*, a local brew, in accordance with the customs of the area. He did not even know the acreage to this land; although, he named neighbors to his land. I believe these persons became his neighbor much later than 1970. The first question to pause is whose land was the 1st Appellant given? The second question to pause is under which custom the 1st Appellant acquired this land. No evidence was rendered towards this effect and this becomes more problematic especially, where there are boundary disputes between those who purchased land and those who simply got free land.

Therefore, looking at all the above observations, I am satisfied that the Respondent called credible evidence to show that the 1st Appellant trespassed on his land. In reaching this conclusion I was convinced by the Respondent's testimony and that of his witnesses that the 1st Appellant

participated in opening boundaries of the Respondent's land in 1999 and when it was established that he was in the Respondent's land, he did vacate it only to come back and sell the same to the 2nd Respondent who also sold the same to the other Appellants. Secondly, there was credible evidence from the Respondent about the boundaries of his land which was corroborated by Turyatemba William PW4, the son to the late Eriya Mbarusha, who sold the land to the Respondent. Thirdly, I was persuaded by evidence of the Respondent , who has since 1992, been trying to use peaceful means to resolve land disputes with the 1st Appellant, who in 1992 and 1999 was found to have trespassed on the Respondent's land. The 1st Appellant does not seem to know the boundaries of his land especially with regard to the land bordering the Respondent.

All the Appellants, who derive title to their land from the 1st appellant, do not therefore have title to the land as the 1st Appellant never obtained valid title to this land. The suit land belongs to the Respondent.

With the above findings, I do not find merit in the appeal and I accordingly uphold the decision of the Magistrate.

Decision

The Appeal is dismissed with costs here and in the court below. The decision of the Magistrate Grade I, dated 25th September 2014, is therefore, upheld.

It is so ordered.

Gadenya Paul Wolimbwa

JUDGE