

UGANDA / JUDGMENT

Abiar and Others v Adumun

(CIVIL APPEAL NO. 0013 OF 2023)

[2024] UGHC 1202 (24 March 2024)

[2024] UGHC 1202

COURT

High Court of Uganda

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI
CIVIL APPEAL NO. 0013 OF 2023 (ARISING FROM KATAKWI CHIEF MAGISTRATES
COURT CIVIL SUIT NO. 008 OF 2016) 1. ABIAR EMMANUEL

2. EMUKADE 3. OKIM PAUL 4. OTIM aka BLIQUE 5. ANYAIT BEREDETA 6. AKWI
PERPETUA 7. IBWALINGAT FRANCIS 8. AMODOI AUGUSTINE 9. ODOC 10.
OPALA :: APPELLANTS VERSUS
ADUMUN PHILOMINA :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

- [1] The appellant being dissatisfied with the judgement and decree of **Her Worship Abalo Agnes Oneka**, Magistrate Grade One of the Chief Magistrates Court of Katakwi vide Civil Suit No. 008 of 2016 delivered on 14th December 2022, brought this appeal seeking orders that the appeal be allowed, the orders of the lower court be set aside and the appellant be granted costs of this appeal and in the lower court.

Background to the Appeal

- [2] The respondent instituted Civil Suit No. 008 of 2016 against the appellants at the Chief Magistrates Court of Katakwi seeking for recovery of approximately 5 gardens of land located at Akamurieri village, Ongongoja parish, Ongongoja sub-county in Katakwi District,

for an order of vacant possession, a permanent injunction, general damages and costs of the suit. The respondent claimed that she inherited the suit land from her late father, Olukoluk John. The suit land formed part of a larger piece of land, approximately 186 gardens, on which she had lived all her life. Between 2015 and 2016, the appellants variously trespassed on the suit land, leading to the suit before the trial court. For the appellants, it was stated in their defence that the suit land belongs to them having acquired the same from their parents through inheritance. They asserted that the respondent had no lawful claim over the suit land. The learned trial magistrate made judgment in favour of the respondent whom she declared as the rightful owner of the suit land and granted the reliefs claimed in the plaint. The appellants thus lodged the present appeal.

Representation and Hearing

- [3] At the hearing, the appellants were represented **Ms. Mwesigwa Jemimah** and **Mr. Collins Mutumba** from M/s Omongole & Co. Advocates while the respondent was represented by **Mr. Isodo Samuel** and **Mr. Opolot Simon** from M/s Isodo & Co. Advocates. The hearing proceeded by way of written submissions which were duly filed by both parties' counsel. I have adopted the submissions and considered them in the determination of this appeal.

Grounds of Appeal

- [4] The appellants raised seven (7) grounds of appeal in their Memorandum of Appeal, namely that;
- a) *The learned trial Magistrate erred in law and fact when she handled and made a finding on a matter beyond her pecuniary jurisdiction thus occasioning miscarriage of justice.*
 - *b) The learned trial Magistrate erred in law and fact when she held that the plaintiff owned the suit land without ascertaining the proper size of the suit land, thereby occasioning a miscarriage of justice.*
 - *c) The learned trial Magistrate erred in law and fact when she failed to properly conduct the locus visit by accepting evidence not adduced in court, thereby occasioning a miscarriage of justice.*
 - *d) The learned trial Magistrate erred in law and fact when she disregarded the inconsistency of the plaintiff's evidence, who had pleaded recovery of 5 gardens and was given 20 gardens.*
 - *e) The learned trial Magistrate erred in law and fact when she held that the defendants were time-barred to recover the suit land and yet the defendants pleaded a disability.*
 - *f) The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence that the suit land was gift inter vivos.*

g) The learned trial Magistrate erred in law and fact when she entered judgment and a permanent injunction against the 3rd, 4th and 9th defendants without service of summons and legal representation thereby occasioning a miscarriage of justice.

Duty of the Court on Appeal

[5] The duty of the first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in the lower court. See: *Section 80 of the Civil Procedure Act Cap 282*. This position has been restated in a number of decided cases including *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997 [1998] UGSC 20 (15 May 1998)*; *Fredrick Zabwe v Orient Bank Ltd SCCA No. 4 of 2006* and *Baguma Fred v Ug* SC Crim. App. No. 7 of 2004. In the latter case, **Oder JSC** stated thus;

"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".

Consideration of the Grounds of Appeal

Ground One: The learned trial Magistrate erred in law and fact when she handled and made a finding on a matter beyond her pecuniary jurisdiction thus occasioning a miscarriage of justice.

Submissions by Counsel for the Appellants

[6] Counsel for the appellants submitted that under Section 207(1) of the Magistrates Courts Act while a Chief Magistrate has unlimited jurisdiction in matters relating to conversion, damage to property and trespass, the Magistrate Grade One's pecuniary jurisdiction is limited to a subject matter not exceeding UGX 20 million and is only unlimited on civil matters governed by customary law only. Counsel submitted that the value of the subject matter of the suit before the trial magistrate exceeded the pecuniary limit of her jurisdiction and was not a matter only governed by customary law. Counsel argued that upon the trial Magistrate realizing that she was not seized with the requisite jurisdiction in the matter, she ought to have halted the proceedings and or transferred the matter to the Chief Magistrate who had unlimited jurisdiction in trespass. Counsel argued that the claim based on trespass is maintainable under common law and was not an action based exclusively on civil customary law. Counsel prayed to the Court to find that the trial Magistrate Grade One did not have jurisdiction in the matter before her.

Submissions by Counsel for the Respondent

- [7] Counsel for the respondent submitted that the appellants having submitted to the jurisdiction of the court and not raising issue with it at the trial court are now estopped from challenging the court's jurisdiction to handle the matter on appeal. Counsel stated that the suit property never had any pecuniary value attached to it at the time of filing and neither did any of the witnesses testify to the value of the suit property. Counsel further submitted that the suit property was not registered and was purely customary land which played to the dictates of the prevailing customs. Counsel pointed out that under Section 207(2) of the Magistrates Courts Act, a Magistrate Grade One has unlimited jurisdiction in regard to disputes, relating to a cause or matter of a civil nature governed only by civil customary law. Counsel argued that the subject matter of the suit having been purely customary land; which fact ran throughout the pleadings and evidence adduced, the learned grade one magistrate had jurisdiction to handle the dispute. Counsel prayed that this ground of appeal fails.

Determination by the Court

- [8] Where a party disputes the jurisdiction of a court in a particular matter, the party ought to set out such facts before the court; for the court to ascertain whether on the facts of the matter, it is seized with jurisdiction or not. Where no facts make it apparent to the court on the face of the pleadings that the jurisdiction of the court is in issue, and the matter is not raised in the proceedings, a trial court cannot be expected to make a finding on such a matter. In the present case, the appellants in their joint written statement of defence categorically stated that they submitted to the jurisdiction of the court. When the matter came up for hearing before the learned Magistrate Grade One, no question regarding her jurisdiction was raised. The court and all the parties proceeded upon the understanding that the court's jurisdiction to handle the dispute was not in issue. In those circumstances, it would be irregular to challenge the decision of the court based on a ground which could have been available but was not raised before the court. It would be greatly presumptuous and prejudicial to expect a court to determine a matter based on a point that was not raised before it.
- [9] Secondly, while I am aware that an appellate court may in certain circumstances consider a matter that was not raised before the trial court, the law is that it is only under limited circumstances that an appellate court may allow new issues to be raised notwithstanding that the party relying on them did not utilise the opportunity at the trial to do so. One circumstance is where the court is satisfied that *'full justice can be done to the parties'*. See: **Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd*, [1960] E. A 620*. In **The Tasmania* [1890] 15 A. C 223,* the Court stated that where a point is raised, for the first time, at the court of appeal, it *'ought to be most jealously scrutinised.'* The Court went further and stated thus;

"[The] Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied ..., first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box".

- [10] It is clear from the above legal position, therefore, that for a court on appeal to exercise its discretion and entertain a point in controversy that was not at all pleaded or canvassed before the trial court, the appellate court must have before it sufficient evidence on which it could undertake an investigation and determine whether if the matter had been raised at the trial, the lower court would have had sufficient material to determine the issue. On the case before me, as was pointed out by Counsel for the respondent, no value of the subject matter was set out in the plaint. No question was raised by the appellants over the manner of pleading. Since the subject matter of the suit concerned customary land, the trial magistrate did not find it imperative to demand for indication of the value of the subject matter. On the facts and circumstances before the learned trial magistrate, I do not find any reason to fault her approach.
- [11] As such, no material was before the trial court and none can be relied upon by this Court to entertain a matter that is being raised for the first time on appeal. This explains why in their submissions, Counsel for the appellant has chosen to lead evidence from the bar concerning the value of equivalent land within the location of the suit land and thus imputing a certain value to the subject matter of the suit land. Such a statement from the bar cannot be accepted as evidence and constitutes an effort in vain. It however goes to prove that there was no material before the trial court that can be based on by this Court to determine a matter that is sought to be raised for the first time on appeal. The point raised by Counsel for the appellants, therefore, does not fall within the limited circumstances in which the court can exercise such discretion.
- [12] Lastly on this point, even if the Court were to exercise discretion and deal with the point of law raised by the appellants' counsel, it is clear on record that although the respondent alleged that the appellants had trespassed on her land, the matter before the court was not purely based on trespass. This is because, in their defence, the defendants laid a claim over the land. This also explains why the issue agreed upon for trial by the court was "who owned the suit land?". This is the question that the trial court dealt with. As such, it is not true that the dispute was founded purely in trespass over which only the Chief Magistrate had unlimited jurisdiction by virtue of Section 206(1) of the Magistrates Courts Act Cap 19. It was also argued by Counsel for the appellants that given that the suit was founded in trespass, which is a tort founded on common law, such took the suit outside the domain of pure civil customary law over which the trial magistrate could have had unlimited jurisdiction.

[13] I need to point out that the dispute before the court concerned establishing who the rightful owner of the suit land was and, consequently, to establish whether the defendants were rightly in occupation thereof or were trespassers on the suit land. Such did not make the matter founded purely in trespass. The evidence indicates that the land, the subject matter of the suit, was governed by civil customary law. For that reason, the land was described in terms of "gardens" which is only understandable through customary connotation. Placing a value to it had to be through a deliberate effort to measure the same in universally known units of measurement and such evidence had to be brought before the court expressly. Such facts cannot be assumed. As such, the subject matter of the suit was governed only by customary law and the learned trial magistrate was seized with jurisdiction to entertain the same. The first ground of appeal thus fails.

[14] Grounds 2, 4 and 6 were argued jointly by both Counsel. I will follow the same approach in resolving them.

Ground Two: The learned trial Magistrate erred in law and fact when she held that the plaintiff owned the suit land without ascertaining the proper size of the suit land, thereby occasioning a miscarriage of justice.

Ground Four: The learned trial Magistrate erred in law and fact when she disregarded the inconsistency of the plaintiff's evidence, who had pleaded recovery of 5 gardens and was given 20 gardens.

Ground Six: The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence that the suit land was gift intervivos.

Submissions by Counsel for the Appellants

[15] Counsel for the appellants faulted the learned trial magistrate for failing to evaluate the evidence that the suit land was a gift intervivos and declaring it to belong to the plaintiff yet she had not ascertained the proper size of the same. Counsel argued that it was an error to declare the respondent as the rightful owner of the suit land when she pleaded recovery of five gardens which she later claimed in her evidence to be more than 20 gardens that the appellants continued trespassing on. Counsel argued that the approach amounted to departure from pleadings contrary to Order 6 rule 7 of the CPR. Counsel further submitted that it would have been proper for the trial magistrate who visited locus to find out the total size of land that had been trespassed on. Counsel stated that during locus visit, the appellant departed from her original claim of 5 gardens to a claim of over 20 gardens which evidence in effect amended the pleadings and manifested an inconsistency in the respondent's evidence. Counsel argued that it was not open to the trial magistrate to entertain anything else other than what was in the plaint. Counsel finally submitted that appellants were able to show by evidence their possession of the land through cultivation and residence; and their earlier possession of the land should not be overridden by the recent interests of the plaintiff who was a trespasser.

Submissions by Counsel for the Respondent

[16] Counsel for the respondent disputed the appellants' contention that the extension of the trespass on the property from the 5 gardens in the plaint to the 20 gardens at the time of testifying amounted to a departure from pleadings on account that while the pleadings are meant to help parties come up with an arguable case, the court can only make a decision basing on the evidence adduced. Counsel stated that the alleged departure did not amount to an inconsistency in the respondent's evidence; the court having been satisfied with the explanation given by the respondent in her evidence as to why the disputed land had reached 20 gardens. Counsel argued that the inconsistencies that the court can adversely impute against a party were those that are not explained. Regarding the contention in regard to a gift *intervivos*, Counsel argued that there was no evidence on record suggesting that the appellants were given land as a gift *intervivos*. Counsel also pointed out that the same was not pleaded and no evidence to that effect was led. Counsel prayed that court finds no merit in the three grounds of appeal.

Determination by the Court

- [17] Under Ground 2 of the appeal, the learned trial magistrate was criticized for having found that the plaintiff owned the suit land without ascertaining the proper size of the suit land which occasioned a miscarriage of justice against the appellants. I have already pointed out above that the matter before the trial magistrate concerned recovery of a portion of customary land. The land was described in form of "gardens" which term bears customary connotation. In absence of an express request by one of the parties that the land be measured using non-customary methods, the inference by the Court is that the parties were comfortable with that description. Even when the court visited the *locus in quo*, there was no demand for alternative measurement of the land. The appellants cannot therefore reasonably demand for such evidence on appeal. Indeed, it is not to be expected that the trial magistrate would have imported a form of measurement that was not introduced in the pleadings and evidence before her.
- [18] As such, it is clear on record that the learned trial magistrate appreciated the facts that the plaintiff owned a bigger piece of land of approximately 186 gardens which were trespassed on by the defendants. At the time of institution of the suit, the area trespassed on was about 5 gardens. The plaintiff, however, indicated in evidence that during the hearing of the matter, the defendants had continued extending their occupation and cultivation up to approximately 20 gardens. During the *locus in quo* visit, the court was shown the land belonging to the plaintiff and the area under encroachment. The court found for the plaintiff (the present respondent) and granted the reliefs that appear in the judgment.
- [19] In the circumstances, I find that there was sufficient evidence before the learned trial magistrate to enable her reach the conclusion that she did. She was able to establish the land that belonged to the respondent and the part that was encroached on. I am unable to fault her based on measurement of the land which aspect was not part of either the pleadings or

the evidence. I also find that the shift from the 5 gardens mentioned in the plaint to the approximately 20 gardens mentioned in evidence and in the judgment was well explained by the plaintiff, as shown above. The learned trial magistrate had

firm basis to believe the explanation by the respondent since the same was raised during the trial and was observed by her during the locus visit.

- [20] While I agree with the position set out in the authorities cited by learned counsel for the appellants concerning the treatment given by the courts to inconsistencies in parties' evidence, it clearly comes out that a party's evidence is negatively affected where such inconsistencies or discrepancies are grave and not explained or reconciled. See: *Constantino Okwel alias Magendo v Uganda, SCCA No. 12 of 1990.* In this case, the alleged inconsistency in the respondent's evidence was well explained and clearly appreciated by the learned trial magistrate as pointed out by her in her judgment.
- [21] The said shift in the evidence concerning the area of encroachment was further referred to by the appellants' counsel as a departure from pleadings. I agree with Counsel for the respondent that the principle barring departure from pleadings was cited out of context by learned Counsel for the appellants. Where the cause of action is clear and constant, and the reliefs claimed are the same and remain known to the parties, it would be superfluous to demand that every change in the status quo of the suit property has to require an amendment of the pleadings. Such a call would only be necessary where the change in the status quo either introduces a new cause of action or makes the reliefs sought in the plaint overtaken by events or insufficient. In the present matter, the cause of action was based on alleged encroachment by the defendants over land belonging to the plaintiff. Any additional encroachment was allegedly done by the same defendants and it is said to have kept diminishing the plaintiff's free land. This was established by the trial court in evidence taken in court and at the locus. As such, by the court taking into account the increased encroachment by the defendants, it cannot be said that the same amounted to departure from pleadings. This complaint by the appellants is therefore devoid of merit.
- [22] The complaint in ground 6 of the appeal is that the learned trial magistrate failed to evaluate the evidence indicating that the suit land was a gift inter vivos. As correctly stated by learned counsel for the respondent, there was neither a pleading nor any evidence indicating that the suit land was obtained by the defendants or any of them by way of a gift inter vivos. A look at the joint written statement of defence (WSD) clearly shows that the defendants claimed to have obtained the land through inheritance. Indeed, in the joint WSD, the 2nd and 3rd defendants (now appellants) intimated to raising an objection to the effect that they were wrongly sued since the land belonged to their father who was still alive. This pleading is inconsistent with an allegation of existence of a gift inter vivos.
- [23] Then during evidence, it was claimed that the suit land was given to the 2nd and 3rd appellants by their father (Emoit Faustino). This evidence was found by the trial magistrate to have been contradicted by other evidence which had shown that the land had been given

to them by their grandfather (Erengé Otim). Furthermore, beyond the bare claim that the 2nd and 3rd appellants had been given land, which the trial court found uncorroborated and contradicted by other evidence, there was no other evidence proving existence of any gift inter vivos. The learned trial magistrate was therefore right in her finding and refusal to believe the existence of any gift inter vivos. I find no reason to fault her.

[24] In all, therefore, on grounds 2, 4 and 6, all the grounds have been found to be devoid of merit and each accordingly fails.

Ground Three: The learned trial Magistrate erred in law and fact when she failed to properly conduct locus visit by accepting evidence not adduced in court which occasioned a miscarriage of justice.

Submissions by Counsel for the Appellants

[25] Counsel for the appellants submitted that once the court visits locus, evidence at the locus is conducted as part of the trial. Counsel cited *Registered Trustees of Archdiocese of Tororo v Wesonga Reuben & 5 Others*. Counsel stated that during locus visit, there is no adding to or closing of gaps in evidence. The court only clarifies what has already been testified in court. Counsel faulted the trial magistrate for going against the law, rules and directions of conducting locus by allowing the 2nd and 3rd defendants who did not give evidence in court to testify at locus. Counsel argued that by allowing such extraneous evidence and considering the same in her decision, the proceedings at locus became irregular.

Submissions by Counsel for the Respondent

[26] In reply, Counsel for the respondent submitted that the learned trial magistrate followed all procedures and guidelines for visiting locus in quo. Counsel stated that while at locus, the 2nd and 3rd defendants who did not testify in court, on their own choice turned up at locus and the court found it acceptable that they be heard as they expressed their desire. Counsel submitted that despite the court receiving their evidence at locus, they still lost the case. Counsel argued that the appellants' arguments would hold water if they had lost after the respondent had been allowed to adduce additional evidence at locus. Counsel concluded that since it was the appellants who were allowed to adduce additional evidence, they could not have been prejudiced by being given an opportunity to give evidence.

Determination by the Court

[27] The complaint in this ground of appeal concerns the trial magistrate's handling of the locus in quo proceedings. It is alleged that the learned trial magistrate erred in law and fact when she failed to properly conduct the locus visit by accepting evidence not adduced in court which occasioned a miscarriage of justice. The impugned evidence is that of the 2nd and 3rd defendants/ appellants who were said to have testified at the locus while they had not testified in court.

[28] In law, locus in quo proceedings are provided for under Order 18 rule 14 of the CPR which provides that the court may at any stage of a suit inspect any property or thing concerning which any question that may arise. The purpose of a locus visit is to check on the evidence already given by witnesses in court, and not to fill gaps in the evidence for them. See: *Fernandes v Noroniha [1969] EA 506; Yeseri Waibi v Edisa Byandala [1982] HCB 28* and *Nsibambi v Nankya [1980] HCB 81*.

[29] This area of the law has further been subjected to regulation under the provisions of **Practice Direction No.1 of 2007 on the Issue of Orders Relating to Registered land which affect or Impact on the Tenants by**

Occupancy. Under Direction No. 3 thereof, it is provided as follows;

"During the hearing of land disputes, the court should take interest in visiting the locus in quo, and while there;

- *a) Ensure that all parties, their witnesses and advocates (if any) are present.*
- *b) Allow the parties and their witnesses to adduce evidence at the locus in quo.*
- *c) Allow examination by either party, or his counsel.*
- *d) Record all the proceedings at the locus in quo.*
- *e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.*

[30] On the case before me, while the proceedings taken by the trial magistrate at the locus in quo do not explicitly indicate that the 2nd and 3rd appellants were called as witnesses, took oath and testified, it features in the judgment of the trial court that the said two witnesses gave evidence at locus which the trial magistrate evaluated. This was erroneous on two fronts. One concerns the already stated position of the law that the purpose of a locus in quo visit is to check on the evidence already given by witnesses in court, not to lead new evidence and not to fill gaps in parties' evidence. Secondly, where a witness is called or recalled during the locus proceedings, the witness must take oath or be reminded of the oath they took while testifying in the court. In this case, there is no evidence that any of the two named witnesses were put on oath. It was therefore erroneous on the part of the learned trial magistrate to take the evidence of the 2nd and 3rd appellants during the locus visit and to place any reliance on it.

[31] Nevertheless, the real questions before this Court concern the value obtained from the said evidence, how it affected the decision of the trial court and whether the same occasioned any prejudice to the appellants. Section 166 of the Evidence Act Cap 6 provides that the *"improper admission or rejection of evidence shall not be ground of itself for a new trial, or reversal of any decision in any case, if it shall appear to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought

not to have varied the decision"*.

- [32] On the matter before me, the said 2nd and 3rd appellants were attempting, albeit belatedly, to introduce evidence concerning the manner in which they obtained the land; as a gift from their father. This evidence has already been found to have been correctly rejected by the trial court. Secondly, and more important to the question now before the Court, that evidence was adduced for the benefit of the two named appellants. The claim by the other appellants was based on inheritance. There is no way the other appellants were affected by the wrong admission of the evidence adduced by the 2nd and 3rd appellants. In accordance with the above cited rule of evidence, I would find the improper admission of the said evidence at the locus in quo to have been inconsequential. It is incapable of vitiating the learned trial magistrate's finding and final determination in the matter. Upon perusal of the record, I am convinced that even without considering the evidence of the 2nd and 3rd appellants, the learned trial magistrate would have arrived at same conclusion and finding on the matter before her. This ground of appeal also fails.

Ground Five: The learned trial Magistrate erred in law and fact when she held that the defendants were time barred to recover the suit land and yet the defendants pleaded a disability.

Submissions by Counsel for the Appellants

- [33] It was submitted by Counsel for the appellants that the Karamojong insurgency made the defendants to flee from their land but later returned at different times which made their settlement on the suit land difficult. Counsel argued that such a scenario amounted to disability occasioned by the insurgency which exempted the appellants from time limitation contrary to the finding of the learned trial magistrate.

Submissions by Counsel for the Respondent

- [34] Counsel for the respondent submitted that the statement in the judgment of the learned trial magistrate to the effect that "if at all the defendants had any claim over the suit land then they are barred by limitation"; was made in respect of the 4th, 6th and 9th defendants who did not file defenses and the 10th defendant whose evidence was expunged from the record. Counsel further submitted that a complaint of being time barred is limited to only those who wish to institute a suit and not those who are sued. Counsel stated that the suit before the trial magistrate was instituted by the respondent and no suit by the appellants was dismissed for being time barred. Counsel concluded that the trial magistrate's comments had no effect on the outcome of her judgment as no suit was dismissed for being time barred.

Determination by the Court

[35] It is true as submitted by learned counsel for the respondent that time limitation is raised against an action and not a defence. A person that has no action before the court or who is brought to the court as a defendant, without a counterclaim cannot be affected by time limitation. In the present case, the appellants were merely defendants and they raised no counterclaim. Any claims raised by them over the suit land were in defence and could not be determined on basis of time bar. The issue of time limitation would have arisen if the appellants had raised a counterclaim in the matter. The statement by the learned trial magistrate in relation to the issue of time limitation was, therefore, superfluous and inconsequential to the final determination reached by the trial court. This ground of appeal also fails.

Ground Seven: The learned trial Magistrate erred in law and fact when she entered judgment and permanent injunction against the 4th, 6th, and 9th defendants without service of summons and legal representation and thereby occasioning a miscarriage of justice.

Submissions by Counsel for the Appellant

[36] Counsel for the appellants submitted that under Order 5 rule 1 (3) of the CPR, where summons have not been served within 21 days and no application for extension of time has been made or the application for extension has been dismissed, the suit shall be dismissed. Counsel cited the case of **Mulyabintu v Cape Western Reserve University (Ohio) & Another, HCMA No. 498 of 2012** to the effect that the rule for dismissal of a suit for failure to effect service of summons is mandatory. Counsel submitted that by the time the lower court set down the suit for hearing, several months had passed since the time for service upon the 3rd, 4th and 9th defendants had expired. Counsel concluded that the suit should have been dismissed with costs as far as the said defendants were concerned.

Submissions by Counsel for the Respondent

[37] It was submitted by Counsel for the respondent that the summons to file a defense were served on all the parties and the only complaint that was resolved on 7/5/2019 by the trial magistrate was the non-signing of the WSD by the 6th and 9th defendants. Counsel stated that the court struck off the 4th defendant for being dead and the 6th and 9th defendants for not signing the WSD and having already been struck off, they could not appeal the decision.

Determination by the Court

[38] To begin with, although the appellant's counsel made reference to the 3rd, 4th and 9th defendants as the persons that were not served with the summons and did not participate in the proceedings, the record indicates that it were the 4th, 6th and 9th defendants/appellants. The joint WSD on record indicates that it was signed by all the named defendants except the 4th, 6th and 9th defendants. There is no affidavit of service on record indicating

the manner in which the summons was served. Before commencement of the hearing, the learned trial magistrate took no steps to satisfy herself as to whether summons had been served upon the three named defendants who had not signed the WSD. In absence of evidence of compliance with such an essential step, the suit could not proceed as against the 4th, 6th and 9th appellants.

- [39] It ought to be understood, however, that although absence of proof of service may point to non-service of summons, it does not certainly prove that the summons was not actually served. There remains a possibility that the summons could have been served but the plaintiff could have omitted to file proof of service. Where there is no proof of service of summons but the defendant appears in court when the suit is called for hearing, and he/she is indeed heard, the absence of proof of service of summons therefore only remains a technicality over which the court cannot place undue regard. In this case, while there was no proof of service of summons upon the 6th appellant (Akwi Perpetua), the record indicates that she did appear in court as early as 17th January 2017; the day the case came up before the court for the second time from inception. She continued appearing although not consistently and was mentioned to be represented by counsel for the defendants (appellants). She was also present at the locus according to the record. I find the above to constitute clear evidence that the 6th appellant was served with the summons and only omitted to sign the joint WSD. In that regard, I find that the absence of any evidence that she was personally served with the summons remains a mere technicality which I would accordingly ignore as no miscarriage of justice is apparent in that regard.
- [40] Regarding the 4th and 9th defendants/ appellants, no evidence was produced proving that they were served with summons. They neither signed the joint WSD nor appeared in court. Deep into the proceedings, it was alleged that the 4th defendant had died but no proof was furnished to court. Counsel for the plaintiff/respondent asked the court to strike out the case as against the deceased defendant and those that had not signed the WSD. Although this was not the right procedure that ought to have been adopted by the court (striking out the suit), in substance, it means that the suit against the 4th and 9th defendants was discontinued by the plaintiff. The learned trial magistrate, therefore, wrongly made findings and orders against the 4th and 9th appellants.
- [41] It ought to be clear, however, that the above finding only affects the part of the trial court proceedings and judgment that is related to the two above named appellants. It does not affect the court's decision as against the other appellants. That being the case, ground 7 of the appeal succeeds in part. The judgment and orders of the trial magistrate shall be set aside in part in as far as it affects the 4th and 9th appellants.

Decision of the Court

- [42] In all, therefore, grounds 1 – 6 of the appeal have been found to be devoid of merit and have failed. Ground 7 of the appeal has succeeded in part and the judgment and decree of the lower court is partially set aside in as far as it affects the 4th and 9th appellants. The other

part of the judgment and decree of the trial court is upheld and shall be enforced. To a large extent, therefore, the appeal fails and is accordingly dismissed. The respondent shall be paid $\frac{3}{4}$ of the costs of the appeal and of the proceedings in the lower court by the appellants except the 4th and 9th appellants.

It is so ordered.

Dated, signed and delivered by email this 24th day of March, 2024.

Boniface Wamala JUDGE

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