

UGANDA / JUDGMENT

Aluma & 2 Others v Okuti (Civil Appeal 214 of 2017) [2025] UGCA 81 (24 March 2025)

[2025] UGCA 81

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Cheborion-Barishaki, JA,
Gashirabake, JA

CASE / FILE NUMBER

Civil Appeal 214 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT GULU

[*Coram: Egonda-Ntende, Barishaki and Gashirabake, JJA*]

CIVIL APPEAL NO. 0214 OF 2017

(Arising from High Court Civil Appeal No. 023 of 2013 at Arua on appeal from *Civil Suit No. 0058 of 2010 at Yumbe Magistrate Grade 1's Court)*

BETWEEN

| ALUMA MICHAEL BAYO=====APPELLANT NO.1 | |

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| ISMAIL DRATIGA=====APPELLANT NO.2 | |

| SWALEH AYO=====APPELLANT NO.3 | |

AND

SAIDI NASUR OKUTI== \$=RESPONDENT\$

(*On appeal from the Judgment of High Court of Uganda at Arua, (Mubiru, J.) delivered on 20th July, 2017*)

JUGDMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

- §[1] This is a second appeal against the decision of the High Court in Civil Appeal No. 023 of 2013. The respondent sued the appellants jointly and severally for trespass to land, wherein he sought an order of eviction, a permanent injunction and costs. The respondent's case was that his father, the late Al-Hajji Nasuru Okuti Fadimula was the owner of 2590 hectares of land in Kei Division, Palja Parish in Kei Sub-county, Yumbe District on which he set up "Lobe Mixed Farm".
- §[2] In the year 1976, the respondent's father applied for a lease on the land, and remained thereon after expiration of the lease. Upon his death, the respondent and the rest of the members of the family of the deceased inherited the land and continued the farming activities until sometime in 2009 when the appellants trespassed on the land.
- The appellant no.1 contended that he had never entered onto land §[3] constituting Lobe Mixed Farm but rather was occupying land constituting "Chere Mixed Farm" which is communally owned. He further contended that the respondent's father had wrongfully obtained the lease on the suit

land. He averred that in 2009, the respondent unlawfully entered onto their land constituting "Chere Mixed Farm" and owing to this, he filed a counterclaim for trespass.

- 14l At the conclusion of the hearing, the trial Magistrate in his judgment found that the respondent was the lawful owner of the disputed land. He dismissed the appellant no.1's counterclaim and found the appellants to be trespassers on the suit land.
- t5l The appellants being dissatisfied with the decision of the trial Court appealed to the High Court on the following grounds:

'(i) The trial Court erred in law and in fact when it confirmed that the suit land belonged to the respondent on grounds of having an expired lease whereas not.

(ii) The Trial Magistrate erred in law and in principle in failing to properly evaluate the evidence before him hence arriving at a wrong conclusion.'

- t6l The High Court dismissed the appeal. In its judgment, it found that the respondent had established the fact of possession of the land as at the time of the alleged intrusion in the year 2009. It further held that any customary interests that the appellants may have had on the land had been extinguished by the law of limitation and the doctrine of laches.
- U1 Dissatisfied with the decision of the High Court, the appellants appealed to this Court on the following grounds:

'(i) that the Learned Judge erred in law when he held that the Respondent was in rightful possession of the suit land, and that the Appellants had intruded into the same.

(ii) The Learned Judge erred in law when he held that the Appellant's customary interests in the land had been extinguished by the law of limitation and the doctrine of laches.

(iii) The Learned Judge erred in law when he failed to properly evaluate.'

t8l The respondent opposed the appeal and contended that the High Court had carefully evaluated evidence on record, scrutinized the pleadings and correctly reached the conclusion that the respondent was in rightful

possession of the suit land and that the appellants had intruded into the same

Representation

t9] At the hearing, the appellants were represented by Mr. Okong Innocent while the respondent was represented by Mr. Odama Henry.

Duty of A Second Appellate Court

[10] This is a second appeal. It is governed by section 72 (l) of the Civil Procedure Act. It states, 'Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-

- (a) the decision is contrary to law or to some usage having the force of law;
- (b) the decision has failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.'

- [11] Second appeals are restricted to points of law and not fact
- ll21 The duty of this court is not to re-evaluate the evidence in the courts below unless the first appellate court failed to do so but to decide points of law. Secondly this court will not depart from the concurrent findings of fact of the courts below unless special circumstances exist to necessitate it doing so. See Milly Masembe v Sugar Corporation and Anor [2000] UGSC 36 and Nazmudin Gulam Hussein Viram v Nicholas Roussos [2006] UGSC 2 r.

Analysis

[13] It is with the above principles in mind that I will proceed to resolve the appeal.

Ground 1: That the Learned Judge erred in law when he held that the Respondent was in rightful possession of the suit land, and the Appellants had intruded into the same.

- §[14]§ Counsel for the appellants in his submissions faulted the first appellate Judge's evaluation of the evidence as having been erroneous because the respondent did not actually establish possession of the suit land in his personal capacity at the time of instituting the suit in the trial court. Counsel also submitted that the learned appellate Judge erred in implying that possession of a portion of the suit land by the respondent's brother, Agotre Kassim, amounted to possession of the land by the respondent himself.
- §[15]§ I note that counsel for the appellant was alive to the matters to be considered in a second appeal and he rightfully cited *Kasoma Fred v Sembatya James* [2015] UGCA 55 in support of the proposition that a second appellate court is precluded from questioning the concurrent findings of facts by the trial and first appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion. A second appellate court can only interfere with such a finding where there was no evidence to support the finding because this is a question of law. Counsel for the appellant contended that in the present case there is reason to question the findings of fact by the trial and the first appellate courts.
- This ground faults the judge's application of constructive possession of §[16]§ land. Counsel for the appellant submitted that the respondent who was the plaintiff in the suit at trial cannot be said to have enjoyed a right which right the appellants violated because the respondent at the time of filing the suit was not in actual or constructive possession of the land.
- §[17]§ In the court below, the first appellate Judge at page 12 of his judgment noted that;

'On basis of that evidence as a whole, I am satisfied that although the respondent did not have actual physical possession of that part of the land now under dispute, he adduced unequivocal evidence before court showing that by fencing the whole of the land, including the part now in dispute, and grazing cattle on parts of it and in light of the activities going on in that part of the land under his actual physical possession, co-extensive with the boundaries shown to court, he was dealing with the whole of the land in the same way that a rightful owner would deal with it.'

As noted from the above excerpt, the appellate Judge clearly noted in his §[18]§ judgment that the respondent had not adduced evidence of physical possession of the suit land but he was satisfied that there was sufficient

evidence of constructive possession. The judge discussed in depth, the concept of constructive possession in paragraph 2, page 11 of his judgment and in the last paragraph at page 11, he proceeded to analyse and apply that concept of constructive possession to the evidence that had been adduced before the trial Court.

[19] The learned appellate Judge stated in part;

a.

'The respondent, and more particularly P. W.3 on his behalf, had enjoyed such open, notorious, continuous, and exclusive possession and occupation of a part of the land which in the circumstances constructively extended to the rest of it as enclosed. In absence of actual adverse possession of the parts not actually occupied by the respondent before the year 2009, the trial court was correct in construing his occupancy of a part as possession of the entire land in dispute.'

- [20] As regards the appellant's argument that the trial Judge relied on evidence of PW3 and not that of the respondent to imply possession, I reject that argument. I note that on pages 11 and 12 of the judgment, the first appellate judge referred to the evidence of both the respondent (PW1) and PW3 to arrive at a decision regarding possession. The first appellate Judge evaluated the evidence as a whole and did not solely rely on the evidence of PW3 to reach his conclusion.
- 121l Considering the evidence as whole, particularly the uncontroverted evidence adduced by PW1 and PW3 regarding the fencing of the land and use of the same for cultivation over the years, the first appellate judge properly construed and applied the concept of constructive possession to the evidence. Having had constructive possession of the suit land, the respondent had the capacity to bring a suit for trespass against the appellants.
- 122l I find that the first appellate Judge unquestioningly discharged his duty as a first appellate Court and was right in finding that the respondent held constructive and rightful possession of the suit land.
- 123l This ground of appeal fails

Ground 2: The Learned Judge erred in law when he held that the Appellant's customary interests in the land had been extinguished by the law of limitation and the doctrine of laches.

124l Counsel for the appellants submitted that the doctrine of laches does not apply to the customary land as the customary land had been in existence even before the respondent had started claiming the same. He argued that the learned appellate Judge ought to have evaluated the evidence that was led regarding the Oluba-Gologo customary land. In rejoinder, he submitted that the appellants' counterclaim was for trespass which is a continuing tort, for which the law of limitation is not applicable.

- 125l Counsel for respondent, citing section 6 of the Limitation Act, submitted that the principle of adverse possession and limitation was properly applied by the appellate court on page 11 of the High Court judgment.
- 126) The first appellate Judge in his Judgment observed that;

'There was uncontroverted evidence that this land had been fenced off as way back as 1976 and that before that it was uninhabited woodland. If any customary interests in the land existed then they has been extinguished by the long period of inaction. . . . they (respondent and relatives) had enjoyed undisturbed occupation until that intrusion in 2009, a period of 23 years. Any customary interests they may have had in the land were therefore extinguished by the law of limitation and the doctrine of laches.'

- 1271 It is imperative to note that the learned judge did not dispute that the appellants may have held customary interest on the disputed land. The Judge's observation was that any such right was defeated by the long period of inaction.
- [28] From the pleadings filed at the trial court the appellants' counterclaim against the respondent was for trespass. The appellants contended that their case being premised on trespass, the law of limitation is inapplicable.
- 1291 Section 5 of the Limitation Act, Cap.290 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 person through whom he or she claims, to that person.'
- [30] Section 5 of the Limitation Act refers to action to recover 'any land'. Any land means that the said provision applies to any of the land tenures referred to in Article 237 (3) of the Constitution of the Republic of Uganda, which includes customary land. Contrary to the appellants' submission, the Limitation Act applies to disputes involving customary land.

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- [31] In *Lutaya v Stirling Civil Engineering Company Ltd* [2003] UGSC 39, Mulenga, JSC, with which the other Justices concurred, stated the legal position about a right of action based on a continuous trespass to land, as thus:

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'Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.'

- 1321 Following the above dictum, I would reject the argument by the counsel for the appellant that the Limitation Act does not apply to the tort of trespass to land or to land held under customary tenure.

- [33] The first appellate Judge was right in finding that the appellants' failure to bring an action against the respondent within the statutory time, despite being aware of the respondent's fencing of the land in 1976 meant that the appellants' claim was barred by limitation.
- [34] The appellants' filing of an action in the form of a counterclaim against the respondent in 2010 despite being aware that the respondent's father fenced off the land in 1976 implies that their action was 23 years late. The respondent ought to have filed their claim against the respondent for trespassing on their customary land within 12 years. Such an action ought to have been filed not later than 1988. As rightfully held by the first appellate Judge, the appellants' suit against the respondent was barred by Section 5 of the Limitation Act.
- [35] Having found that written law, in the form of the Limitation Act applies to the matter in dispute, it is unnecessary to determine whether or not the doctrine of laches, an equitable doctrine of the common law, applied in the circumstances of this appeal.
- [36] This ground is misconceived, and it accordingly fails.

Ground 3: The learned Judge erred in law when he failed to properly evaluate the evidence before him, hence arriving at a wrong conclusion.

1371 This ground was not argued specifically in the written submissions of the appellant much as it is listed. I take it that the appellant abandoned the

same knowing fully well that this court, as a second appellate court, had no duty to re-evaluate the evidence before the trial court, unless it was shown that the first appellate court had failed in its duty to re-evaluate the evidence adduced at the trial. In any case it is a general re-gurgitation without specifying what specific point of law, or mixed law and fact, was wrongly decided in the court below. It contravenes rule 66 of the Judicature (Court of Appeal Rules) Directions.

[38] I would strike it out for those reasons.

Decision

§[39] I find no merit in this appeal. I would uphold the decision of the High Court. As Barishaki Cheborion and Gashirabake, JJA, agree, this appeal is dismissed with costs here and below.
\$2.415\$

Dated, signed and delivered at Gulu this day of 2025

Fredrick Egonda-Ntende **Justice of Appeal**

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT GULU

ICoram: Egonda-Ntende, Baishaki and Gashirabake, JJA

CIVIL APPEAL NO. 0214 OF 2017

(Arising from High Court Civil Appeal No. 023 of 2013 at Arua on appeal from Civil Suit No. 0058 of 2010 at Yumbe Magistrate Grade 7's Court)

BETWEEN

| ALUMA MICHAEL BAYO | APPELLANT NO.1 |

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| ISMAIL DRATIGA | APPELLANT NO.2 |

| SWALEH AYO | . APPELLANT NO.3 |

AND

SAIDI NASUR OKUTI . RESPONDENT

(On appeal from the Judgment of High Court of Uganda at Arua, (Mubiru, J.) delivered on 20th July, 2011)

Judgment of Cheborion Barishaki JA.

I have had the benefit of reading in draft the judgment in this Appeal prepared by my brother Egonda- Ntende JA and I agree with the analysis he has made and the conclusion reached that this appeal has no merit and ought to be dismissed.

I also agree with the order he has proposed regarding costs.

Dated at Kampala this 16 day of 2025 ? Cheborion Barishaki a

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT GULU**

(Coram: Egonda -Ntende, Barishaki and Gashirabake, JJA)

CIVIL APPEAL NO. 0214 OF 2017

(Arising from High Court Civil Appeal No. 023 of 2013 at Arua on appeal from Civil Suit *No.0058 of 2010 at Yumbe Magistrate Grade 1's Court)*

BETWEEN

|| ALUMA MICHAEL BAYO =====APPELLANT NO.1 |

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| | ISMAIL DRATIGA ===== |

| | SWALEH AYO =====APPELLANT NO.3 |

AND

SAIDI NASUR OKUTI == \$\rightarrow\$ RESPONDENT

(*On appeal from the Judgment of High Court of Uganda at Arua, (Mubiru,J.) delivered on the*
\$20^{th}\$ July, 2017)

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA.

I have read in draft the Judgment of Hon. Justice Egonda -Ntende, JA.

I concur with the judgment and the orders proposed therein and have nothing useful to add.

Signed, dated and delivered at Kampala this

Christopher Gashirabake JUSTICE OF APPEAL.

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