

UGANDA / JUDGMENT

Obote v Drasa (Civil Appeal 24 of 2016)

[2024] UGHC 803 (29 August 2024)

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COURT

High Court of Uganda

BEFORE

Acellam, J

CASE / FILE NUMBER

Civil Appeal 24 of 2016

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA CIVIL APPEAL No.024 OF 2016 (ARISING OUT OF CIVIL SUIT No.002 OF 2014)

OBOTE KAWAWA:..... 10

VERSUS

DRASA GABRIEL

BEFORE HON. JUSTICE COLLINS ACELLAM

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JUDGEMENT

Introduction

This is an Appeal arising from the judgement of His Worship Andrew Katurubuki the Magistrate Grade 1 of Adjumani vide land Civil Suit No.002 of 2014 dated on 6th December 2016 wherein he entered judgement against the Appellant on terms that; the Respondent (plaintiff) is the

rightful owner of the suit land, and is entitled to vacant possession. He also awarded the 20 Respondent (Plaintiff) costs of the suit. The Appellant being dissatisfied with this judgement, appealed to this court seeking that the Judgement and Orders of the lower Court in Civil Suit No. 0002 of 2014 be set aside and an order that the Appellant be awarded both costs of the Appeal and that of the lower court.

25 Background

In the Lower court, both parties were self-represented. The Respondent (Plaintiff) brought a suit against the Appellant (Defendant) for recovery of land measuring one acre located in Rasia West village, Pachara Sub - county on Adjumani Road. In the Plaint, the Respondent (Plaintiff) averred that the suit land is their customary land since 1910. And that he inherited the land from his

- late father Anzeliko Gweny who also inherited from the Respondent's grandfather Acholi Tangu 30 who owned the land since 1910. That the Appellant encroached on the Land when the Respondent was away in the Army and that he had been out of the land for over 28 years. He then prayed for judgement in his favor for ownership of the suit land, cost of the suit, and any other relief. The Appellant (Defendant) in his written statement of Defence, stated that the
- Respondent's claims are wrong and that the land is not one acre but rather 68x 100 meters. That 35 the suit land doesn't belong to the Respondent and that he inherited the land from Arikanjelo Tikka son of Ali and that it is not true that he encroached on the land. He then prayed for judgement in his favor that the Appellant (Defendant) is the owner of the suit land since 1994 up to date, costs of damages and any other court relief.

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5 The Appellant's evidence in the court below

DW1, Obote Kawawa who was the Defendant in the lower court and the Appellant herein testified that the Plaintiff was not known to him and that the two did not have any land bordering each other. That on 26th July 1994, he bought land from Alikanjero Tika Ali at 60,000/= (sixty thousand) measuring one acre. That the suit land is on the road from Moyo. He further stated

- that he executed a sale agreement when he was buying the suit land and attached a copy of the 10 sale agreement which he produced in court (DEI). He then testified that he has been using the suit land from 1994 and that the borders of his land were shown to him by the late Alikenjero Tika Ali and his brothers, sisters, and late mother. That in 2010, Martina his neighbor complained that some portion of the suit land belonged to her. That He reported the matter to
- Police which advised the two parties to find a way to settle the matter. The late Alikenjero advised 15 that he leaves the portion to Martina which he did and that that is how his land reduced from 68m x 100m to 68m x 68m. He further testified that Respondent (Plaintiff) went to him in 2012 and claimed that he had heard about the issues he had with Martina and asked to see the portion of land which he had given to her. That the Respondent intimated to the Appellant that he

- would sell that portion of land which he indeed sold to Nyanmia Group and that the Appellant 20 and the Respondent were cousins. That in 2013 UNRA wanted to start working on the road from Atiak - moyo and requested people who would be affected to ask for compensation but were required to fill forms from the LC1. He then claimed that the LC1 of the area with the Respondent objected claiming that the suit land belonged to the Respondent. That when he
- objected, they threatened him, reported the matter to Police and the Respondent filed a suit 25 against him. He requested Court to dismiss the claim over him and prayed for costs from the Respondent (Plaintiff). In cross examination by the Respondent (Plaintiff), the Appellant testified that by the time he settled on the suit land, the Respondent was not around but his wife Jonobo Zainab was there in the village. That in 1998 the Respondent joined him on the land
- and never complained and that he has never sat down with the Respondent to settle matters in 30 the suit land. And that he has never told the Respondent that he was looking for alternative land.

Respondent's evidence in the lower court

The Respondent (Plaintiff) in his defense presented 5 witnesses (PW1, PW2, PW3, PW4, PW5). The Respondent (PW1) in his testimony testified that he brought the suit because the Appellant 35 occupied his land without his knowledge during his absence. That the land was originally owned by his grandfather Acholi Yanku who was born in 1880s. That his grandfather who died in 1949 gave the land to the Respondent's father Anjeriko Gwenyi who continued using it till death in 1991. That after the death of his father he took ownership of the land since he was the oldest

- son. That his father had died when the Respondent had already joined the army in 1986. That 40 before his father's death, his father had given part of the land to Alikenzero Tika only for digging. That his grandfather gave part of the land permanently to Alikenzero and that land is still being used by the descendants of Alikenzero. That in 1998 when the respondent came to the suit land, he found Obote using the land and when he asked Obote (Appellant) how he came to the
- Respondent's land, the appellant claimed that he was using it temporarily and that he was 45 looking for where to relocate. That in 2014, the Appellant bought bricks and sand on the suit land and the Respondent asked the Appellant why he had bought the material yet the land was

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- not his, the Appellant ignored him and told him to get out of his sight and that the land belonged to the Appellant. To this effect, the Respondent reported the matter to the LC1 who referred him to LCII and there the Appellant was served but he refused to turn up. That in 2014, the Appellant started constructing on the suit land. That the Respondent has suffered a lot of inconveniences because of the Appellant's actions. PW1 also testified that he doesn't know the
- cost of the land since he has not been staying there for some time. He then prayed that Court 10 finds that the land is his and if the Appellant wants the land, he can buy it even if the Respondent's intention is not to sell it. During cross examination, the Respondent confirmed that the Appellant occupied the land without the Respondent's knowledge and that he had witnesses to confirm that the Land is his. When court asked for clarity, the Respondent testified
- that he had never told the Appellant to leave his land because he knew that he was using it 15 temporarily and besides he treated him like a brother and that Tika had told him that he gave the land to the Appellant to use temporarily because he had helped him to pay graduated tax.

PW2, PW3, PW4, PW5 all testified that the land belonged to the Respondent's grandfather and that after his death, the Respondent's father inherited it. And that when they found the

- Appellant on the land, they asked him how he came to stay there and he told them he was only 20 there temporarily. That when the Respondent's father died, the Respondent inherited it. PW2 testified that the Respondent was using the land until he joined the Army and when he came back, he found that the Appellant was using the land. That when the Respondent asked the Appellant what he was doing on the Respondent's land, the Appellant stated in PW2's presence
- that the suit land had been given to him by Tinka. PW3 testified that when he came home from 25 working in prison in 1994, he found the Appellant staying on the suit land. And that he asked the Appellant said that the land was given to him by Tinka. That PW3 informed the Appellant that the suit land belonged to the Respondent and not Tinka and that Tinka had no mandate to give the land to the Appellant. That the Appellant then told PW3 that he was only using the
- 30 land temporarily.

Judgement of the Court below

In his judgement dated 6th December, 2016, H/W Andrew Katurubuki, found that the Respondent's evidence was consistent and truthful. And that the Respondent's claim of buying the land from the late Tinka was not believed. The Court found that the Respondent was the rightful owner of the suit land thus entitled to vacant possession. He also ordered the Appellant to pay costs to the Respondent.

Duty of the 1st Appellant Court

The duty of the 1st Appellate Court was well stated by the Supreme Court of Uganda in its landmark decision of *Kifamutwe Henry vs Uganda, SC, (Cr) Appeal No. of 2007* where it held that;

"The appellate court has duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it."

In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: *Lovinsa Nankya vs Nsibambi (1980) HCB 81*. In considering this appeal, the above legal provisions are taken into account.

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Representation

The Appellant was represented by M/s Alaka & Co. Advocates while the Respondent was represented by M/s Matovu N. J & Co. Advocates.

The grounds of appeal:

- The Appellant was dissatisfied with the decision of the lower Court and thus filed an Appeal on 15 grounds that;
- 1. The learned trial magistrate Grade 1 erred both in fact and law when he failed to properly and judiciously evaluate the evidence on record and failed to find that the Plaintiff had no locus standi and right to claim ownership of the suit land because the suit land had long ago been given by his late father to Alikenzero Tika who sold the suit land to the Defendant.
- The learned trial Magistrate Grade 1 erred both in law and fact when he failed to properly evaluate the evidence on court record and find that the Plaintiff failed to prove his ownership of the suit land to the legally required standard of proof.

Arguments of Counsel for the Appellant.

- Counsel for the Appellant in his written submissions decided to handle ground 1 and 2 together. He averred that the Respondent totally failed to prove on Court Record that his late father Anjeliko Gweni gave the suit land temporarily to Arikanzelo Tika Ali for digging as he falsely alleged. And that the Respondent did not adduce any evidence if the same. And in paragraph 10 of their submission, The Appellant's counsel submitted that the Respondent's claim over the

- suit land is time barred by virtue of section 5 of the Limitation Act. Counsel then prayed that 30 this Honorable court reaches the only logical, fair and proper decision that the learned trial magistrate did not properly evaluate the evidence on court record as to ownership and possession of the suit land by the Respondent. That the Judgement of the Lower court be set aside and the Appellant be found to be the lawful owner of the suit land by both purchase from Arikanjelo
- Tika Ali and by Adverse Possession since he stayed on the suit land with knowledge of 35 Respondent from 1994 up to 2014 without any challenge by the Respondent. They prayed that both grounds succeed and that the Respondent pays costs. Counsel for the Appellant also submitted submissions in rejoinder wherein he reiterated his submissions.

Arguments of Counsel for the Respondent:

- Counsel for the Respondent in their written submission, averred that the learned trial Magistrate 40 Grade 1 properly evaluated the evidence on court record to find the Respondent the lawful owner of the suit land in civil suit No. 002 of 2014 in the Magistrate Court of Adjumani. He also argued that the Respondent discharged the burden on balance of probabilities as required by law given the fact that the Respondent presented five witnesses whose evidence was consistent
- and corroborative and testified that the suit land belongs to the Respondent. That the Appellant 45
- did not challenge the said evidence in cross examination and there was no contradiction 5 whatsoever in all the witnesses of the Respondent/Plaintiff. He further argued that the Respondent and all his witnesses were able to give oral evidence in court to show that Tika from whom the Appellant claims to have got his interest in the land from was given the land to use temporarily and as such could not pass a good title to the Appellant. That Tinka was just a
- licensee. And therefore, that the Appellant cannot claim proprietary interest on the suit land 10 since he acquired the land from Tinka who was just a licensee. Counsel for the Respondent relied on the case of Ojwang vs Wilson Bagonza, CACA No. 025/2002, Byamugisha JA (as he was then) in order to fortify his submission. Counsel then submitted that the Respondent had locus standi and right to claim the suit land because his interest in the suit land was never at any
- material time passed to any one and that he is the rightful owner of the land as rightfully declared 15 by the Trial Magistrate Grade 1. Counsel also submitted that the Appellant / Plaintiff did not adduce any evidence to support the claims that the land was given to Tinka on a permanent basis. Counsel for the Respondent further averred that the Appellant's evidence in the lower court was inadmissible as the Appellant in his written statement of defense pleaded that he

- 20 inherited the suit land from Tinka yet in his written submissions he testified that he bought the land from Tinka which is a departure from his pleadings. To fortify his submissions, Counsel for the Respondent cited Order 6 rule 7 of the CPR SI 71-1 which provides that no pleading shall not being petition or application, except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with previous pleadings of the party pleading that
- pleading. He also relied on the case of Nakirya Ssekataba & Another vs Attorney General, \$25\$ CACA No. 038/2003 (arising from HCCS No. 095/2000 in the High Court at Jinja) wherein it was stated that it is trite law that parties are bound by their pleadings during trial. In respect to the suit being barred by limitation, counsel submitted that the Respondent's suit was not time barred and that PW1 testified in the lower court that when he returned in 1998 and found the
- Appellant on the suit land the Appellant intimated to the Respondent that he was just using the 30 land temporarily and he was going to relocate but instead in 2014 the Appellant brought the materials and on being asked why he ignored and told the respondent to get out of his sight. Counsel submitted that limitation period begins running when the claimant becomes aware of the adverse possession and in the instant case it was in 2014 and the Respondent filed the suit
- in 2016 which was only after two years. Counsel then prayed that the court finds that the appeal 35 lacks any merits and costs of the appeal in the lower court and of this appeal.

Determination of court

Ground 1 & 2; the trial magistrate's evaluation of evidence

It is evident that the 1st and 2nd grounds of the appeal are really variants of one ground; namely that they both allege a flaw in the trial Magistrate's evaluation of the evidence adduced at the trial. I will therefore consider them jointly.

Limitation

In their submission, Counsel for the Appellant raised a point of law in respect to limitation. He submitted that the Respondent's suit was barred by time as it was brought after 12 years and he quoted section 6 of the limitation Act. Counsel for the Respondent on the other hand submitted

that that the Respondent's suit was not time barred and that PW1 testified in the lower court

\$\mathsf{S}\$ that when he returned in 1998 and found the Appellant on the suit land the Appellant intimated to the Respondent that he was just using the land temporarily and he was going to relocate but instead in 2014 the Appellant brought the materials and on being asked why he ignored and told the respondent to get out of his sight. Counsel submitted that limitation period begins running when the claimant becomes aware of the adverse possession and in the instant case it was in 2014 and the Respondent filed the suit in 2016 which was only after two

years. 10

A suit being barred by time is indeed a point of law and it had potential of disposing off the suit. (See Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696. It is very clear that for one to say that a suit is time barred is to raise a defence of the statute of limitation. By that rule, a defendant who intends to raise the defence of the limitation Act (as is

- 15 in the present case) must specifically plead that defence. Once it is not pleaded then the defendant will ordinarily not be granted the protection of that law since the Court can not grant a party the benefit of the law on limitation contrary to the rules of pleading and the principle of avoidance of surprise. (See; Yaya Farajallah vs Obur Ronald & others Civil Appeal No. 0081 of 2018). I take into account that both parties were self-represented in the lower court and may
- 20 not have been advised on the same. But even in this court when the parties are represented by Counsel, Counsel for the Appellant only raised and submitted on it as an afterthought in paragraph 11 of his submissions/ legal arguments and not raising it at the earliest opportunity. None the less looking at both counsel's submission on the aspect of limitation / barred by time, it is evident that indeed the Respondent from 1994 when he found the Appellant on his land,
- he thought the appellant was only there temporarily until he saw the appellant binging material 25 on to the land and starting to construct. In the lower Court, the respondent adduced oral evidence of 5 witnesses all testifying that the Appellant had said he was using the Respondent's land temporally until 2014. The Appellant on the other hand did not adduce any evidence that indeed the Respondent knew that the Appellant had taken the Respondent's land permanently.
- Limitation starts counting when the right of action is accrued to the claimant. (See; Section 5 of 30 the Limitation Act). In the instant case, the Respondent/ Plaintiff got to know about the action in 2014 and brought the suit in the lower court in 2016 which is just two years from the time it accrued to him. Therefore, after looking at the record of appeal and the submissions in this court I find that the suit was not time barred.

Balance of probability 35

Counsel for the Appellant submitted that the Respondent did not satisfy the balance of probability to prove that he is indeed the rightful owner of the suit land. Counsel for the Respondent on the other hand submitted that the Respondent in the lower court satisfied the balance of probability which is the required standard of proof in civil cases by presenting 5 witnesses who all testified to that effect. The standard of proof in civil cases is on a balance of probability. In the case of Oketch P. Wilson vs Odong Ballam CA No. 0010/2014, it was stated that, the standard of proof in civil matters is on a balance of probabilities and isn't on the standard of beyond reasonable doubt as is in the case for criminal matters. In the instant case, the Respondent/ Plaintiff according to the record of appeal presented five witnesses who all

testified that indeed the land belonged to the Respondent. I therefore find that indeed the 45 Respondent/ Plaintiff proved his case to the balance of probabilities.

Counsel for the Appellant stated that the Respondent has no locus standi to bring a suit in respect to this matter because he is not the rightful owner of the land. Counsel for the Respondent on the other hand submitted that the suit land belongs to the Respondent and as such it gives him locus standi to institute a suit in that aspect. According to the Black's Law Dictionary 9th edition,

- Accordingly, then, I have to dismiss this appeal with costs to the Respondent both in the court 30 below and in this appeal.

Collins Acellam**JUDGE**

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