THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 2251 0F 2016

(Arising from Civil Suit No. 272 of 2009 Chief Magistrates Court at Nakawa)

BENARD MILITARY ::APPELLANT

VERSUS

WASSWA ORATIBO ::RESPONDENT

BRFOR HON. MR. JUSTICE NYANZI YASIN

JUDGMENT

1. In the trial court the plaintiff herein referred to as the respondent sued the defendant herein referred to as the appellant for eviction orders, general damages, mesne profits and costs of the suit. The issues for the determination by court were;
   i. Whether the plaintiff is the owner of the suit Kibanja
   ii. Whether the plaintiff sold the suit kibanja to the defendant
   iii. Whether the defendant trespassed on the suit kibanja
   iv. What remedies are available to the parties?

2. The trial magistrate found that the respondent proved all the above issues on the balance of probabilities and awarded him all the prayers prayed for.

3. The appellant was dissatisfied with the trial magistrates decision hence this appeal.

4. The appeal is based on three grounds as given below;
   i. That Her Worship erred in law and fact in that, she handled this case and gave judgment in favour of the respondent when it was res judicata and she had no jurisdiction over it.
   ii. That Her Worship erred in law and fact in that she allowed the proceedings of this case when it was time barred
   iii. That Her Worship erred in law and fact in that she disregarded the provisions of the Land Act, 1998

5. He prayed that the court allows the appeal, makes appropriate orders in the interest of justice and award costs of the appeal.

6. The brief facts in the trial court were that during the year 2000, the defendant unlawfully entered upon the plaintiff's plot and without his consent started constructing a house on the plaintiff's land. The plaintiff protested about the construction and referred the matter to elders who advised the defendant to stop the construction of the house but he refused. The house being constructed is detached or attached to the plaintiff's house.

7. Counsel Paul Batte represented the respondent whereas the appellant represented himself

8. This court takes note that it is the first appellant court and therefore is under a duty to subject the evidence on record to fresh scrutiny and come up with its own decision considering the fact that it did not see the demeanor of the

witnesses. See a case of **Kifamunte Henry vs. Uganda SCCA No. 10 of 1997 and Fr. Narsensio Begumisa and 3 ors Vs. Eric Kibenaga SSCA NO. 17 of 2002.** The Supreme Court noted that; "*The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses*."

9. The grounds of appeal will be resolved as they were urged by both counsel.

10. **Ground No. 1:** *That Her Worship erred in law and fact when she handled this case and gave judgment in favour of the respondent when it was res judicature and she had no jurisdiction over it.*

11. Submissions on Ground No. 1

12. Counsel for the appellant referred this court to Section 7 *explanations* 1-6 and S. 8 and submitted that this case was dismissed by the Chief Magistrate on the 6/9/2011. The plaintiff did not appeal against that dismissal but instead filed an application and sought an order to set aside that dismissal. Unfortunately, the Honourable Chief Magistrate who dismissed the suit moved from that court and so no one could make any decision against his decision. He urged that only the High Court could do so. Thus another Chief Magistrate had no jurisdiction to cancel that decision when his power was not higher than that of the Chief Magistrate

13. Counsel for the appellant further submitted that the record of proceedings does not indicate that the High court dealt with that application and set aside that dismissal. He averred that another Chief Magistrate could not deal with that application because he had no jurisdiction over the decision of the former Chief Magistrate

14. Counsel for the respondent on the other hand on ground one cited O.9 rr.22 and 23 and a case of **Posiano Semakula V. Susana Magala and others, 1993 KALR P.213** where it was stated that: The doctrine of res-judicata embodied in S.7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: nemo debt bis vexari pro una et eada cause (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res- judicata appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res- judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time."

15. He submitted that following that decision the issues for determination in Civil Suit No. 272 of 2009 had not been adjudicated upon by the 5th/09/2011. Secondly, Miscellaneous Application No. 719 of 2011 was not in itself a

second suit for it to amount to res judicata. Thirdly, on the 5th/09/2011, the dismissal order of civil suit no. 272 of 2009 did not amount to a valid judgment of the first court.

16. He further urged that a matter is said to be res judicata when the matter in issue was directly and substantially in issue in a former suit, the subsequent suit should be between the same parties under whom they or any of them claim. The court which tried first suit must have been competent to try and the matter must have been heard and finally decided by the court in the first suit.

17. He averred that where the merit of the matter was not heard and determined, the doctrine of Res judicata does not apply. He submitted that in the instant case, the issues for determination in Civil Suit No. 272 of 2009 had not been tried and that counsel for the appellant erroneously applied the principle of res- judicata.

18. <u>Resolution of Ground No. 1</u>

19. **<u>Order. 9 r. 23 (1) of the Civil Procedure Rules</u>** provides that; "*where a suit is wholly or partly dismissed under Rule 22 of this order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.* ***But he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit****."*

20. **Section 7 of the Civil Procedure Act** provides that; "***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties,*** *or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."*

21. In the **Court of Appeal Civil Appeal No. 51 of 2007 General Industries (U) Ltd V. Non- Performing Assets Recovery Trust and 3 others**. Justice Remmy Kasule, JA stated that *"...Res judicata includes two related concepts: claim preclusion and issue preclusion. The former focuses on barring a suit from being brought again, and again, on a legal cause of action that has already been finally decided between the parties or sometimes those in privity with a party; while the latter bars the re-litigation of factual issues that have already been necessarily determined by a Judge or jury as part of an earlier claim. It presupposes that:*

i. *There are two opposing parties;*
ii. *There is a definite issue between them;*
iii. *There is a tribunal competent to decide the same; and*
iv. *Within the competence, the tribunal has done so..."*

He further noted that; *the common law doctrine of res judicata thus bars re-litigation of cases between the same parties over the same issues already determined by a competent Court. The rationale is to prevent multiplicity of suits and bring finality to litigation.*

22. In the instant facts, the respondent sued the appellant in Civil Suit No. 272 of 2009. The matter came up for hearing on 5th of September, 2011 in the presence of the defendant but in absence of the plaintiff. The trial magistrate dismissed the suit for luck of prosecution. The respondent filed an application to set aside a dismissal which was granted by Her Worship Esta Nambayo Chief Magistrate on 16th of January 2012 and the matter was set for hearing inter-parties.

23. Subjecting the interpretation of the Doctrine of Res Judicata by Justice Remmy Kasule cited above to the facts before this court, since this was a dismissal for luck of prosecution, the matter was not finally determined and that being the position, Order. 9 rule. 23 provides for the procedure to undertake in such circumstances which the respondent did and the dismissal was set aside.

24. On the issue that the Chief Magistrate who handled the matter had been transferred and therefore the other Chief Magistrate had no jurisdiction to do so. **Section 98 of the Civil Procedure Act** provides that; " *Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

25. Also in the case of **Rawal vs Mombasa Hardware Ltd [1968] EA 392 Sir Charles Newbold *at* pg. 394-;** the court held that, the trial court had the power to re-instate a suit within its inherent jurisdiction.

26. Therefore, considering the wording of O.9r.23, S. 98 of the CPA and the case cited above, the trial chief magistrate Esta Nambayo had the same powers as the dismissing magistrate.

27. Accordingly, it is found that the matter was not res judicata. Hence, the trial magistrate was right to substantially determine the matter to its final conclusion.

28. Ground No. 1 is answered in the negative.

29. **Ground No. 2:** *That Her Worship erred in law and fact in that she allowed the proceedings of this case when it was time barred*

30. Submissions on ground No. 2

31. Counsel for the appellant cited S.3, S. 5, S.6 of the Limitation Act and submitted that by 2009, the period of 12 years had expired and the plaintiff was not entitled to institute that suit.

32. Counsel for the respondent on the other hand submitted that under paragraph 5 and 6 of the plaint, the respondent sued the appellant in trespass which was indicated to still be continuing at the time of filing the suit in the year, 2009, even if it commenced in the year, 2000. He cited the case of Justine **E.M.N Lutaaya V. Stirling Civil Engneering Company Ltd, Supreme Court Civil Appeal NO. 11 of 2002,** where court had this to say about the tort of trespass to land; "Trespass to land is a continuing tort, when an unlawful entry on the land is followed by its continuous occupation or exploitation, proof of such

continuous unlawful occupation is sufficient proof of trespass, even if the date it commences is not proved."

33. He averred that basing on the above legal authority, the respondent's action in trespass against the appellant is not time barred since it was a continuing trespass right up to the time of filing the suit in the year 2009. He submitted that counsel for the appellant misapplied the defence of limitation.

34. Resolution of Ground No. 2 by Court

35. In the **Civil Appeal No. 01/ 2018 Amina Aroga V. Haji Muhammad Anule** Justice Stephen Mubiru stated that; "the tort of trespass to land is a continuing tort, such that the law of limitation does not apply to it in the strict sense maintenance of that action is available to a person in possession. With the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass for which an action lays for each day that pass ……
……."

36. From the plaint paragraphs 5 and 6, the respondent sued the appellant in trespass to his land. As defined in the case of **E.M.N Lutaaya V. Stirling Civil Engneering Company Ltd (Supra)** and the case of **Amina Aroga V. Haji Muhammad Anule** cited above, trespass is a continuing tort that lays for each day that passes.

37. In the view of the above authorities I agree trespass is a continuous tort as counsel for the respondent urged. Therefore, the respondent's suit was not barred by time.

38. Ground No. 2 is also answered in the negative.

39. **Ground No. 3**: *That Her Worship erred in law and fact in that she disregarded the provisions of the Land Act, 1998*

40. On the 3rd ground counsel for the appellant cited Section 29 of the Land Act on Lawful and Bona fide occupants and Section 35 of the same Act on option to purchase by a tenant by occupancy.

41. On the other hand counsel for the respondent submitted that the provisions of the Land Act, 1998 as submitted by the appellant don't apply to the present ground of appeal since it was not a contest between a Registered owner and a Bonafide occupant, but one relating to persons claiming a kibanja interest over the same piece of land.

42. Resolution of Court on ground 3

43. It is this court's observation that ground 3 of appeal is ambiguous as no provision is cited to have been ignored.

44. Never the less, this court will comment on it in line with the submissions.

45. Section 29 of the Land Act as referred to by counsel for the appellant concerns lawful occupants and bonafide occupants which were not matters in contention in the trial court. The matter in contention related to ownership of the Kibanja. Therefore, the appellant departed from his previous pleadings contrary to **O. 6 r.7 of the Civil Procedure Rules**.

46. Counsel for the appellant also cited Section 35 of the Land Act which talks about option to purchase in case a tenant wants to sale his kibanja. Considering the record, the appellant claims to have bought the kibanja from the respondent who also had a kibanja interest. Therefore, since none of the parties in this matter had registered interest, the section did not apply.

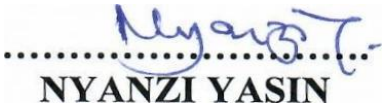
47. Be the above as may be, on perusal of the record, it is noted that the plaintiff witnesses testified that the suit kibanja belongs to the respondent's brother one Peter and that the respondent holds that land in trust for Peter's Children.

48. Ground 3 of the appeal is answered in the negative.

49. This appeal fails

50. Costs of the appeal are awarded to the respondent.

GIVEN under my hand and seal of court this **4th** day of **November**, 2021



NYANZI YASIN

JUDGE