THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 1 OF 1999

CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE G.M. OKELLO, JA.
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.

JAMES SEMUSAMBWA……APPELLANT

VERSUS

REBECCA MULIRA……RESPONDENT

(Appeal from Judgment/Decree of the High Court of Uganda by the Honourable Justice I. Mukanza dated 6th June, 1996 in HCCS No. 471 of 1992.)

JUDGMENT OF THE COURT:

The appellant, Mr. James Semusambwa is the son and administrator of the estate of late Erisa Mujobe. He unsuccessfully sued the respondent, Mrs. Rebecca Mulira before the High Court (Mukanza J) for an order of specific performance of the lease agreement dated 24/8/77 between late Mujobe and the respondent, general damages and interest thereon at 50% from date of filing suit till judgment.
The action was held to be barred by laches.

The background is as follows. Late Erisa Mujobe was a customary kibanja holder of the suit property of which the respondent was the mailo owner (now head-lessor).

On 17-6-77 the respondent wrote to late Mujobe the following note.

> "Mr. Mujobe,
>
> I have written to inform you that should you not buy your plot on Kampala Road on Plot 11 Kampala Road, I have allowed you one month to pay. Should you fail to do so I have authorised Mr. Waswa to sell it to any other person. Furthermore, please pay that money to Mr. Waswa who should give you a note acknowledging receipt of it.
>
> Sgd by Rebecca Mulira
> The Landlord. "– Ex. P2.

On 22-8-77 Mr. Waswa acknowledged receipt of Shs.6, 000/= from Mr. Mujobe for and on behalf of Mrs. Mulira in respect of Plot No. 13 Kampala Road Mukono Township. Mrs. Mulira was to issue a formal receipt – Ex.P4.

> We shall be going to the lawyer for a formal agreement.
>
> Sgd. Rebecca Mulira. "– Ex.P5

Thereupon late Mujobe paid the survey fees and had the land surveyed as Kyaggwe Block 530 Plot 13. His building plans were approved by Mukono Town Council. The respondent however declined to execute the lease. Mujobe died on 7/2/87 leaving the lease unexecuted. Various lawyers to wit Mr. Katongole, Mr. Mulira and M/s. Sendege & Co. Advocates had all been contacted about execution of the lease but were all coming up with various excuses. The appellant took up the matter after his father's death. During 1990 the respondent finally refused to execute the lease indicating that she had withdrawn it. On 22/5/1992 when he obtained probate and letters of administration to his late father's will, he filed suit seeking specific performance of the lease by the respondent. At the hearing the respondent resisted the suit on ground of non-payment of the rent by the appellant's father late Mujobe. The

learned trial judge however dismissed the suit not on that ground but on ground of laches, having earlier rejected a preliminary objection that it was time-barred. The appellant now appeals against the dismissal.

The memorandum of appeal comprises six grounds:-

(1) The learned trial Judge erred in law and in fact when he contradicted himself by finding in the final Judgment that the appellant had acquiesced the defendant's wrong doing for 10 years and was therefore guilty of laches whereas he had earlier found in the ruling of 29th June, 1993 that the plaintiff's cause of action accrued on the 6th December, 1990.

(2) The learned trial Judge erred in law and in fact when he came to findings that were not supported by the evidence on record.

(3) The learned trial Judge erred in law and in fact when he came to findings that the appellant was guilty of laches whereas the respondent had testified that the lease had been terminated for failure to pay rent.

(4) The learned trial Judge erred in law and in fact when he failed to find that it was the responsibility of both the appellant and the respondent jointly to execute a lease agreement and regularise their dealing for the registration of the lease.

(5) The learned trial Judge erred in law and in fact when after finding that the appellant had made efforts to have the lease executed but was frustrated by the respondent, he then held that there was delay and acquiescence amounting to laches that barred the appellant from enforcing the execution of the lease agreement.

(6) The learned trial Judge erred in law and in fact when he found that the appellant was not entitled to the relief of specific performance.

Written submissions were filed by both parties under Rule 97 of the Rules of this Court.

At the commencement of the hearing, Mr. L. Mukasa, learned counsel for the respondent raised a preliminary objection regarding Ground No. 1 as per paragraph 2 of the Written Statement of Defence, to the effect that under section 6 of the Limitation Act (Cap. 70) no action for recovery of land was sustainable after the expiry of 12 years. He submitted that since the lease agreement was dated 1977, the suit being brought in 1992 was clearly time-barred. Mr. Zaabwe, learned counsel for the appellant pointed out that the late Mujobe was in possession of the suit property as customary tenant paying busuulu when he was invited by the respondent to convert it into leasehold. He argued that the respondent never sued him for eviction but merely declined to execute the lease agreement. The cause of action therefore accrued in 1990 when the respondent finally refused to execute the lease.

The learned Judge rejecting the preliminary objection observed:

> "It is the firm view of this Court that the right to sue accrued from the moment the defendant was invited by the plaintiff on 6/12/90 to execute a formal lease and the defendant refused to do so in which case the suit was filed within the limitation of 12 years."

Having rejected the preliminary objection and ordered that the trial proceed, the learned judge finally dismissed the suit on ground of laches as follows:

> "It would appear in the instant case the equitable doctrine of laches come into play. A plaintiff who has been dilatory in the prosecution of his equitable claim and acquiesced in the wrong done to him is said to be guilty of laches and is barred from relief although his claim is not by (sic) any statute of limitation…… There was therefore delay and acquiescence on the part of the late Mujobe which are in my humble opinion laches which bar him from getting the relief sought……."

It should be pointed out that laches is mere delay not amounting to a bar by statute of limitations. Its validity is to be weighed against principles substantially equitable. It is therefore inconsistent with equitable principle to bar relief on ground of delay without examining the principles involved after having ruled its prosecution to be within the statutory time limit. It is a well known maxim that equity aids the law. The learned Judge clearly does not appear to have been alive to this as will be seen later in this judgment. In our view the cause of action in this case accrued on 6.12.90 as rightly found by the learned Judge in his ruling.

This ground of appeal succeeds.

We propose to deal with grounds 2 and 3 together. These aver that the Judge's findings were not supported by evidence and that he erred in fact and in law when he came to a finding that the appellant was guilty of laches whereas the respondent had testified that the lease had been terminated for failure to pay rent.

It was submitted for the respondent that:-

> "……. The conduct of the late Mujobe constituted an abandonment of his claim to the respondent's property. If he (the deceased) had a valid claim, he would not have allowed it to go to sleep while the respondent was shouldering the ground rents to date. Further it is submitted that the appellant's conduct amounted to no more than last ditch effort to re-instate not only an abandoned and/or withdrawn right but also circumvent the rigors of the limitation period through the get away provision of S.4(b) of the limitation Act……
>
> This, the appellant cannot do both in law and equity."

According to the record of evidence, the respondent's defence revolved around non-payment of rent/busuulu:

> "……I have never received rents from Semusambwa or Mujobe.

……..

Even before 1977 when I tried to legalise the relationship between me and Mr. Mujobe, even before then he was not paying Busuulu. That is why I wrote him very many times telling him that he is no longer the owner or occupier.

……

I deprived him of the ownership and I refused to sell the said land and the Land Office at Mukono are aware of this."

It is therefore clear that the respondent never complained of delay or laches as the learned Judge found but of non-payment of rent. This however raises a further question as to whether the procedure the respondent adopted was the correct one. Our procedure is well adapted for non-payment of rent. Before the 1975 Land Reform Decree which abolished the busuulu, all the respondent had to do was to re-enter and determine the lease. After the 1975 Decree the respondent had only to serve the appellant with a six months' notice to quite or sue for eviction. She did neither. It seems a little strange that if late Mujobe was such a bad defaulter, the respondent would fail to utilise all the legal options open to her and instead opt to regularise the tenancy with him. We are far from accepting the respondent's story regarding non-payment of rent. Related to this point is the question whether she could legally withdraw the lease after entering into the contract with late Mujobe if it was a binding contract. To constitute a complete contract there must be a proposal or offer to grant a lease followed by an unequivocal and unconditional acceptance without variance of any sort between it and the proposal and such acceptance communicated to the grantor: Thynne v Glengall (Lord) (1847) 2 H.L. Cas 131. The respondent made the offer on 17/6/77 – Ex.P2. the late Mujobe accepted it on 22/8/77 without any variance and accompanied it with the down payment of the premium asked for. Ex.P3. The respondent received the payment on 24/8/77 and acknowledged receipt thereof setting out all the terms requisite for a lease, premium, monthly payments, the specific clear term of 49 years, its commencement date of 1/9/1977 and duration, with a variation clause or review of terms every 15 years. She concluded with the words:-

"We shall go to the lawyer for a formal agreement".

It was submitted for the respondent that the last words meant it was an agreement to agree, there was therefore no contract. This matter was never raised at the hearing. It cannot be raised here at this late hour. However we would point out that the phrase used by the respondent is not the same as the usual phrases like "subject to the terms of the lease" which would mean subject to the terms to be contained in a lease to be executed by the lessor and therefore implies a lease has to come into existence and has to be executed before a binding agreement is reached. Locket v Norman - Wright (1924) AER 216 AT 824 a-b PER Lawrence L.J. We are unable to read the words "subject to" in this agreement. It is plain to us that there were no further negotiations to continue but only execution of the agreement. It should also be made clear that a lease is a conveyance of an estate in land whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date, which was the case in the matter before us: Lace v Chantler (1944) 1K.B. 360. Dr. Adeodanta Kekihinwa & 3 others vs Edward Maudo Wakida – Civil Appeal No. 3 of 1997 (C/A unreported).

Having ruled that there was an offer which was accepted unequivocally, it is important to note that the respondent could have revoked or varied it only at any time before acceptance but not afterwards: Brogden vs. Metropolitan Ry (1877) 2 App Cas 666. It would be dangerous to allow people to enter into contract and then before execution wait while reflecting whether it was a beneficial deal and if not withdraw for a better one. After accepting the offer and clinching the contract, late Mujobe secured a lease in equity. He became protected in the same way as if a lease had been executed by the respondent: Walsh v Lonsdale (1882) C.A. 9. Late Mujobe paid the survey fees on 6/7/1997. The land was surveyed and demarcated as Kyagwe Block 530 Plot 13 – Ex.P8. It was also stated that his building plans were approved by Mukono Town Council, but the respondent gave instructions that he should not carry on any construction on the plot. Despite several reminders to the respondent and her lawyers, the respondent was recalcitrant and finally declared she had withdrawn the plot from late Mujobe and further that she never had any dealings with the appellant, but with late Mr. Mujobe.
We therefore find that the respondent could not legally determine the late Mujobe's lease, since he had become an equitable owner whose rights were enforceable. He had done

everything expected or required of him promptly to have the lease executed but was frustrated by the respondent. There was no issue of non-payment of rent.
In the above discussion we have covered grounds 2, 3, 4 and 5 which must succeed.

We now turn to the last ground, No. 6 which alleges that the learned trial judge erred in law and in fact when he found that the appellant was not entitled to the relief of specific performance.

We note that considerable argument was devoted to the issue of laches by both counsel in their written submissions most which was tediously meandering.

For the appellant it was submitted –

> "If the respondent had executed her part and the late Mujobe had failed before he died, and there was need to execute another lease, then the defence of laches would have probably (sic) operational. In the instant case even the respondent did not sign her part".

For the respondent it was submitted:

> "The conduct of the late Mujobe constituted an abandonment of his claim to the respondent's property……
> ……..

It was further stated –

> "…….. The appellant compounded the laches, delay and acquiescence of the deceased when he rested on his laurels as executor of the estate from 1987 to 1992 when he proved the will and filed the suit giving rise to this appeal."

The learned Judge observed:

"…… Mujobe accepted to regularise his stay on the land when he paid Shs. 6,000/= premium as per exhibits P2 and P3 to the defendant. In effect he had entered into a lease

agreement in 1977 which he waited to be executed. Evidence shows that Mujobe contacted the defendant and her lawyer but the defendant and her lawyer appeared unwilling to fulfil her obligation until Mujobe passed away in 1987. That was a period of ten years without the said Mujobe taking any action against the defendant with a view to have the contract enforced. Mujobe had acquiesced in the wrong done to him for a period of ten years……."

It should be pointed out that the cause of action for specific performance is not a breach of the contract, such as alone gives rise to a claim for damages, but is the duty considered in equity to be incumbent on the defendant if actually doing what she promised by the contract to perform: Spottiswoode v Dorren App (1942) 2 KB 32. Wilson v Balfour (1929) 45 TLR 625. The learned Judge seems to have been alive to this but curiously and suddenly took a different turn. We find the case of: Williams v Greatrex (1956) CA 81 to be precisely to the point. A purchaser of land who went into possession under contract after paying deposit sued for specific performance ten years after the date of the contract. It was held inter alia that the purchaser having paid the deposits and having entered into possession of the land became equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. It was further held that despite the lapse of time the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years. We have already pointed out above that the respondent's recalcitrance was unjustifiable. She did not sue for eviction nor did she do anything tangible to bring the tenancy to an end, apart from instructing RCs to stop any developments on the land by the late Mujobe and notifying the Land Office personnel at Mukono to be on the lookout.

The following dictum of Denning LJ in the same case is most pertinent and illustrous:

> "But then it is said when the vendor repudiated this contract, surely the purchaser ought to have taken her to court, he ought to have brought an action for specific performance there and then to compel him to perform his contract. I confess that

argument did appeal to me at one time in the course of the case. A very long time elapsed without his taking the vendor to court. But I think the answer is this: once the purchaser went into possession…..

…….

laches or delay is not a bar to this action."

The learned Lord Justice cites another case in the following words:

"There is an interesting passage which Mr. Pennant read us from a case in 1806, Crefton v ormsby (1806) 2 Sch & Lef 583) in which Lord Redesdale, Lord Chancellor in ireland, said "The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession, Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for 40 or 50 years without clothing it with the legal title. I conceive therefore that possession having gone with the contract there is no room for the objection".

And then he added: "But in the present case, there is nothing but a resting on the equitable estate by a person in possession, without clothing it with a legal title, which I think never was held to be that sort of laches that would prevent relief." Likewise we have possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar."

We find the persuasive force of this authority irresistible and we adopt it.

In our view the learned Judge was not justified in dismissing the suit on ground laches/delay. Ground 6 therefore succeeds.

For the above reasons we allow the appeal. The judgment and order of the High Court dated 6th June 1996 dismissing HCCS No. 471 of 1992 are set aside.

Accordingly judgment is substituted for the appellant as prayed with costs here and in the court below.

Dated at Kampala this 12th day of August, 1999.

C.M. Kato
Justice of Appeal.

G.M. Okello
Justice of Appeal.

A.E.N. Mpagi-Bahigeine
Justice of Appeal.