THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL (COA) OF UGANDA

AT KAMPALA

CIVIL APPEAL NUMBER 0084 OF 2012

(ARISING FROM NAKAWA HIGH COURT CIVIL APPEAL N0. 0026 0F 2011, JUDGMENT OF HON. FAITH MWONDHA J (AS SHE THEN WAS)

GALABUZI PADDY:::::::::::::::::::::::::::::::: APPELLANT

VS.

NSEGIYUNVA KALOLI:::::::::::::::::::::::::::RESPONDENT

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA
HON. MR. JUSTICE. KENNETH KAKURU, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT.

This is a second appeal from the decision of the High Court Nakawa.

The respondent was a successful plaintiff in **Kiboga Civil Suit N0. 6 of 2009**. The appellant appealed to the High Court Nakawa and lost the appeal hence this second appeal to this court.

The brief background of the dispute is that, the parties own land near each other. The appellant applied and was granted a lease from the Area Land Committee. During survey, the respondent objected to his

customary holdings (*bibanja)* being included in the land that was available for leasing. The area Land Committee ignored the respondent's objection, and went ahead to support the appellant to absorb the respondent's customary holdings (*bibanja*) into his land and granted him the lease offer. The appellant took over the respondent's customary holdings which the respondent had developed and fenced and denied him the right to graze his cattle there.

Dissatisfied with the committee's decision, the respondent filed a suit against the appellant in the Chief Magistrate Court Kiboga which decided in his favor and declared that the disputed land was the property of the respondent. A permanent injunction against the appellant from further trespass was issued and general damages of Ug. Shs. 6, 000,000/= were awarded to the respondent with costs.

The appellant being further dissatisfied with the decision, of the trial Magistrate appealed to the High Court Nakawa which upheld the decision of lower Court.

The appellant appealed the decision of the High Court to this Court on five grounds namely;-

Grounds of the appeal.

1. ***That the learned appellate judge erred when she failed to hold that the failure by the trial to visit the locus in quo in the***

circumstances of the case was an illegality and resulted in a miscarriage of justice.

2. *That the learned appellate judge erred in holding that the respondent owned the suit land without ascertaining whether he had lawfully acquired the customary tenure interest in the suit land.*

3. *That the learned appellate judge erred in holding that the appellant was a trespasser on the land when there was evidence on record that the appellant was a lawful allocate of the land by the controlling authority.*

4. *That the learned appellate judge failed to evaluate properly the evidence on the record as a whole and misdirected herself on the law and facts thereby arriving at wrong conclusions which resulted in a miscarriage of justice.*

5. *That the learned appellate judge erred in holding that the respondent was entitled to general damages of shs. 6, 000,000/= without properly evaluating the evidence on record that the respondent incurred the damage or loss.*

In the mean time, pending the hearing of this appeal, the appellant obtained an order of stay of execution with the result that he is still using the land for his own benefit to the exclusion of the respondent.

Representation.

Mr. Johnson Kwesigabo represented the appellant while Mr. Tugume Moses represented the respondent.

Submissions for the appellant.

Issue one.

Whether the learned appellate judge erred when she failed to hold that the failure by the trial to visit the locus in quo in the circumstances of the case was an illegality and resulted in a miscarriage of justice.

Counsel contended that the failure to visit the *locus in quo* resulted in a miscarriage of justice.

He submitted that the *bibanja* sale agreements the respondent relied on, were a suspect and vague in the description of the size and the boundaries of the *bibanja* and that land valued at Ug. Shs. 200,000/= at that time must have been very small. He relied on the survey report, the sale agreements of the *bibanja*, the inspection report made by the Area Land Committee and P.W.5's evidence who according to Counsel, gave contradictory evidence about the size and location of the land.

Counsel explained that the appellant did not apply for the visitation of the locus, because he was not represented by Counsel in the Magistrates' court and the court had the responsibility to administer substantive justice.

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Counsel explained that the appellant did not apply for the visitation of the locus, because he was not represented by Counsel in the Magistrates' court and the court had the responsibility to administer substantive justice.

He argued that, the issue of locus in quo was raised in the first appellate court, but the judge ignored it and yet the court was vested with powers to hear a new point of law.

In support of his argument, he referred us to **Practice Direction N0.1 of 2007 item No.3** which requires that courts take interest in visiting the locus in quo during hearing of land disputes and the case of **Yowasi Kabiguruka Vs Samuel Byarufu, Civil Appeal N0. 18 of 2008** where it was held that failure by the trial court to visit the locus in quo was an illegality which could not be sanctioned as was held in the case of **Makula International Ltd. Vs. His Eminence Cardinal Nsubuga & Another [1982] HCB 11 at page13.**

Counsel prayed that this court makes an order for a retrial.

Issue two.

Whether the learned appellate judge erred in holding that the respondent owned the suit land without ascertaining whether he had lawfully acquired the customary tenure interest in the suit land.

Counsel submitted that the respondent had to prove that the customary holding had been acquired lawfully and in accordance with the customary rules prevailing in the local area.

According to counsel, customary tenure must be proved by evidence establishing the origin, succession to or acquisition of the *kibanja* by the tenant.

He contended that there was no clear evidence to prove lawful or bonafide occupancy of the land in accordance with **Article 237 of the constitution and section 29 of the Land Act 1998**. In support of his argument, he referred to the case of **Kampala District Land Board and another Vs Venansio Babweyaka and 3 others, Supreme Court Civil Appeal N0. 2 of 2007** where it was held that since the respondents were lawful bonafide occupants, their interests in the suit land could not be granted or transferred to a 3rd party without affording them protection provided in land Act.

Counsel submitted further that the land in dispute was public land. After the application for a lease was granted to the appellant, he acquired a right to it. He contended that the respondent purported to have acquired the customary interest in the land in the years between 18.3.2002 and 23.8.2006 before making an application for a lease. The sale agreements became a suspect and that the mere fact that the respondent claimed to be in occupation was in its self not sufficient to prove ownership because he could have been a trespasser on public land.

That the provisions of the Public Lands Act 1969 and the Land Reform Decree, 1975 were not taken into account since he could have applied to

the District Land Board to have his customary tenure converted into freehold.

Counsel prayed that the judgments of both the Magistrates court and High court be set aside and a retrial be ordered.

Issue three.

Whether the learned appellate judge erred in holding that the appellant was a trespasser on the land when there was evidence on record that the appellant was a lawful allocate of the land by the controlling authority.

Counsel argued that the appellant was not a trespasser to the land he was allocated to by the controlling authority and for which he paid the requisite premium and fees. According to counsel, the appellant had the necessary permission to be on the land.

He further argued that no activity was on the land when the local area land committee went for inspection yet the respondent purports to have fenced off the land. That no proof was brought to show that the appellant in any way evicted the respondent.

Counsel prayed that the court finds that the lower court erred in holding that the appellant was a trespasser.

Issue four.

Whether the learned appellate judge failed to evaluate properly the evidence on the record as a whole and misdirected herself on the law and facts thereby arriving at wrong conclusions which resulted in a miscarriage of justice.

Counsel submitted extensively on this issue and pointed out that, had the appellate Judge properly re-evaluated the evidence, she should have come to a different decision.

That although the respondent claimed that he owned 150 acres of land, the survey report established less than 79 acres out of the land of more than 100 hectares he had applied for and that he did not inform the controlling authority that he was a customary tenant.

That the appellant was the first to apply for a lease and later the respondent also did for the same land.

Referring to the documents tendered by the respondent at the trial, counsel stated that they were wanting as regards the size and location of the land bought by the respondent. According to counsel, there were also contradictions with regard to the boundaries of the land allegedly fenced which was not correct based on the evidence on ground. That the sale agreements in themselves could not establish how the *bibanja* sellers on the respondent's land came to attain the status of customary tenancy.

Counsel argued further that the appellate Judge ignored evidence of the Area Land Committee and their report which was to the effect that when they inspected the disputed land, they saw no evidence of customary tenure or kibanja in form of boundary marks, crops, housing or other activity. That when the committee asked the respondent about his claim, he neglected/refused to show them any demarcation of the claimed *Bibanja* (customary holdings).

Counsel submitted that the trial Court ought to have visited the *locus in quo* in order to establish the facts on the ground to able to arrive at a correct decision. In support, he relied on the authorities of **Uganda Breweries Vs Uganda Railways Corporation, Supreme Court Civil Application N0. 6 of 2001,** and **Administrator General Vs James Bwanika, Supreme Court Civil Appeal N0. 7 of 2003** where it was held that a second appellate court has the power to interfere with the findings of the first appellate court where it has erred in law not to subject the whole evidence to a fresh and exhaustive scrutiny which was not done. In conclusion, counsel requested court to assume the duty of the first appellate court and re-evaluate the evidence as a whole and come to our own independent decision and make appropriate orders.

Issue five.

Whether the learned appellate judge erred in holding that the respondent was entitled to general damages of shs. 6, 000,000/=

without properly evaluating the evidence on record that the respondent incurred the damage or loss.

Counsel argued that the general damages awarded to the respondent were not supported by the evidence on record. He gave an example the appellant was not a trespasser on the land because it was lawfully allocated him.

That the evidence on the ground showed no developments on the land and given the fact that the trial Magistrate did not visit the *locus in quo,* there was no basis for the award of Shs. 6, 000,000/=. According to counsel, the respondent's claim of having been evicted from the land by the appellant was not proved to the required standard.

He submitted further that while the award of general damages is in the discretion of the trial court, in the case **of Margaret Kato & another Vs Nuulu Nalwoga, Supreme Court Civil Appeal N0. 3 of 2013**, it was held that the appellate court has a mandate to interfere with the award if it is satisfied that the trial court acted on a wrong principle and prayed that the court does likewise.

Finally, counsel prayed that the appeal be allowed, the judgment and decree of the learned appellate judge be set aside, a retrial in the Chief Magistrates Court be ordered and the costs of the appeal and the courts below be granted to the appellant.

Submissions for the respondent.

On the first issue of failure to visit the *locus in quo*, counsel for the respondent submitted that the issue had not been agreed upon during scheduling. The appellant's counsel only intimated that he would raise it as a point of law. According to counsel, it should not have formed part of the issues to be resolved. He cited **Rule 66(2) of the Rules of this court** to the effect that, in second appeals, the memorandum of appeal shall set forth the points of law or mixed law and fact which are alleged to have been wrongly decided. That the issue of visiting the *locus in quo* was never a ground appealed against in the first appellate court and therefore the first appellate court should not be faulted for not making a finding on a matter that was not an issue.

Counsel referred us to the case of **Makula International Limited Vs His Emminence Cardinal Nsubuga and another [1982] HCB 11,** where it was held that,

> ***"the appellate court should only decide in favour of an appellant on a ground raised for the first time, if it be satisfied beyond doubt, first, that it had 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 explanation had been offered them in the witness box".***

Counsel disagreed that there was need to visit the *locus* because there was no boundary dispute of the appellant's fenced land. The dispute is in relation to the whole of the respondent's land that the appellant grabbed. According to counsel, the appellant has 40 hectares of land which he fenced and are outside the suit land. The trial court decided that the suit land belonged to the respondent which finding was upheld by the first appellate court. That the appellant had gone beyond his fenced boundary. The respondent claims under customary tenure, but also on the 28.12.2006, he applied to the Kiboga District Land Board to have his customary holding upgraded to a lease hold.

Counsel submitted that visiting the *locus in quo* was not mandatory unless the circumstances of the case required so. He cited item 3 of Practice Direction No 1 of 2007 which provides that, during the hearing of land disputes, the court should take interest in visiting the *locus in quo*. He referred to the case of **Safina Bakulimya and another. Yusuf Musa Wamala, Civil Appeal No. 68 of 2007,** for the proposition that only applied to titled land.

On the second issue, whether the respondent owned a customary tenure interest in the suit land, counsel submitted that there was overwhelming evidence to show that the respondent owned the suit land under customary tenure. The respondent bought the land from the former owners and his aunt. He bought *Bibanjas* from four different persons

who were; Wizeye Partick, Peter Kyakamala, Imelda and Kamuzanduzi Yovan. He tendered in court the relevant purchase agreements.

According to counsel, the respondent in cross examination explained how the sellers acquired the various portions which evidence was corroborated by the sellers themselves hence the justification for the trial court and Judge's finding that the respondent lawfully purchased the land.

On Issue three, whether the appellant was a trespasser, counsel contended that this was proved by the respondent and the appellant's witnesses. They stated that the appellant's activities were outside his known fenced land and that in spite of the respondent's protests, the appellant continued to occupy and use the respondents land.

That PW4 gave evidence that he participated in the fencing of the appellant's land where the respondent was employed as manager/ supervisor of the fencing. That the respondent knew very well the boundaries of the appellant's land and clearly they did not include the respondent's land / land in dispute.

That DW5 stated that on instructions of the appellant, he used to graze the appellant's cows on the disputed land and when the respondent found him doing so, he stopped him.

PW5 Mr. Senjogera Moses LCIII Chairman Muwanga Sub- County wrote to the respondent asking him to allow the appellant to survey his late father's 40 hectares of land. However, the letter was not allowing the appellant to survey the adjoining public land which was occupied by the respondent. The respondent fenced his *bibanja* which the appellant is claiming and annexed them to his existing land. This was done and the land was later fenced off.

Issue four, Improper evaluation of evidence, stated the duty of the second appellate court as being to ascertain whether the first appellate court properly re-evaluated the evidence on record and comes to its own independent decision. To support the above proposition, he referred to the case of **Kifamunte Henry v. Uganda, Supreme Court, Criminal Appeal No. 10 of 1999 at 57.**

He supported the decision of the first appellate court because it considered both the appellant and respondent's evidence bearing in mind the standard of proof. The appellate judge considered both oral and documentary evidence and came to a justified conclusion that the respondent had proved that he had purchased the disputed land for purposes of grazing his cattle and was a customary tenant.

Counsel prayed that the court finds that the first appellate court properly discharged its duty in re- evaluating the evidence on record.

Issue five, regarding grant of damages, counsel submitted that the general rule is that damages are such as the law will presume to be direct, natural and probable consequence of the act complained of. He referred us to the case of **Stroms Bruks Aktie Bolag v. John and Peter Hutchinson [1905] AC 515** to support that principal of law.

He supported the decision of the appellate judge when she upheld the award of general damages of shillings 6, 000,000/= by the trial court. The appellant had trespassed on the respondent's fenced land and denied him from grazing his cattle therein and instead allowed a one Walakira David to graze his cows on the land of the respondent. He Prayed that the award be upheld.

Submissions in reply.

Counsel for the appellant, on the first ground, stated that because the court failed in its duty to visit the locus in quo, it is the very reason why it became an issue. He submitted that according to Black's Law Dictionary, "*an issue is a fact put in controversy by pleadings*".

He cited **Rule 86(2) and 102** of the rules of this court which do preclude a party from raising a new point of law on appeal. That the first appellate court should have pronounced itself on the issue since it was raised as a new point of law. He supported his submission with reference to the authorities of **Makula International and that of Yowasi Kibigurika** (supra).

On the second, third, fourth and fifth ground, counsel reiterated his earlier submissions.

Findings of Court.

Rule 32(2) of the Rules of this Court provides that on any second appeal from a decision of the High court acting in the exercise of its appellant jurisdiction, the court shall have power to appraise the inferences of fact drawn by the court by the trial court, but shall not have discretion to hear additional evidence.

Ground one.

Whether the learned appellate judge erred when she failed to hold that the failure by the trial court to visit the locus in quo in the circumstances of the case was an illegality and resulted in a miscarriage of justice.

Indeed this ground was never raised in the first appellate Court.

This court has the discretion to either allow or not allow new grounds but such discretion ought to be exercised in rare circumstances. (See **Section 72(1) (C) of the Civil Procedure Act Cap 71)**

In this case, the new ground of appeal cannot reasonably be said to stem from the issues as framed by the parties and raising it at this time would be a procedural prejudice to the respondent.

The issue of visiting the locus in quo in our view was not necessary in this case because the boundaries were never in contest and we think that the documentary evidence on record was sufficient for the trial court to resolve the dispute.

Even if the issue was not prejudicial to the respondent, visiting a *locus in quo* is not mandatory. It is in the discretion of the Court and depends on the circumstances of each case. In the case of **Mukasa Vs Uganda (1964) EA 698 700** Sir Udo Udoma C.J stated that:-

> ***" ...a view of a locus in quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings..."***

We considered whether in exercising its discretion, the trial court (Chief Magistrate's Court) applied wrong principles or was manifestly erroneous in its exercise of the discretion. We found on the record documents that could explain the location and estimated size and boundaries of the disputed land.

This ground therefore fails.

Ground two and three.

Whether the learned appellate judge erred in holding that the respondent owned the suit land without ascertaining whether he had lawfully acquired the customary tenure interest in the suit land and Whether the learned appellate judge erred in holding that the appellant was a trespasser on the land when there was evidence on record that the appellant was a lawful allocatee of the land by the controlling authority.

We have decided to combine these grounds because ground two would dispose of ground three as well.

Section 1 (l) of the Land Act Cap 227 defines customary tenure as a:-

"Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons of which are prescribed in Section 3."

It is the appellant's case that the respondent did not prove his tenure which was that he bought several *bibanja* which he put together to constitute the suit land. The respondent tendered in the trial court sale agreements which the appellant found suspicious.

It was the respondent's case that he bought the *bibanja* from previous owners whose names were given in evidence including the agreements of sale which were not objected to by the appellant.

The respondent at the trial told Court that he bought the land from four different persons whom he mentioned. He presented to court the sale agreements, and copies of the application forms to the land board applying for a title over his land. The land board inspected the land, and a survey report was made. The respondent stated that he knew the land belonging to the appellant because he was the LC chairman then, and supervised the fencing of the appellant's land. That evidence was not challenged or contradicted in any way by the appellant.

PW2 and PW3 in their testimonies in Court confirmed having sold to the respondent the respective *bibanja*. The sale agreements were identified and exhibited. There were other agreements in respect of land that had been sold by Merida Tusabe and Kamuzanduzi Yovani. These sale agreements were specific on the location of the land and its boundaries.

It was the appellant's evidence that the respondent informed him that there was public land available at Kasawo. He inspected it with the vice chairman and applied for it through the Land Board who wrote a letter to the LC I, II and III. That he was recommended and went ahead to pay the necessary fees to acquire the same.

From the documents tendered for the plaintiff, (now respondent), there are various letters from Kiboga District Local Council and Muwanga Sub Council Office LC III Chairperson informing the respondent about the decisions of the District Land Board, meetings and clarifications.

This is a clear indication that the local leaders were aware of the interest of the respondent but the Board decided to favour the appellant in total disregard of the fact that the land was being occupied by the respondent and that he had also applied to convert his customary holding to a lease hold. We looked for evidence leading to the proof of the appellant's acquisition of the land but found none, save for his application for the above said acreage which was approved by the Area Land Committee but subject to interests of other occupants like the respondent.

This case differs from the case of **Kampala District Land Board and Another Vs Venansio Babweyaka and others, Supreme Court Civil Appeal N0. 2 of 2007** cited to us by counsel for the appellant, the respondents in that case were dealing with public land in an urban area and they had not gone through the necessary procedure of applying for the same unlike this one where the respondent had applied for rural land and was wrongfully denied his right.

We therefore agree with the concurrent findings of the lower and High Court that the respondent is the customary owner of the suit land and is at liberty to apply and convert it into freehold under Section **9(1)** of The **Land Act [Cap 227].** This ground also fails.

On the third ground on whether the appellant was a trespasser, Having agreed with the trial Court and the 1st Appellate Court that the land in question belongs to the respondent who holds it under customary

tenure, we agree with the finding of the two Courts below that the appellant is a trespasser.

Ground four.

Whether the learned appellate judge failed to evaluate properly the evidence on the record as a whole and misdirected herself on the law and facts thereby arriving at wrong conclusions which resulted in a miscarriage of justice.

While re-evaluating the evidence, the first appellate judge had this say;

> ***"From the above evidence as summarized and answering issue N0.1 who the owner of the land was, it was very clear from the evidence of the plaintiff/respondent that he bought the suit land in bits right from young age. He produced the agreements signed and in other respects thumb printed by the settlers. The exhibits tendered were not objected to and his evidence together with his witnesses testified to the same facts. He also testified that he applied for the public land he had applied before the appellant did which included the church land and Makopi land. Whereas the appellant's ownership fell far short from the establishing his ownership. Infact his testimony was very clear and it was among others to the effect that, he started putting his cows on the land in 2006, whereas the respondent was there as far back as 2004. DW3 and DW6 told Court that the reason why they made the report in favour of the appellant, was because the respondent did***

not show them the bibanjas as there was no house, garden and other developments. They had a shallow meaning of what a kibanja constitutes. This could not erode the evidence of the respondent who had given uncontroverted evidence about his ownership of both bibanja and public land which he had earlier applied for. The neighbours of the appellant could not tell them how the appellant acquired the land. So the first issue is resolved in favour of the respondent that he was the owner of the suit land.

On the role of the 2nd appellate Court, the Supreme Court in **Civil Appeal N0. 11 of 1999 Muluta Joseph Vs Katama Sylvano,** Kanyeihmaba JSC page 16 had this to say;

"In a number of cases, including Banco Arabe Espanol Vs Bank of Uganda Civil Appeal N0. 8 of 1998 (SC) unreported, this court reiterated our view that, as a second appellate court, except in the clearest of cases, we are not required to re-evaluate the evidence like a first appellate court. However, where the court of Appeal has failed to do so or has applied a wrong principle as in this case, we must correct any errors committed as was held in D.R. Pandya Vs R.91957 E.A 366 and Bogere Charles Vs Uganda Criminal Appeal N0. 10/98 (S.C), (unreported)".

From the except of the judgment of the learned appellate judge, quoted above, we find that she properly evaluated the evidence and we are

unable to fault her in the way she discharged her duty as a first appellate judge. We agree that she came to the correct decision that the land belongs to the respondent. This ground too fails.

Ground five.

Whether the learned appellate judge erred in holding that the respondent was entitled to general damages of shs. 6,000,000/= without properly evaluating the evidence on record that the respondent incurred the damage or loss.

The trial court awarded Uganda shillings six million (6,000,000/-) as damages which was upheld by the first appellate court. This court can only interfere with this award if it finds that the award is out of proportion with the facts or that the trial court below acted on wrong principles of law or that the award was manifestly excessive. See **Trail Vs Bowker (1947)14 EACA 20** cited in **Attorney General Vs A.K M Lutaya, Civil Appeal N0.16/2007** and also cited in this Court's decision in **Civil Appeal N0. 15 of 2010 Attorney General & Uganda Industrial Research Institute Vs Abel Kaahwa.** None of these were present this case. The respondent has had to stay out of his land ever since the dispute arose. The appellant has unjustly enriched himself by hiring out the land to other grazers and the appellant has had to look elsewhere to take his cattle for survival, out of a land he had developed and fenced. We think 6,000,000/- (six million shillings) general damages are adequate in the circumstances and we uphold the award.

In the result, we find no merit in this appeal which is hereby dismissed with costs here and in the two courts below.

DATED THIS.....19th.....DAY OF .....June.....2015.

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HON. MR. JUSTICE A.S. NSHIMYE,
JUSTICE OF APPEAL

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HON. MR. JUSTICE. KENNETH KAKURU,
JUSTICE OF APPEAL

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE,
JUSTICE OF APPEAL

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