THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende & Musota, JJA and Kasule Ag. JA*]

CIVIL APPEAL NO. 249 of 2017

(Arising from High Court Civil Appeal LD No.15 of 2016)

(Arising from Civil Suit LD No. 29 of 2011)

BETWEEN

Kasese District Local Government Council ===================Appellant

AND

1. Baluku Luciano Buhaka
2. Masereka Julius
3. Bamwite David
4. Emmanuel Buhaka
5. Marahi Julius

========================Respondents

(*On appeal from the judgment of the High Court of Uganda, (Oyuko Anthony Ojok, J.,) delivered on 1st June 2017 at Fort Portal.*)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

[1] This is a second appeal, against the decision of the High court in Civil Appeal No 15 of 2016. The respondents instituted Civil Suit No. 29 of 2011 in the Chief Magistrate's court at Kasese against the appellant for trespass seeking an eviction order, a declaration that the suit property belongs to the respondents, a permanent injunction against the appellant and damages.

[2] The respondents' case is that they are beneficial owners of customary land measuring approximately 4.6 hectares located in Kisagazi, Nyakasanga 1 Parish, opposite the civil aviation airfield in Kasese Municipal Council. The respondents claim to have inherited the land from their father, the late Stephen Kule as a gift *inter vivos* in 2000 who had been using the suit property uninterrupted. The respondents also claim that upon inheriting the suit property, they continued cultivating seasonal crops and later deposited building material to construct houses on the land but they were stopped by the appellant's agents.

[3] The appellant on the other hand claims that the suit property is government land that was formerly owned by the Ministry of Agriculture, Animal Husbandry and Fisheries but following the policy reforms of privatization, decentralization, divestiture and democratization, the Government divested of itself of the suit property which was formerly a class 1 agricultural workshop and handed it over to the appellant for developmental purposes.

[4] The trial court in its decision found that the respondents are the owners of the suit property and that the appellant was a trespasser. The trial court awarded damages of UGX 20,000,000 to the respondents and ordered that the file be forwarded to the High court for purposes of cancellation of the freehold title in the names of the appellant. The appellant being dissatisfied with the decision of the trial court appealed to the High Court on the following grounds:

> '(1) The Learned Trial magistrate erred in law and fact when he failed to evaluate the evidence on Record that the Appellant/Defendant/The Central Government is the owner of the suit property and had operated a mechanized Agricultural workshop on the suit land and therefore had been in occupation of the land as far back as the 1950's.
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> (2) The Learned Trial Magistrate erred in law and fact when by holding that the Respondents/ Plaintiffs were *bona fide* occupants of the suit.
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> (3) The Learned Trial Magistrate erred in law and fact by holding that Respondents/ Plaintiffs are customary owners of the suit land.

(4) The Learned Trial Magistrate erred in law and fact when he held that the Appellant/ Defendant was falsely laying a claim and are therefore trespassers on the suit land.

(5) The Learned Trial Magistrate erred in law and fact when he held that the Appellant's/Defendant's Title to the land **(LRV 143 Folio 23 Plots 176-186, Kabarole Road)** was obtained fraudulently and therefore should be cancelled.

(6) The Learned Trial magistrate erred in law and fact when he held that the suit land was not available for leasing to the Appellant/Defendant.'

[5] The first appellate court found that the appellant was the owner of the suit land and allowed ground no.1. At the same time, it found that the respondents are *bona fide* occupants of the suit property and that their interest in the suit property as *bona fide* occupants supersedes the registered interest of the respondents. The learned appellate judge upheld the decision of the trial court and dismissed the appeal with costs. He ordered for the cancellation of the certificate of title held by the appellant. Being dissatisfied with the decision of the first appellate court, the appellant has now appealed to this court on the following grounds:

'(1) The Learned Judge erred in law when declared the respondents to be the customary owners of the suit land and that it was not available for leasing to the Appellant yet in resolution of Ground 1, he declared the appellants the rightful owners of the suit land comprised in FRV 143 Folio 23 Plots 176-186.

(2) The Learned Judge erred in law by ordering the cancelling of Certificate of Title for property comprised in FRV 143 Folio 23 Plots 176-186 registered in the names of the appellant after declaring it (the appellant) the lawful owner of the property.

(3) The Learned Judge erred in law when he declared the appellant trespassers on the suit having declared them the lawful owners of the suit property.

(4) The Learned Judge erred in law when he attributed fraud on the part of the appellant yet it had not been specifically pleaded and tried.

> (5) The Learned judge erred in law in finding that the respondents were *bona fide* occupants on the suit land yet the same, as he found in the resolution of ground 1 the appeal is and has always been occupied by the Appellant who is the registered proprietor.'

[6] The respondents oppose the appeal. And they filed a cross appeal on the sole ground below:

> '1. The learned trial judge erred in law and fact when resolving the 1st ground of appeal held that the appellant is the lawful owner of the suit land and been in occupation as far back as the 1950's.'

Submissions of Counsel

[7] At the hearing, the appellant was represented by Mr. Kiryaye Samuel while the respondent was represented by Mr. Ahabwe James and Mr. Nahinda Enock.

[8] Counsel for the appellant in his submission relied on section 3 (1) of the Land Act and Kampala District Land Board and Another v Venansio Babweyaka and Others [2008] UGSC 3 to define customary system of land ownership. Counsel for the appellants argued that the respondents did not prove that they had a customary interest in the subject land.

[9] Mr. Kiryaye submitted that the appellant produced a certificate of title in court to prove that it is the rightful owner of the suit property. He was of the view that a certificate of title, in absence of fraud attributed to the transferee is conclusive evidence of ownership. Counsel for the appellant submitted that having found that the appellant was the lawful owner of the suit property, it was a reasonable conclusion that the appellant's act of processing the certificate of title was consistent with the appellant's right of ownership.

[10] Counsel for the appellant stated that trespass occurs when a person makes an unauthorized entry upon land and thereby interferes with another person's lawful possession of the land. He referred to Justine E.M.N. Lutaya v Stirling Civil Engineering Company Ltd [2003] UGSC 39. Counsel for the appellant argued that the appellant is the lawful owner of the subject land and therefore could not have made an unlawful entry unto

the land. He also submitted that the respondents did not specifically plead fraud against the appellant in their pleadings.

[11] Counsel for the appellant was of the view that one can only qualify as a *bona fide* occupant if on registered land or that person was settled on the land by the Government under the law. Mr. Kiryaye submitted that at the time of the respondents' claim on the suit property in 2000, the suit property was not registered and that there is no proof that the respondents were settled unto the land by Government.

[12] In reply, counsel for the respondents submitted that the respondents led evidence to show that they inherited the suit land from their late father who inherited the same from their grandfather who had acquired it from the village elders. Counsel submitted that the respondents proved that they are customary owners of the suit land and court rightly cancelled the appellant's title. Counsel for the respondent argued that the appellant is a trespasser who obtained ownership of the suit land by fraud. Counsel further submitted that the suit from which this appeal arises was filed in 2011 while the appellant acquired its certificate of title in 2013 thus imputing fraud on the appellant.

[13] In the cross appeal, counsel for the respondents argued that the appellant is not a lawful occupant on the suit land. Counsel for the respondents submitted that the appellant was not in existence in the 1950s and that by then the suit property was already being occupied by the respondents' ancestral parents.

Analysis

[14] The duty of this court as a second appellate court is laid down under Rule 32(2) of the (Judicature Court of Appeal Rules) Directions S.1 13-10 as follows:

> '(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.'

[15] The Supreme Court considered the duty of a second appellate court in Milly Masembe v Sugar Corporation & Anor [2000] UGSC 6, where it decided that the appellate court's exercise of the power to review the evidence depends on whether the trial judge failed to take into account any particular circumstances or probabilities or whether the demeanour of the witness whose evidence was accepted was inconsistent with the evidence generally. Mulenga, JSC stated as follows: -

> 'In a line of decided cases, this court has settled two guiding principles at its exercise of this power. The first is that is the failure of the appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as a second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to do, except where it is clearly necessary'

[16] It is necessary that this court re-evaluates the evidence on record in light of the failure of both the trial court and the first appellate court in adequately evaluating the evidence on record and reaching conclusions that are consistent with the evidence on record.

Grounds 1, 3 and 5 of the appeal & the sole ground of the cross appeal

[17] Grounds 1, 3 and 5 of the appeal and the sole ground of the cross appeal will be considered together as they involve resolving which version of the case for either the appellant or respondents is credible or more probable than the other.

[18] PW1, Baluku Luciano, the first respondent stated in his testimony that they inherited the suit property from their father, the late Steven Kule when he passed away under customary law. He stated that his father had in turn inherited the suit property from his father the late Muhanya Bughogholho. He also stated that before his father passed away, he informed him that the district had been fighting for the land. PW1 stated that there were uniports on the land but were removed by the chairman LCV before his father passed away. He also stated that they wanted to develop the land thereafter but they were blocked by the police. He was arrested and charged with criminal trespass and malicious damage to property in 2005 for destroying barbed wire on the suit property.

[19] Upon cross examination, PW1 stated that a group of white people who referred to themselves as PIDA settled on the suit property with the permission of their father upon an understanding to leave the disputed land after they had finished their activities. He stated that the settlers put a big hall on the land for storage purposes but this hall was destroyed by the district. He also stated that he has no developments on the disputed land. PW1 stated that there are houses on the suit property and some are occupied by relatives and others by the district.

[20] PW2, Buhaka Emmanuel, the fourth respondent stated in his testimony that his grandfather, the late Muhanya Bughogholho worked with the Ministry of Agriculture. He stated that the land in dispute was given to his grandfather by the elders when he shifted to Kilembe around 1952 and that his father was born on the disputed land. PW2 stated that the appellant grabbed the land in 2010 following the death of his father. He asserted that the appellant came and fenced off the suit property and constructed houses on the land after the respondents had instituted a suit against it. Upon cross examination, PW2 stated that he does not think that the houses on the suit property belong to the district and does not recall when houses for PIDA were constructed on the suit property. He stated that his late father gave permission to PIDA to work on the suit land and that the appellant did not compensate them when it took over the land.

[21] PW3, Aziz Tikwendema in his testimony stated that he came to the area where the disputed land is located on 11th July 1952 as a worker in the Kilembe mines and was staying at the Base camp. It is at that place that he met the late Muhanya Bughogholho who used to give them cassava from his plantation. He stated that the plantation was located where the appellant built and that at the time, only the late Muhanya Bughogholho was staying on the land. PW3 also stated that he got land in the same area and that some men came to him and asked for a place to repair their tractors and store their inputs. He stated in his testimony that the Agriculture Department came and occupied the land after PIDA and that it found structures already built on the land. He also stated that the District came into place later in 1974 when Amin erected four districts.

[22] PW4, Spiriano Musodibwa, testified that his father, Baworotho came and settled in Kisagazi. While there some men came and requested his father to come and do their work on our land. He allowed them but he told them

that after their work the land will remain his. They cooperated with him till he died. After his death his son, Kule Stephen, took over. The District started disturbing him till he shifted and started living in Kiteso in Kamaiba. After Stephen Kule shifted his son wanted to utilize the land but Government Officials deployed police to arrest whoever was utilizing the land.

[23] In cross examination PW4 stated that the land was not for Agriculture as they only requested from Boroboro space to repair tractors. He gave them the said place to repaid (*sic.* repair) tractors. There was a house on the land constructed by Kule Steven. The appellant forcefully constructed a building on the suit land.

[24] On the other hand, the defence called three witnesses. DW1, Wilson Asaba, was the Assistant Chief Administrative Officer of the appellant. He stated that the appellant acquired the suit property after a decentralization and divesture process. He stated that there is evidence on record dating back to 1962 showing that the land in question was owned by the Central Government through the Ministry of Agriculture. He stated that the record indicates that the land was being used as veterinary holding ground for cattle and was later taken over by the Department of Agriculture that established a tractor repair workshop on the suit land. He stated that there were building structures such as agriculture workshops, houses for staff, stores and some still exist today on the suit land.

[25] DW2 Kamalha Yofesi stated in his testimony that he was a field assistant in the Department of Agriculture, Kasese tractor hire unit in 1966 and was residing in Kisagazi in the camp. He stated that he does not know Steven Kule. He used to repair tractors coming from outside and carry out agriculture activities while dealing with corporations. DW2 stated in his testimony that when he was posted on the suit property in 1966, there were structures on the land such as garages, uniports, town offices and other buildings were constructed on the land thereafter. He also stated that tractors used to be tested from the place and that they were not allowed to cultivate on the land. He stated that the late Muhanya Bughogholho used to stay at Kanyangeya. On cross examination he stated that he knew Muhanya Bughogholho and that he used to go to church with his sons.

[26] DW3, Byarugaba Augustine, stated that he stated working in the Agriculture, Kasese workshop in 1978 April. He was stationed in

Kisagazi and used to sleep in the airport for 27 years. He also stated that he found 23 uniports, 2 workshops, 4 houses, 5 workshops, big water tanks and trees on the land.

[27] The correspondence on record indicate that the land in question was originally granted to the Veterinary Department by the Uganda Land Commission as cattle holding ground. The evidence indicate that the Agricultural Department had been operating a tractor workshop and tractor hire service unit from the suit land for some time. The Agricultural Department moved their tractors on the suit land following an arrangement with the Veterinary Department that the former would move onto the land on loan. All this is evidenced in the correspondences dated 30th December 1966, 23rd January 1967, 26th January 1967 and 27th January 1967.

[28] In a letter dated 8th June 1967, the Office of Commissioner of Lands and Survey informed the Secretary to the Uganda Land Commission that new mud and wattle buildings had been erected on land belonging to the Uganda Land Commission located along the main Fort-Portal Kasese road which is the suit land. The Assistant Commissioner raised concern about the growing number of squatters on the land and the fact that the Veterinary Department had failed to utilize the land despite giving the Agricultural Department a small portion of the land. In a letter dated 24th May 1968 the Regional Lands and Survcy Officer advised the Commissioner of Lands and Survey to make an allocation of the subject land to the Agricultural Department without further reference to the Veterinary Department. In a letter dated 27th June 1969, the Commissioner, Lands and Surveys Department, advised the Commissioner of Veterinary Services to take steps to prevent further encroachment on the portion of land that the Department of Veterinary Services had retained, separate from the 20 Acres that the Agricultural Department, was allowed to use, in order to avoid excessive compensation at a future date.

[29] Following the decentralization and divesture policy reforms, the Government divested itself of the suit property to Kasese District Local Government vide a letter dated 6th April 2001 from the Permanent Secretary of the Ministry of Agriculture. The appellant applied for a grant of a freehold land title in respect of the suit property in 2011which was granted in 2013.

[30] The case for the respondents is that the suit land or part thereof, (given that they claim only, 4.6 hectares, while the respondents claims 6.392 hectares), initially belonged to their grandfather, who allowed the Department of Agriculture, which employed him, to establish a tractor repair workshop on the land, on the understanding that they would give up the land to the respondents' grandfather, when they no longer needed it. No date is provided when this oral agreement was made between the Department of Agriculture and the respondents' grandfather. And that the appellant is now a trespasser on their land. On the other hand, the appellants contend that the suit land originally belonged to the Government of Uganda which had established a class 1 Agricultural Workshop for Tractor Repair and a Tractor Hire Unit. The land was subsequently passed on from the Ministry of Agriculture to the appellant in 2001. Documentary evidence to that effect was admitted in evidence without objection by the respondents.

[31] In considering which of these two versions is more probable than the other I find the words of Leggat J, in the case of Gestmin SGPS S.A. v Credit Suise (UK) Limited and Anor [2013] EWHC 3560 as particularly instructive as to how a court should evaluate evidence. He stated,

> **'Evidence based on recollection**
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> 19.The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
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> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of

the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21.It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness

> recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. It is in this way that I have approached the evidence in the present case.'

[32] I agree that much as oral testimony is of value as evidence, written and or documentary evidence available in relation to the matters in issue may be preferred as it is least likely to be subject to revision, or reconstruction, unlike oral recollection of past events or transactions. I will approach the evidence in this case with this principle in mind.

[33] Only PW4 claims to have been present when PW4's father and grandfather of the respondents allegedly allowed the Ministry of Agriculture to enter his land and establish a workshop on the suit land, among other things. The other respondents' / plaintiffs' witnesses had not been presumably born at the time. Their evidence, (testimony of PW1, PW2 and PW3), in relation to this alleged agreement between the respondents' grandfather and the Government is entirely hearsay and not acceptable on this point.

[34] Against this version of events, is the appellant's version that this land initially belonged to the Department of Veterinary Services, passed on to the Ministry of Agriculture which established an agricultural workshop, among other things on the land, which was devolved to the Appellant in 2001. The trail of correspondence that DW1 submitted to court and were admitted as defence exhibits dating from 1962 to 1969, clearly established that the land in question belonged to Government, was managed by the Uganda Land Commission, and the Department of Agriculture established a tractor hire service and repair workshops on the same.

[35] DW2 was employed by the Department of Agriculture from as far back as 1966. He described the development of the suit land by Government. It had workshops for repair of tractors and offices for a tractor hire service provided by Government. There were residential houses built on the premises using bricks and timber. There were 32 uniports. Some of these developments are still available on the land. The testimony of DW1, DW2 and DW3 is largely free of contradictions and has not seriously been challenged.

[36] The question to be resolved on this dispute is whether the respondents' grandfather was indeed the owner of this land, who lent it to Government, or the land was owned by the Government. On the evidence on record the claim that the land was owned by the respondents' grandfather who lent it to Government is simply not credible. It is preposterous. It is not known which year this agreement was entered into. There are no particulars provided by PW4 about this agreement. It is not even clear if he witnessed the making of this oral agreement.

[37] It is improbable that an employee of the Government, as it is claimed the respondents' grandfather was, would lend 20 acres of land to the Government which would then develop it with permanent buildings, on the oral understanding that Government would give up its holding and revert it back to the individual employee. Governments in this country, from the colonial times to this day, simply did not operate that way. The respondents' version of the root of their ownership and how Government came to occupy this land is simply improbable on its own. It is a yarn created to falsely appropriate public property for private purposes.

[38] From the testimony of PW4, it is clear that Stephen Kule, did not occupy the suit land, as attempts to do so, were successfully resisted by the Government and he settled elsewhere. It is now the respondents who have attempted to take over the property and this has been successfully resisted by the appellants. The respondents' claim that this was a gift *inter vivos* is another yarn to attempt and establish title. Stephen Kule, could not pass on that which he had no title to. On the other hand, PW1 claimed that they inherited the land after their father's death. The two propositions are inconsistent. It must be one or the other. If it was a gift *inter vivos* as claimed in the pleadings, it cannot be inherited by way of intestate succession, as it would no longer be part of the estate of the donee.

[39] PW1, the first respondent/ plaintiff, as did his brothers, PW2 and PW3, testified that their father occupied the suit land. While PW4 the only one who could have been alive, while their grandfather was alive, testified that Stephen Kule's attempts to take over the suit land were resisted by Government and he went and settled in Kiteso, Kamaiba. The respondents' claim that there are *bona fide* occupants has no basis whatsoever. They have not occupied the suit land. Neither did their father successfully do so, on the evidence of PW4.

[40] Though PW1 initially denied that he had been successfully prosecuted over attempts to take over this land in his examination in chief, in cross examination he admitted that he had been prosecuted for malicious damage to property and fined. It is clear that the appellants have been consistent in resisting attempts by the respondents to take over the suit property.

[41] From the testimony of DW1 there is documentary evidence showing how the Central Government passed on this property to the appellants. The letter that was exhibited is dated April 6, 2001 and was written by the Permanent Secretary, Ministry of Agriculture. It devolved Class 1 Agricultural Workshop located in Kasese to Kasese District Local Government, as part of a general policy divestiture of central government functions and properties. This evidence has not been impeached by the respondents. It is a complete answer to the respondents' claims of ownership.

[42] I note that whereas the witnesses for the appellant have no interest in the suit land and stand to benefit nothing whichever way this case goes the respondents on the other hand are seeking to establish an interest of ownership over the suit land. The appellant's evidence was credible while the respondent's evidence was contradictory on important aspects of the case for the respondent. Take the point whether the respondents' father, Stephen Kule, settled on the suit land. Whereas PW4 stated that he settled elsewhere the respondents' in their testimony claimed that he settled on the suit land. Both versions of the respondents cannot be true on this point. The latter was clearly a lie. PW4's testimony on this point supports the appellant's version that Government and the appellant have been in occupation of the suit land at all material times.

[43] PW2 claimed that it was his father, Stephen Kule, who gave land to PIDA, meaning Government. This is contradicted by PW4 who testified that it was the respondents' grandfather, who gave the land to the Government. Anyhow, whichever it was, if at all, PW2, was not a witness to those events. Respondents are clearly not creditworthy

[44] The respondents' testimony appears to be a reconstruction of events rather than a recollection of what occurred long before they were born. They were not witnesses to the alleged transaction between their grandfather, or father, with the Government. The source of their information is

unknown. There is no record of such transactions as they allege to have taken place. In other words, it appears simply made up to lay claim to the suit land.

[45] I would hold that the respondent failed to establish the case put forward that they are the customary owners of the suit land or that they are bona fide occupants of the same. I would find that the appellant rightly established that the suit land belonged to the appellant. I would allow grounds 1, 3 and 5.

Grounds 2 and 4

[46] I would consider the said grounds together as they revolve around whether the first appellate court was right to find fraud against the appellants and cancel the certificate of title to the suit land.

[47] In the course of the trial the appellant produced a certificate of title to the suit land and the documents that led to its issuance. The certificate of title and these documents were admitted in evidence without objection by the respondents. The respondents, at that stage had two options, if they wanted to challenge that title. Firstly, it was to apply for amendment of their pleadings, and the plaint in particular, as they were the plaintiffs and seek to impeach that certificate of title for fraud or other ground allowed by law. They did not do so. Having not done so, and never sought to re-open their case, and lead evidence to impeach that certificate of title, it was not open to the trial court, or the first appellate court, to cancel that certificate of title for fraud. Fraud had not been pleaded at all.

[48] Secondly cancellation of title was not relief that the respondents sought in the Court of first instance. That certificate of title was a complete defence to the respondents' claims to the suit land, until it was nullified for fraud by a competent court of law, after hearing proceedings for that purpose. See sections 59 and 77 of the Registration of Titles Act, Chapter 230. Or, on the second option available to the respondents / plaintiffs, on proceedings before the Commissioner for Land Registration, (Chief Registrar of Titles), in accordance with section 91 (2) of the Lands Act, Chapter 227.

[49] Neither of the foregoing 2 options were chosen by the respondents / plaintiffs. In my view, in the circumstances of this case, it was not open to the trial court or the first appellate court, to purport to consider claims of fraud, and relief, which had not been set in the pleadings before it, and evidence adduced upon the same.

[50] The Supreme Court was confronted with a somewhat similar situation in J.W. R. Kazzora v M.L.S. Rukuba [1993] UGSC 2. The appellant had filed a suit against the respondent in the High Court contending that certain property had wrongfully be transferred to the respondent while there was an existing caveat against any dealings in respect of the suit property. The High Court dismissed the action, inter alia, on the ground that the caveat had lapsed by the time the land was transferred. On appeal the appellant contended that since the respondent was aware of the appellant's caveat on the suit property the transfer of the said land to him was fraudulent and ought to be set aside.

[51] Oder, JSC, stated in part,

> 'In the instant case fraud was not specifically pleaded. Nor was fraudulent intent pleaded or the facts set out in the plaint such as to create fraud. Fraud was not only not pleaded but it was also not proved. Further, the appellant's case in the lower Court, was founded on and argued on the basis of fundamental mistake. I do not think, therefore, that on appeal he is entitled to rely on fraud, which is different from his original case. This view, I think is supported by the case of Vidyarthi v Ram Kalcha [1957] E A 527. .....'

[52] The appellant's case in the Court below, was based on trespass. It is not possible to raise a new ground of fraud on appeal, which was neither pleaded or proved in the Court below. It was an error for the first appellate court to consider fraud which had not been pleaded in the court of first instance. The order for cancellation of the appellant's certificate of title has no justification in the circumstances of this case.

[53] Lastly, I know that the High Court of Uganda is a court of unlimited civil and criminal jurisdiction. It is the only court with jurisdiction to cancel a certificate of title for fraud, pursuant to section 177 of the Registration of Titles Act. It states,

'177. Powers of High Court to direct cancellation of certificate or entry in certain cases.

Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.'

[54] However, when the High Court of Uganda is sitting as a first appellate court, or indeed as an appellate court, its jurisdiction is defined by section 80 of the Civil Procedure Act, and in this regard, it would be limited to the exercise of the jurisdiction that the trial court was seized with.

[55] Section 80 states,

'80. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power,

'(a) to determine a case finally;
(b) to remand a case;
(c) to frame issues and refer them for trial;
(d) to take additional evidence or to require such evidence to be taken;
(e) to a order a new trial.

(2) Subject to subsection (1), the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted in it.'

[56] It follows that as the trial court did not have jurisdiction to cancel a certificate of title in respect of the proceedings before it, the High Court of Uganda was similarly constrained in its appellate jurisdiction and could not have rightly ordered the cancellation of the appellant's certificate of title to the suit lands without further proceedings for that purpose.

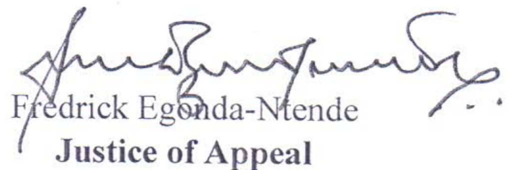
[57] In light of the above, I would allow grounds 2 and 4 of the appeal.

[58] In the result, I would find that the appellant is the rightful owner of the suit property. I would allow the appeal, with costs here and below. I would set aside the decision and orders of the first appellate court and trial court.

Decision

[59] As my brothers, Musota, JA., and Kasule, Ag. JA., agree, this appeal is allowed with costs here and below. The judgment and decree of the High Court of Uganda is set aside. The appellant is declared the rightful owner of the suit land.

Dated, signed and delivered at Kampala this 2nd day of Oct 2020.



Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Civil Appeal No. 249 of 2017

(Arising from High Court Civil Appeal LD No. 15 of 2016)
(Arising from Civil Suit LD No. 29 of 2011)

Kasese District
Local Government Council :: Appellant

Versus

1. **Baluku Luciano Buhaka**
2. **Masereka Julius**
3. **Bamwite David**
4. **Emmanuel Buhaka**
5. **Marahi Julius**

:::::::::::::::::::::::::::::::: Respondents

Coram: Hon. Justice Egonda-Ntende, JA.
Hon. Justice Stephen Musota, JA.
Hon. Justice Remmy Kasule, JA.

Judgment of Justice Remmy Kasule, Ag. JA

I have read through the lead draft Judgment by my brother Frederick Egonda-Ntende, JA. I agree with his conclusion of allowing this appeal.

I, for emphasis, note that the respondents claimed to be owners of the suit land having customarily acquired the same under customary law. They thus had the burden to prove, on a balance of probabilities, that they owned and occupied the suit land under customary law by adducing evidence to prove the customary law under which they claimed to own, occupy and use the suit land in the same was as they would be required to prove any other relevant facts of their case. See: **Ernest Kinyanjui Kimani vs Muiru Gikanga [1965] EA 735, at page 789**, applied in Uganda in **Supreme Court Civil Appeal No. 2 of 2007: Kampala District Land Board and Another vs Venansio Babweyaka and 2 others.**

At trial the witnesses for the respondents, apart from generally asserting that the respondents owned, used and occupied the suit land as customary owners, adduced no credible evidence to prove the customary law and the customary ownership of the suit land. There was no independent evidence adduced at trial from the clan or customary community of the respondents to prove their assertion that they customarily inherited the land in 2000 from their father Steven Kule and that their said father under customary law had inherited the same from their grandfather Muhanya.

None of the respondent's witnesses stated to the trial Court the customary boundaries of the suit land they claimed to own customarily and what customary marks had been set up over time to customarily demarcate the boundaries of that land.

No evidence was adduced of any gardens of crops and agricultural developments customarily developed by the respondents or their predecessors on the suit land. None of the witnesses for the respondents pointed to a house structure or other customary features, such as graveyards on the suit land, to prove customary ownership occupation and use of the land by the respondents and their predecessors. None of the respondents pointed to and showed the trial Court the actual house structure or spot where their father and the other predecessors in title are alleged to have been born. While there were trees on the suit land, no particular respondent or any one of their predecessors claimed to have planted those trees. The same are also not claimed to have been planted for the purpose of establishing customary boundary marks of the suit land.

By way of contrast, on the other hand, the appellant, as the defendant to the suit, adduced credible evidence through witnesses, that proved that, as early as 1962, the suit land was owned by the Central Government through the Ministry of Agriculture. It is the Central Government through the Ministry of Agriculture that passed on the ownership of the suit land to the appellant. Exhibits DE1, and DE2 clearly established this. There was also evidence that was not controverted that as early as 1962 the Central Government was in occupation and use of the suit land for repair of tractors and also for carrying out agriculture activities dealing with Co-operatives.

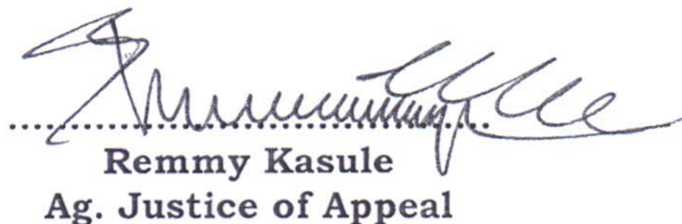
The fact that it was the Central Government through the Uganda Land Commission that passed on title of the suit land to the appellant was not in any credible way challenged.

On the overall appreciation of all the evidence, I too agree with Hon. Justice Egonda-Ntende, JA, that as a matter of law, the respondents failed to prove, on a balance of probabilities, that they customarily own the suit land. The appellant, on the other hand, proved on a balance of probabilities, the acquisition of ownership of the suit land from the Central Government of Uganda.

Accordingly, I am in agreement with the decision that this appeal be allowed with costs to the appellant of this appeal and those in the Courts below. The Judgment and decree of the High Court of Uganda is set aside, thus also setting aside the Judgment of the Chief Magistrate's Court, Kasese in Civil Suit No. LD 029 of 2011.

The appellant is hereby held to be the rightful owner of the suit land.

Dated at Kampala this 2nd day of Oct 2020.



Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 249 OF 2017

(Arising out of Civil Appeal No. LD 15 of 2016)
(Arising out of Civil Suit No. 29 of 2011)

KASESE DISTRICT LOCAL

GOVERNMENT COUNCIL :::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **BALUKU LUCIANO BUHAKA**
2. **MASEREKA JULIUS**
3. **BAMWITE DAVID** :::::::::: **RESPONDENTS**
4. **EMMANUEL BUHAKA**
5. **MARAHI JULIUS**

CORAM: HON. JUSTICE F. M. S EGONDA NTENDE, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE REMMY KASULE, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my learned brother Fredrick Egonda-Ntende, JA. I agree with the reasoning in his judgment and the orders he has proposed. This appeal be allowed.

The judgment and decree of the High Court of Uganda is set aside. The appellant is declared the rightful owner of the suit land.

Dated at Kampala this.....2nd.......day of .....Oct............2020

....

Stephen Musota

JUSTICE OF APPEAL