

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

[*Coram: Egonda-Ntende, Bamugemereire, and Madrama, JJA*]

Criminal Appeal No. 817 of 2014

(Arising from High Court Criminal Appeal No.59 of 2014 at Jinja)

**BETWEEN**

Wasswa Jamada=====Appellant No.1  
Kisige William=====Appellant No.2  
Kisige Bakali=====Appellant No.3

**AND**

Uganda=====Respondent

*(On appeal from the judgment of the High Court of Uganda Basaza Wasswa, J.,  
delivered on the 9<sup>th</sup> September 2014)*

**JUDGMENT OF THE COURT**

**Introduction**

[1] This is a second appeal. The appellants were charged and convicted before the Chief Magistrates Court of Iganga of the offence of forcible entry contrary to section 77 of the Penal Code Act and sentenced to various custodial sentences on 3<sup>rd</sup> July 2014. In addition, several orders were made in relation to the land at the heart of the matter. The appellants appealed to the High Court of Uganda. On 9<sup>th</sup> September 2014 the conviction was set aside and substituted with a conviction for the offence of criminal trespass contrary to section 302 of the Penal Code Act. The appellants were sentenced to one year's imprisonment to run from 3<sup>rd</sup> July 2014. The High Court maintained the order for re planting the boundary marks in the

presence of the Officer in Charge of Namungalwe Police Station and eviction of the appellants from the land belonging to the complainant.

[2] In the appeal to this court the appellant sets forth 7 grounds of appeal, challenging both the conviction and the orders in relation to re planting of boundary marks in the presence of the officer in charge of Namungalwe police station. The grounds in relation to the re planting of boundary marks in the presence of the officer in charge of Namungalwe police station were not challenged in the High Court where only one ground was argued against conviction. The permission of this court was not sought to argue new grounds not argued in the court below.

[3] We shall set out the grounds of appeal.

‘(1) The learned judge of appeal erred in law when she maintained the learned magistrates order that the boundary marks be replanted in the same positions as they were before they were removed without considering the errors on record thereby occasioning a miscarriage of justice.

(2) The learned judge of appeal erred in law when she ordered the appellants out of the complainant’s land to the extent of their encroachment without considering the inconsistencies on record thereby occasioning a miscarriage of justice.

(3) The learned judge of appeal erred in law when she ordered that exhibit P.3 a sketch map that was followed by the magistrate G11 dated 04/07/91, and P.4 the sketch map drawn by Detective AIP Orupot Peter shall guide the replanting and re demarcation of the suit land which occasioned a miscarriage of justice.

(4) The learned judge of appeal erred in law when she directed the O/C of Namungalwe Police Station in Iganga District to oversee the exercise replanting boundary marks in the same positions as they were before which occasioned a miscarriage of justice.

(5) The learned judge of appeal erred in law when she relied on a judgment that arose from an RC111 Court which was not properly constituted according to the law and had no proper records and proceedings thereby occasioning a miscarriage of justice.

(6) The learned judge of appeal erred in law when she relied on a judgment of the an RC111 court where the appellants were not parties thereby occasioning a miscarriage of justice.

(7) The learned justice of appeal erred in law when she failed to accord the appellants the defence of honest claim of right.'

- [4] The brief facts in relation to this appeal, which are not in contention, are that the complainant in this case was the daughter of one Wakinyankali Hussein. She inherited the land in question from her father. Prior to her father's death there had been a dispute between her father and one Kadiri Waiswa over this land. Kadiri Waiswa sued the late Wakinyankali before the Local Council Court. Kadiri Waiswa lost and appealed to the Chief Magistrates Court of Jinja. Kadiri Waiswa lost the appeal and Wakinyankali Hussein was declared the owner of the land. The Chief Magistrate directed a magistrate grade 11 at Namungalwe to re plant the boundary marks and hand over the land to Wakinyankali which was done. Calm obtained for some time as Kadiri Waiswa made no further appeal.
- [5] The appellants are brothers of Kadiri Waiswa. They have land neighbouring the land in question. When both Wakinyankali and Kadiri Waiswa died the appellants removed the boundary marks and entered on the late Wakinyankali's land which led to the current proceedings against them.
- [6] Counsel in this matter filed and relied on their written submissions.
- [7] The grounds of appeal fall in 2 categories. There is one set, ground 1 to 6 which are being raised for the first time in this court and were neither raised at the trial at first instance nor before the first appellate court. And ground 7 which is a matter that raises a defence to the offence which they were convicted of by the first appellate court. We will take ground 7 first.

### **Ground 7**

- [8] In ground 7 the appellants challenge their conviction on the ground that the first appellate court failed to accord them the defence of honest claim of right. It states, 'The learned Justice of appeal erred in law when she failed to accord the appellants the defence of honest claim of right.'

- [9] Mr Andrew Ssebugwawo, for the appellants, submitted that it is clear from the defence of the appellants that they claim a right on the disputed land. This land is being disputed between 2 families. Had the learned judge on appeal taken into account section 7 of the Penal Code Act, she would not have convicted the appellants of criminal trespass. He cited the case of Byekwaso Mayanja Sebalijja v Uganda [1991] HCB 15 but did not avail this court a copy of that decision as he is obliged to do.
- [10] Mr Joseph Kyomuhendo, Chief State Attorney, for the respondent opposed this ground. He submitted that the suit land was not in dispute. That had been resolved by the Chief Magistrate's decision in the dispute between Wakinyankali and Kadiri Waiswa, which had not been appealed by Kadiri Waiswa, the party that initially filed it and lost.
- [11] Section 7 of the Penal Code Act provides,
- ‘7. Claim of Right A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.’
- [12] This defence can only hold water if the person claiming it, committed the act or acts in question in relation to the property in issue, honestly claiming a right to the property, without an intention to defraud anyone else. It is not enough to simply lay claim to a property, remove boundary marks, separating that property from yours, and take over some one's else land.
- [13] We have examined the record of evidence in this matter. The evidence of the Mr Baite Joan, a neighbour to the appellants and complainant, testified in this matter as an independent witness at the *locus in quo* and demolished the defence of honest claim of right. It was not available to the appellants. The appellants were present when the boundary marks were planted in the civil case between Kadiri Waiswa and Wakinyankali. The claim by the appellants that there were no boundary marks planted is false.
- [14] The appellants deliberately destroyed the boundary marks that had been planted in their presence, and were taking advantage of the death of the original owner and his adversary to forcibly acquire the same, asserting that

it had been theirs all along. The acts were clearly dishonest and fraudulent. The defence of honest claim of right was not available to the appellants.

[15] This ground is without merit.

### **Grounds 1, 2, 3, 4, 5 & 6**

[16] The Supreme Court in Nalongo Naziwa Josephine v Uganda [2018] UGSC 27, restated,

‘ ..... in a second appeal such as the instant one, an appellant is not at liberty to raise matters that were not raised and considered by the trial court and the first appellate court. Accordingly this appeal is incompetent.....’

[17] This point is a settled rule with a wealthy of decisions of the Supreme Court and the Court of Appeal for Eastern Africa / East Africa Court of Appeal to support the same. See Bogere and Anor v Uganda [2018] UGSC 9; Tarinyebwa Mubarak and Anor v Uganda [2000] UGSC 16; and Bakubye and Anor v Uganda [2018] UGSC 5.

[18] Grounds 1 to 4 of appeal related to the order for re planting boundary marks that were made by the trial court and affirmed on appeal. In the court below the appellants, as pointed out earlier, did not, challenge the orders to replant boundary marks. They only challenged their conviction.

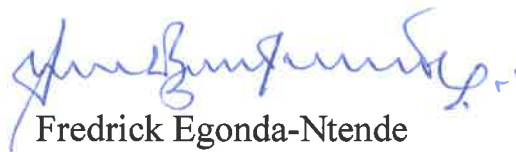
[19] Ground 5 attacks the High Court for relying on a judgment of an RC 111 Court which had not been properly constituted in law and which had no proper records and proceedings. Ground 6 attacks the learned Judge of appeal for relying on the judgment of the RC 111 Court where the appellant were not parties. This challenge was not made at the trial of this matter. Neither was it made on first appeal. It is being raised for the first time without leave of court. At the same time there is no evidence on record to suggest that what is alleged was the case. It was not part of the case put forth by the appellants in the courts below.

[20] As those grounds were not argued in the court below they can only be raised in this court with leave of this court. No leave was sought. We accordingly strike them out.

**Decision**

[21] This appeal is without merit. It is dismissed and the judgment of the High Court of Uganda on appeal is affirmed.


Dated, signed and delivered at Kampala this 13<sup>th</sup> day of September 2021



Fredrick Egonda-Ntende  
**Justice of Appeal**



Catherine Bamugemereire  
**Justice of Appeal**



Christopher Izama Madrama  
**Justice of Appeal**