THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 138 OF 2014
Arising out of High Court Civil Appeal No. 23 of 2011
Arising from Kumi Magistrates Court Civil Suit No 101 of 2004

Coram: **Hon Justice Catherine Bamugemereire JA,**
Hon. Justice Stephen Musota JA,
Hon. Justice Muzamiru Mutangula Kibeedi JA

IPUTO GABRIEL ..... APPELLANT

VERSUS

REGISTERED TRUSTEES OF SOROTI DIOCESE .....RESPONDENT

[An appeal from the Judgment of the High Court at Soroti before H.WALAYO, J dated 28th day of May 2014 in Civil Appeal No. 0023 of 2011]

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

This is a second appeal from the decision of the High Court in Soroti, which in the exercise of its 1st Appellate jurisdiction upheld the decision of the Chief Magistrate.

Brief Facts

The Respondent instituted a suit before the former Land Tribunal in Kumi District against the Appellant claiming 6 gardens of land situated in Kolo Parish, Kapir Sub County, Ngaro District. The matter was later transferred to the Magistrate's Court in Kumi. The Respondent's claim was that she acquired the land in June 1929 from the Colonial Governor through the District Commissioner after Mill Hill Mission, a colonial missionary outfit consisting of Mill Hill Sisters, Brothers and Fathers, was granted Temporary Occupation License No. 938. It is alleged that the Appellant trespassed on

the land in 1998, and cultivated the same without the consent of the Respondent.

The Magistrate's Court of Kumi heard the suit and found the Appellant a trespasser and therefore declared that the Respondent was the rightful owner of the suit property.

Being dissatisfied with the learned Magistrate's Judgment, the Appellant appealed to the High Court in Soroti. The Appellate court dismissed the appeal and found that the Respondent was the rightful owner of the disputed land.

Being dissatisfied, the Appellant appealed to this honourable Court . The grounds of appeal are as here below:

1. **The Learned Appellate judge erred in law and fact when she ordered for a survey and later changed her position on the same.**
2. **The Learned Appellate judge erred in law and fact when she relied on a non-existent sketch map purportedly filed on record on the 14th day of October, 2008.**
3. **The Learned Appellate judge erred in law and fact when she moved herself to grant orders to the Respondent that had not been prayed for.**
4. **The Learned Appellate judge erred in law and fact when she held that there were no contradictions in the respondent's evidence.**
5. **The Learned Appellate judge erred in law and fact when she held that the suit land was given to the respondent by the District Commissioner.**
6. **The Learned Appellate judge erred in law and fact when she held that PW5's testimony was reliable and had no contradictions.**

7. **The Learned Appellate judge erred in law and fact when she failed to re-evaluate the evidence.**
8. **The Learned Appellate judge erred in law and fact when she acted with bias.**
9. **The Learned Appellate judge erred in law and fact when she held that Appellant was a trespasser.**

When the appeal came up for hearing, Learned Counsel, Mr. Songon Mustapha appeared for the Appellant. Learned Counsel, Geoffrey Malinga appeared for the Respondent. Both Counsel relied on written submissions which were adopted by this Court.

Legal arguments.

Ground No.1

The Learned Judge erred in law and fact when she ordered for a survey and later changed her mind.

During his submission in the High Court, Counsel for the Appellant herein implored the court to carry out a locus visit to ascertain the actual acreage of the property in dispute.

In response thereto, the court wrote to both parties by letter dated 11th February, 2014, with directions that;

1) **The file had no locus proceedings**
2) **That it was necessary that the acreage of the land is established by a surveyor.**
3) **And both parties were to appear on the 4th March 2014 at 9:00am.**

The court later opted not to carry out the locus visit.

It was the Appellants submission that the survey was crucial in determining this case and by changing her mind on what she had directed, the Appellate judge was biased. That there was no reason whatsoever for the learned judge to change her mind and she had nothing to base on to make her decision.

Additionally, Counsel submitted that the judge acted functus officio when she abandoned the survey exercise.

He relied on the According to Black's Law Dictionary in which functus officio is defined as 'without further authority of legal competence because the duties of the original commission have been fully accomplished.' relied on the case of **Goodman Agencies Limited v Attorney General & Anor. Constitutional Petition No. 3 of 2008** where court citing **The Botswana Case Of Magdeline Makinta v Fostina Nkwe**, Court of Appeal held the proposition that:

> **'The general Principle now well established is that once a court had duly pronounced itself, it has no authority to correct, alter or supplement it. The reason is that it becomes there upon functus officio, its jurisdiction on the case having been fully exercised over the subject matter has ceased.'**

Counsel the Appellant invited court to allow ground no. 1.

The Respondent's Case

In reply, Counsel for the Respondent submitted that the 1st Appellate Judge did not order a survey but issued guiding directions. Following failure by parties to agree on a surveyor to be appointed, the court proceeded to make a decision aided by the discovery of the sketch map made by the Trail Magistrate at the time of locus visit.

About the contention that the Appellate judge was ***functus officio***, Counsel averred that the doctrine does not apply to the facts here because the directions were not a decision on the rights of the parties nor benefits granted for the doctrine to be invoked.

Ground No. 2

The learned 1st Appellate judge erred in law and fact when she relied on a sketch map that was never adducted in evidence.

During the 1st appeal, the Appellate judge ruled thus:

> 'Moving forward, I have decided to determine the appeal without additional evidence and after discovering a sketch map of the disputed land, on the court record" she further stated, "the sketch map is found on page 3 of the record of proceedings'

Counsel submitted that there was no background laid regarding the manner in which the sketch map was admitted on the court record since it was not formally tendered in court. He contended that it is now an established

principle of law that court cannot rely on a document that has not been formally exhibited in court.

In the alternative, Counsel contended that the discovery of the sketch map by the 1st Appellate Judge did not resolve the issue of determining the acreage of the land. He added that while the sketch map would show the location of the church and probably the Appellant's home, it could not precisely illustrate how many acres each party was occupying and where.

The Respondent's case

Counsel for the Respondent submitted that the Appellate court relied on the sketch map on court record authored by the Trial court. Further that in determination of the size of the suit, the 1st Appellate judge relied on the pleadings filed by the Respondents in its claim filled on 20.06.2005. That the Appellate judge also relied on what was agreed by the parties at the scheduling.

Ground No. 3

The Learned Trial Judge erred in law and fact when she dismissed the appeal and awarded orders that had not been sought for.

Counsel for the Appellant averred that if a party does not specifically plead for a remedy, it is not up to the court to grant it. Counsel submitted that the court is not expected to 'shop around' for reliefs on behalf of litigants. That if a party chooses not to specifically plead for a particular relief, he or she is

deemed to have abandoned. Counsel submitted that the Learned Judge erred when she granted those orders since the Respondent had not sought for them. She did not even give any reasons as how she arrived at the orders she granted on appeal. That whereas the 1st Appellate Court had the powers to vary the orders of the trial court upon appeal, the variation had to be upon some motion or application by a party.

The Respondent's case

Counsel for the Respondent averred that section 80 (2) of the Civil Procedure Act provides that the 1st Appellate court shall have the same power and shall perform as nearly as may be the same duties as are conferred and imposed by the Civil Procedure Act on courts of Original Jurisdiction in respect of the suits instituted in it. Counsel contended that the Appellate court granted orders sought in the Trial Court.

Grounds No. 4,5,6,7,8 and 9

The parties agreed during conferencing to argue ground No. 4, 5,6,7,8 and 9 together since they were inter-related.

The main thrust of the Appellant's appeal to the High Court was essentially about the evidence that had been presented by the claimant at the trial. In particular, he questioned the Temporary Occupation License. He alleged that it was a temporary permit to use land and therefore did not give the Respondent perpetual rights in the land. To that end, Counsel for the

Appellant submitted that the Respondent did not discharge its duty of proving that they owned the disputed land. He noted that the 1st Appellate Judge ignored the pleas to question the above documents.

In reply, Counsel for the Respondent submitted that the appellant was addressing the wrong party. He averred that the right authority would have been the government of Uganda which took over from the Protectorate Government under which the District Commissioner. He further submitted that the document was a pre-typed standard document with the blank spaces not filled in by the issuing authority. Additionally, he invited this court to note that the Appellant neither disputed the location of the suit land nor objected to related documents being tendered in court during the scheduling.

Counsel for the Appellant further brought to the attention of this court, PW5's , Makulata's evidence which he asserted was contradictory and stood in contrast to the evidence of other witnesses on key standpoints such as the use and occupation of the suit land. Makulata's testimony was that nobody from the church had ever utilized the land. He relied on PW1, Okurit Vigil, who testified to the effect that the land was being utilized by teachers. PW3 Oyara Joseph's evidence was that the land was utilised as a food store with granaries and that his father was one of the users. PW2, Opejo Boniface testified that he was appointed a catechist and he lived on the suitland but did not seem to know the other witnesses. Counsel pointed out the

contradictory evidence of the above witnesses and submitted that the contradictions go to the root of the matter but yet the Trial Judge completely overlooked these inconsistencies and contradictions.

He concluded that unlike the above inconsistencies, the Appellant gave a clear and consistent history of his ownership of the suit land from his grandfather through the father to him. Counsel was concerned that in spite of the elaborate explanation, the appellate Judge side-lined the evidence and thus failed to re-evaluate the evidence thereby arriving at a wrong decision.

In reply, counsel for the Respondent, on the other hand contested the contradictions as minors and that they did not go to the root of the case but were caused by lapse of time. He relied on **Okwanga Anthony v Uganda Supreme Court Civil Appeal No. 20 of 2000** for the proposition that alleged contradictions, if any, were minor contradictions and inconsistences that did not go to the root of the case and in this particular case, they could be explained away by forgetfulness due to lapse of time.

He contended that the inheritance of the property only happened after death of the previous owner, and by going with the evidence of the Appellant, it means that he assumed responsibility over the suit land in 1992 following his father's death.

Counsel prayed that the suit be dismissed with costs.

Consideration of the Appeal

In order for the second Appellate court to interfere in concurrent findings of fact by the Trial Court and the first Appellate court, it had to be proved that the first Appellate Court erred in law or in mixed fact and law to justify an intervention.

Preliminary Objection

While replying to the Counsel for the Appellant's submissions, Counsel for the Respondents raised two preliminary points of law:

First that the Respondent was served with the Memorandum of Appeal and Record of Appeal after the expiry of the prescribed time. Counsel contended that this renders the appeal incompetent before this court as the Appellants didn't seek leave of court before serving them, out of time.

He relied on the case of **Dr.S.B Kinyatta & Anor v Subramanian [2001-2005] 2 HCB 95** which settled the question that the failure to take an essential step in the process of prosecuting an Appeal renders an appeal incompetent. Failure to do so within prescribed time had the same effect.

Secondly I note that the Appellant was attempting to recover land from the Respondent approximately 66 years after the latter took possession. Counsel contended that in as much as the initial allocation was on the basis of a temporary license by the District Commissioner of Teso to the Mill Hill Mission who were the Respondent's predecessor in title. Under section 5, 6

and 16 of the Limitation Act, Cap 80, the Respondent had been in possession of the land since 26.6.1929 and had acquired an adverse interest by passage of time. It was Counsel's submission that the Respondent therefore having enjoyed quiet possession of the suit land uninterrupted until 1955 acquired an equitable interest in the said suit land.

In response to the preliminary points of law, Counsel for the Respondent averred that the Appellants were served earlier but opted to put a later date on the served memorandum of appeal.

The two grounds of appeal will be considered concurrently. In **Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22** by the Supreme Court of Uganda that:

> **The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.**

I have addressed my mind to submissions of both counsel and I find that the service of the memorandum and record of appeal outside the prescribed time was an irregularity but this did not prejudice either of the parties. In the

interest of justice I will look at the merits of the appeal and invoke the provisions of Article 126(2) (e) of the Constitution of the Republic of Uganda, 1995.

The preliminary objections as raised by Counsel for the Respondent are accordingly over ruled. The merits of the appeal will be considered to aid in determining the same.

Ground No.1

The Learned Judge erred in law and fact when she ordered for a survey and later changed her mind.

Counsel for the Appellant faults the Appellate judge for ordering a view of a locus in-quo and later changing her mind on the matter.

It was aptly held by **Sir Udo Udoma** CJ (Emeritus) in **Mukasa versus Uganda (1964) EA 698 at page 700** 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. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence.'

In her decision, the First Appellate judge found as follows:

> *After studying the record and in exercise of power to call additional evidence under section 80(1) (d) of CPA, I directed parties to agree on a surveyor to:*
>
> 1. *Determine the acreage of disputing land*
> 2. *Determine acreage of land occupied by the Respondent.*
>
> *However, this decision was not well received, and as a result, a surveyor was not appointed. Moving forward, I have decided to determine the Appeal without this additional evidence and after discovering a sketch map of the disputed land, on the court record. This sketch map shows location of the church and location of the Appellants home. The map is refereed to at page 3 of the typed proceedings. In line with this case and what is on record, in my opinion, there was no miscarriage of justice occasioned to the Appellant nor the Respondent and the locus visit was done appropriately.*

From the above ruling it appears that the 1st Appellate Judge having ordered for the appointment of a surveyor and parties failed to oblige opted to use a sketch map on the record. It has been decided by a host of cases that visiting locus in-quo by court is not mandatory and court reserves the right to visit locus in-quo in deserving cases. The 1st Appellate judge whose sole duty was to re-hear the case by subjecting the evidence presented to the Trial Court to

a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion, can surely not be faulted for failing to visit Locus. She exercised her duty to scrutinize the sketch map presented at the trial.

This ground therefore fails.

Ground No. 2

The learned Appellate judge erred in law and fact when she relied on a sketch map that was never adduced in evidence.

Learned Counsel for the Appellant contested the manner in which the 1st Appellate court relied on evidence not adduced in court. The 1st Appellate court has a duty to re-evaluate the evidence to avoid a miscarriage of justice while it mindfully arrives at its own conclusion. See **Banco Arab Espanol v Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

In the instant case, the 1st Appellate judge referred to that sketch map in her judgment. One Oyama Basil who was a member of the parish Council and a resident was invited by the court to guide on the boundaries. Counsel for the Appellant, then for the defendants objected to Mr Oyama guiding court, which objection was overruled by court on a ground that it was important that court is shown the area in dispute. Thereafter, the record shows the 'map of drawn area attached. It is a typed proceeding. It's unclear whether Mr. Oyama is the one that drew the sketch map and tendered it in court as the author. The map was drawn but Counsel for the Appellant never

objected to it. The 1st Appellate judge could rely on a document on a court record. It was evidence before court. evidence that was undisputed and solves the case. We find that the Judge did not err to rely it. This ground likewise fails.

Ground No. 3

The Learned Trial Judge erred in law and fact when she dismissed the appeal and awarded orders that had not been sought for.

The powers of the High Court as 1st Appellate court are stipulated in Section 80 of the Civil Procedure Act Cap 71. The High Court has power to determine the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

According to Section 80 (2) of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.

In the lower court, the Trial Magistrate made the following orders;

1. **I declare the claimant the rightful owner of the six gardens of land situate at Koloin, Kapir Ngara District, having acquired the same in 1929**
2. **I declare the Respondent trespasser on the same and order him to harvest any crops he had planted on the suit land and vacate the same.**

3. **Permanent injunction restraining the Respondent and his agents shall issue to restrain him from further carrying out any activity on the land.**
4. **Taxed costs.**

The 1st Appellate Judge granted the following orders:

1. **The Respondent is the rightful owner of four gardens ascertained in the sketch map presented to court on 14.10.2008**
2. **The Appellant is directed to vacate the four gardens within two months from the date of this judgment**
3. **Permanent injunction shall issue restraining the Appellant from carrying out any activity on the four gardens**
4. **Costs of this appeal and Trial Court to the Respondent.**

It was clear that in exercising her 1st Appellant duty and upon giving the evidence a fresh scrutiny, the 1st appellate judge found that the Respondent was the rightful owner of 4 and not 6 gardens as the Trial Magistrate had found. Having varied this finding, the 1st appellate Judge indeed could rehear the evidence and arrive at her own conclusions and thus had the discretion to give further orders.

The procedure undertaken by the 1st Appellate court was well within their power.. This ground as fails as well.

Grounds No. 4,5,6,7,8 and 9

The gist of the above grounds rotates around the evidence adduced at the trial: both documentary such as the certificate of occupancy, and oral evidence. This is the evidence that the Learned Appellate judge relied on.

About the documentary evidence, Learned Counsel for the Appellant argued that it was temporary license. Although the license states the date of issue, it does not clearly and expressly place an expiry date on the license. What cannot be disputed however is that it conferred ownership to the Respondent. If anything, it tracks the genesis of how the Respondent got on the land. The Appellate judge did not err by relying on it.

The 1st Appellate judge relied on the oral evidence to trace the genesis of the occupancy of the land follow the occupancy trail. She upraised the evidence of PW1, Okurut who was a pupil of Koloin Primary School in 1951 -1957 and testified that the land was known as the church land. The evidence of PW2, Mr. Opejo Bonaface who was appointed a catechist in 1987 and testified that he was taken around the church land at that time and shown 6 gardens in the presence of the parents of the Appellant. PW4, Mr. Okello Anthony aged 62 years who stated that he grew up knowing that the land belonged to the Catholic Church. PW5, the Appellants step mother who testified that she doesn't recall the family suing the disputed land. PW6 Mr. Ateka who testified that he was a teacher of Koloin Primary school from 1955 to 1956

and appointed head teacher in 1978. That throughout that time, they used the land with permission from the Catholic Church.

All 6 witness were of advanced age and seemed more believable than the witnesses of the Appellant. While this was one word against the other, the trial courts appeared to have been convinced by the more elderly witnesses. The 1t Appellate court was convinced, just as the trial court was, that Respondent was the owner of the disputed land and had been in continued, undisturbed occupancy. Contradictions may be attributed due to the lapse of time. But their evidence pointed to the same issue that they grew up seeing the Catholic Church in occupancy, that the school used the land with permission from the Catholic Church. Having regard to the law, we find that the Catholic church are bonafides occupants and therefore cannot be a trespasser on the land they have occupied for decades.

In the case of **Henry Kifamunte v Uganda, Supreme Court Criminal Appeal No.10. 97.**

The Supreme Court defined the role of the second Appellate court:-

> 'On second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to

support the finding of fact, this being a question of law: **R v Hassan bin Said (1942)9EACA 62'**

The law precludes this court, as the 2nd Appellate court from questioning the findings of fact of a trial court provided that there was evidence to support those findings. I find no cause to interfere with the above findings.

In the instant case, there was ample evidence supporting the findings of the courts below. Regarding the issue of costs please note also that costs follow the event.

This Appeal fails and is herewith dismissed.

Appellant shall bear the costs in this court and in the courts below.

Signed this ...16th.... Day of .....Sept..... 2021

Catherine Bamugemereire
JUSTICEOF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 138 OF 2014

(ARISING OUT OF HIGH COURT CIVIL APPEAL NO. 23 OF 2011

ARISING FROM KUMI MAGISTRATES COURT CIVIL SUIT NO 101 OF 2004)

IPUTO GABRIEL :: APPELLANT

VERSUS

THE REGISTERED TRUSTEES

OF SOROTI DIOCESE :: RESPONDENT

[An appeal from the Judgment of the High Court at Soroti before H.WALAYO, J dated 28th day of May 2014 in Civil Appeal No. 0023 of 2011]

Coram: Hon Justice Catherine Bamugemereire JA,
Hon. Justice Stephen Musota JA,
Hon. Justice Muzamiru Mutangula Kibeedi JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my sister Hon. Lady Justice Catherine Bamugemereire, JA.

I agree with her analysis, conclusions and the orders she has proposed. This appeal is dismissed with costs to the respondent.

Dated this 16th day of Sept 2021

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Catherine Bamugemereire, Stephen Musota & Muzamiru M. Kibeedi, JJA)

CIVIL APPEAL NO. 138 OF 2014

(Arising out of High Court Civil Appeal No. 23 Of 2011 & Original Kumi Magistrates Court Civil Suit No 101 of 2004)

IPUTO GABRIEL ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF SOROTI DIOCESE .....RESPONDENT

[An Appeal From The Judgment Of The High Court At Soroti Before H.WOLAYO, J Dated 28th Day Of May 2014 In Civil Appeal No. 0023 Of 2011]

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Lord, the Hon. Lady Justice Catherine Bamugemereire, JA. I agree that the appeal has no merit and ought to be dismissed as proposed.

Dated at Kampala this 16th day of Sept 2021

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL