THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 037 OF 2017

BAGUMA STEPHEN::APPELLANT

VERSUS

BYARUHANGA JOHN::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Fortportal before Batema, J. dated the 15th day of March, 2016 in Civil Appeal No. 038 of 2013 sitting on appeal from the decision of the Chief Magistrate's Court of Kasese before Mfitundinda, G1 in Civil Suit No. 44 of 2009)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

This is a second appeal. In the trial Magistrate's Court before Mfitundinda, G1, the appellant was the successful party, but on appeal, the High Court (Batema, J) reversed the decision of the trial Magistrate and entered judgment in favour of the respondent.

Background

This appeal concerns ownership of a piece of land (the suit land) located in Kasungu II Cell, Kacungiro Parish, Munkunyu Sub County in Kasese District. Mr. Baguma and Mr. Byaruhanga, are cousins who have separately claimed ownership of the suit land, each alleging that the suit land was given to them by their respective late fathers, who were the previous rightful owners of the suit land.

Mr. Byaruhanga claimed that his late father Mr. Byayomba gave him the suit which is about 5 acres in 1974. Mr. Byayomba was the customary owner of the suit land. In 2003, he planted eucalyptus, bark and acacia trees on the suit land. In 2006, Mr. Baguma went onto the suit land and cut down the

trees he had planted thereon. He felt that Mr. Baguma had no right to occupy the suit land, and he accordingly instituted a suit seeking a declaration that he was the rightful owner of the land, and an order for eviction of Mr. Baguma from the suit land.

On the other hand, Mr. Baguma, too, claimed that his father Mr. Binago Sarapiyo gave him the suit land in 1975. He immediately took possession of the suit land and started cultivating thereon growing bananas, trees, food crops, maize and cassava and was still in possession at the time of institution of the suit land. Mr. Baguma stated that in 2003, Mr. Byaruhanga forcefully occupied the suit land. He unsuccessfully tried to resolve the dispute out of court and spoke to the area elders, but Mr. Byaruhanga remained on the suit land.

The learned trial Magistrate rejected Mr. Byaruhanga's claims finding that the evidence adduced to support them was unreliable evidence. He believed Mr. Baguma's claims after being impressed by his evidence. The learned trial Magistrate found that Mr. Baguma was the rightful owner of the suit land and he dismissed Mr. Byaruhanga's suit.

On appeal, Batema, J. – the learned first appellate Judge, found that the learned trial Magistrate did not properly evaluate the evidence on record, which pointed to Mr. Byaruhanga having been in possession of the suit land for a long period of time since 1975. The evidence indicated that Mr. Baguma had not been in possession of the suit land as he alleged, and that he had lied in that respect. He reversed the decision of the trial Magistrate, set aside the judgment and orders of the trial Court and made an order for vacant possession and eviction of Mr. Baguma from the suit land.

Mr. Baguma felt aggrieved with the decision of the learned first appellate Judge and now appeals to this Court on the following grounds:

> "1. **The learned first appellate Judge erred in law when he held that the glaring inconsistencies in the evidence of the respondents' witnesses were minor hence occasioning a miscarriage of justice.**

2. **The learned first appellate Judge erred in law when he relied on one particular document to make up a conclusion on a matter without evaluating the authenticity of that document and its full content.**

3. **The learned trial Judge erred in law when he failed to properly evaluate the entire evidence on the Court file thus arriving at an erroneous decision."**

The appellant made the following prayers:

"1. **That he be allowed to adduce additional evidence in Court.**

2. **That the judgment and orders of the learned first appellate Judge be set aside with costs."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Baluku Bageni Herbert, learned counsel appeared for the appellant. Mr. Cosma A. Kateeba, learned counsel appeared for the respondent.

Written submissions were filed for the parties after this Court granted permission for doing so, and those written submissions have been considered in this judgment.

Appellant's submissions

Counsel for the appellant argued grounds 1 and 3 jointly followed by ground 1 separately.

Grounds 1 and 3

Counsel submitted that the learned first appellate Judge did not properly address the inconsistencies in the evidence adduced for the respondent in the trial Court which were major inconsistencies, that should have led to rejection of the respondent's evidence. He pointed out that the law is that a major contradiction or inconsistency that goes to the root of one party's case should be resolved in favour of the other party and result in rejection of the evidence. He relied on the authority of **Oketch David vs. Uganda,**

Supreme Court Criminal Appeal No. 24 of 2001 quoting with approval from the authority of **Alfred Tarjar vs. Uganda, Criminal Appeal No. 167 of 1969 (EACA)** in support of his submissions.

Counsel then proceeded to highlight several alleged contradictions in the respondent's case. First, there was a contradiction as to the people who were present when the appellant's late father gave him the suit land. The appellant stated in his evidence that he was the only one present at the time, while each of PW2 Kiiza Leo and PW3 Lonesio Bigogo, both separately testified that he was the only one present as the appellant's father gave out the suit land, and that the appellant was not present at the time. Second, there was a contradiction as to the size of the suit land, PW4 testified that the suit land was 10 acres while PW5 John Bosco Muhindo testified that the suit land was 1 acre. Counsel referred to **Section 10** of the **Evidence Act, Cap. 6** which stipulates that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves of in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. In counsel's view the highlighted contradictions were major contradictions going to the root of the respondent's evidence and should have resulted in its rejection, and in finding that they were minor contradictions and overlooking them, the learned first appellate Judge fell into error.

It was further submitted that this Court has powers to reconsider the evidence if the first appellate Court did not satisfactorily reevaluate the evidence as was the case in the present case. Counsel urged this court to reevaluate the evidence adduced for the appellant which proved that the appellant got the suit land from his late father Mr. Binagwa Sirapio in 1975 in the presence of several family members. He immediately took possession of the suit land and started to utilize it by growing crops thereon from 1975 to 2003, when the respondent trespassed on the suit land end evicted him. However, subsequently he reported a matter to the Local Council Courts

which ordered for his reinstatement on the suit land in 2006. The evidence showed that the respondent's land was adjacent to the suit land.

Counsel further faulted the learned first appellate Judge for relying on Exhibit PE1, a purported judgment of an LC Court which was not only fraudulent but also had very little evidential value. The said judgment was not a certified judgment of any Court and it did not make any reference to the suit land. PW5 who stated that he was the Secretary for the LC Court that made the said judgment did not know the boundaries of the suit land which was purportedly the subject of the litigation. Counsel contended that the impugned judgment did not concern the suit land contrary to the learned first appellate Judge's conclusion that it did.

The learned first appellate Judge was further criticized for finding that there was no evidence showing that the appellant's father utilized the suit land before giving it to the appellant in 1975. Counsel made reference to the evidence of the appellant as DW1 which was supported by the evidence of DW3 Petero Katuramu Kyomya which showed that the appellant's late father occupied the suit land during the relevant period.

Counsel also faulted the learned trial Judge for relying on a judgment in which the appellant was allegedly convicted for criminal trespass in connection to the suit land, and submitted that the judgment should not have been relied on as it was not tendered as an exhibit in the trial Court.

Therefore, in view of the above submissions, counsel urged this Court to find that the learned trial Judge failed in his duty to reconsider the relevant evidence and consequently came to the wrong conclusions. Counsel prayed that this Court allows grounds 1 and 3.

Ground 2

Counsel faulted the learned trial Judge for relying on Exhibit PE1, a purported Resistance Council Court Judgment dated 10th September, 1986 without properly addressing himself on its authenticity. He pointed out that PW5 who tendered the document in evidence stated that the said judgment was

rendered on 10th September, 1986, yet at the time, there was no enabling law for such courts. Further, counsel contended that those courts became operational in 1987 after the passing of the relevant statute No. 9 of 1987, and they subsequently became regulated by the Local Government Act of 1997. He urged this Court to take judicial notice of the above contentions, as it is empowered to do laws pursuant to **Sections 55 and 56** of the **Evidence Act, Cap. 6**.

It was further submitted that PW5 signed on the impugned judgment as Secretary LC3 and not secretary RC3, which was suspicious considering that the LC (Local Council) system only became operational following the passing of the Local Government Act, 1997, which implied that PW5 somehow prophesied the coming in force of Local Council Courts long before they were created. Counsel also further disputed the impugned judgment on grounds that while it indicates that 14 out of 20 witnesses stated that the suit land belonged to the respondent, the attendance list showed that there were 21 persons in attendance during the hearing. Moreover, the judgment indicated that there were two chairmen during the hearing – one as substantive and another as acting chairman. The people in attendance at the hearing did not individually append their signatures on the judgment and some of the names were repeated. Further still, the impugned judgment was not authenticated with a stamp of seal of the RC or LC Court which made it.

It was also contended that while it was purported in the impugned judgment that the appellant's late father attended the hearing conducted in 1986, this was a fabrication because the appellant's father died in 1984 and could not have been a witness. Counsel however conceded that this fact was not adduced in evidence in the trial Court, but submitted that he would move this Court to grant leave to adduce additional evidence. Further, it was submitted that the judgment referred to a different piece of land having a Miramura boundary, whereas the suit land had a foot path boundary.

In view of the above submissions, counsel contended that Exhibit PE1 was a forgery presented by the respondent with a view of misleading the lower

Court and the learned first appellate Judge had erred in relying on it. The impugned document was also an illegality which ought not to have been condoned by the trial Court. Counsel cited the authority of **Makula International vs. Cardina Nsubuga [1982] HCB 11** for the principle that a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings. Counsel concluded by submitting that the learned first appellate Judge failed to properly evaluate Exhibit PE1 and came to a wrong decision on its authenticity.

Counsel prayed that this Court allows ground 2.

Respondent's submissions

Counsel for the respondent argued the grounds of appeal separately.

Ground 1

Counsel submitted that the learned trial Judge fulfilled his duty as first appellate Court, by evaluating the evidence on record and reaching the correct conclusion that the inconsistencies highlighted by the appellant were minor. Counsel submitted that as a second appellate Court, this Court is precluded from second guessing the first appellate Court's evaluation of evidence by re-evaluating the evidence on record. In support of the submissions on this point, counsel cited the authority of **Maniraguha vs. Nkundiye, Court of Appeal Civil Appeal No. 23 of 2005 (unreported)** and **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**.

Ground 2

Counsel submitted that the decision of the learned first appellate Judge was not based solely on Exhibit PE1, but on other pieces of evidence as well. The learned first appellate Judge considered evidence that the suit land is across the stream from the uncontested land of the appellant but was touching on the uncontested land of the respondent. PW1 Bigogo Leocio whose land neighbours the suit land testified that the respondent was his neighbour.

There was a document showing that the appellant's father testified during hearing of a dispute concerning the suit land between the respondent and one John Begura, and stated that the suit land belongs to the respondent. Further, there was evidence of the respondent's long possession of the suit land. In counsel's view, the appellant's submissions that the learned first appellate Judge based solely on Exhibit PE1 were false.

Ground 3

Counsel submitted that ground 3 offends **Rule 86 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** in that the ground is too broad and does not specify the evidence that was not properly evaluated by the learned first appellate Judge. He referred to the authority of **Attorney General vs. Florence Baliraine, Court of Appeal Civil Appeal No. 75 of 2003**, where a similarly worded ground of appeal was found to offend Rule 86 (1) and was struck out.

In the alternative, counsel supported the learned first appellate Judge's handling of the evidence on record submitting that he correctly evaluated the evidence and arrived at the correct conclusions.

On the appellant's request to adduce additional evidence on appeal, counsel submitted that under **Rule 32 (2)** of the **Rules of this Court**, this Court is barred from receiving additional evidence on a second appeal. He urged the Court to dismiss the said request.

Appellant's submissions in rejoinder

On the propriety of ground 3, counsel accepted that ground 3 was not as concise as it was expected to be under Rule 86 (1), but submitted that the submissions on ground 3 be accommodated together with the submissions on ground 1 as they relate to the failure of the first appellate Court to reappraise the evidence concerning inconsistencies and contradictions in the respondent's evidence. He urged this Court to maintain ground 3.

In regard to the powers of a second appellate court, counsel submitted that a second appellate court has the power to re-evaluate the evidence if it

considers that the first appellate court failed in its duty to do so. He cited the authority of **Kifamunte Henry (supra)** in support of that submission. Counsel contended that in the present case, the first appellate court clearly failed in its duty to reevaluate the evidence adduced in the trial Court and it was justified for this Court to have a reconsideration of the evidence.

Resolution of the Appeal

I have carefully studied the Court record, considered the submissions of counsel for both sides and the law and authorities cited in support of those submissions. I have also considered other relevant law and authorities that were not cited.

This is a second appeal, and the duty of this Court is ordinarily to consider points of law arising from the decision of the first appellate Court, and not points of fact or mixed law and fact. **(See: Section 72 and 74 of the Civil Procedure Act, Cap. 71)**. This Court is justified in testing the findings of fact of the lower courts by reconsidering the evidence if it forms the view that the first appellate Court did not properly re-evaluate the evidence. In **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, the Court stated that in "clear cases", a second appellate Court will be justified to re-evaluate the evidence on record, but it did not explain what amounts to "clear cases". In my view, it is impossible to lay down an exhaustive list of such cases, but I am of the considered opinion that where the two lower courts have reached different findings of fact on the evidence, in the interests of justice, the second appellate court should re-evaluate the evidence, in order to determine which of the two decisions is supportable on the evidence. In the present case, the trial Court found the appellant to be the true owner of the suit land, and dismissed the respondent's trespass suit against him; while the first appellate Court found the respondent to be the true owner of the suit land and declared the appellant a trespasser thereon. I therefore deem it necessary to re-evaluate the evidence so as to test the findings of fact of the first appellate Court.

In resolving the appeal, I will consider each ground separately.

Ground 1

It is alleged that the learned first appellate Judge did not properly address certain inconsistencies in the respondent's evidence which should have led to its rejection. I have reappraised the evidence on record. The respondent's evidence was given by 5 witnesses, with the respondent testifying as PW1. He stated that he was the owner of the suit land situated at Kasungu II Village, Kacungiro Parish in Munkunyu Sub County, Kasese District. He obtained the suit land from his father, the late Byayomba in 1974. His father was the customary owner of the suit land and was born on it.

The respondent stated that the suit land was 5 acres and had the following boundaries; Leo Kiiza's land and a Stream to the East; Yakobo Nduru's land to the West; Kamalha Mpaka's land to the North; and Loenesio Bigogo's land to the South. He also stated that in 2003, he planted eucalyptus, bark and acacia trees on the suit land but those trees were destroyed by the appellant in 2006.

The respondent stated that he was alone with his father when he was given the suit land, and that his father did not inform anyone else about giving him the suit land.

PW2 Kiiza Leo whom the respondent stated was the owner of the land to the East of the suit land testified that the suit land was approximately 5 acres and located in Kasungu II Village. He described the boundaries of the suit land as follows; a path to the North; a stream/River Kemengo to the East; another path to the West; and Bigogo Leocio's land to the South.

PW2 stated that the respondent was the owner of the suit land and that land was given to him by his late father in 1974. He also testified about litigation over the suit land between the respondent's late father and one Isaac Begura in 1974 which was determined in favour of the respondent.

In cross examination, PW2 stated that he was present when the respondent's late father gave the suit land to the respondent. This contradicted the respondent's evidence on the point. He also stated that he was not an

immediate neighbour to the suit land meaning that his land did not touch the suit land. This also contradicted the respondent's evidence that PW2 was an immediate neighbour to the suit land.

In re-examination, PW2 recanted and stated that only the respondent was present when his father gave him the suit land. He also stated the appellant's father owned land which was separated from the suit land by a stream.

The third witness for the respondent was PW3 Bigogo Loecio. He stated that the suit land was 2 acres and located at Kasungu II Village. The boundaries of the suit land were as follows; Byayomba's land to the North; Tereza's land to the East; Bigogo's land to the south; and Tereza's land to the East. PW3 stated that the respondent was the owner of the suit land and that the appellant's land was far away from the suit land. In cross examination at page 33 of the record, PW3 stated as follows:

> **"I was present when the plaintiff's father gave the plaintiff's (sic) land. Court should take my evidence. I am telling court the truth. Nobody was present except me alone. I don't know why other children of Byayombya were absent. The plaintiff (respondent) is in occupation of the upper side and the lower side is the one in dispute. Binagwa (the appellant's father)'s land stops at the stream. It does not cross over the stream. I neighbour the land in dispute/ we share a boundary."**

PW3's evidence also contradicted the appellant in that PW3 said that he (PW3) was the only one present when the respondent's father gave the suit land to the respondent, while the respondent's evidence was that it was only the respondent who was present at that time. PW3's evidence also contradicted the respondent's testimony about the boundaries of the land. Like PW2, PW3 also spoke about a stream neighbouring the suit land and separating the appellant and the respondent's land.

The fourth witness for the respondent was PW4 Yohana Kihangara. He stated that the suit land was 10 acres and situated in Kimengo. He stated that the suit land belongs to the respondent because he inherited it from his

father called Byayombya who also inherited it from his father (the respondent's grandfather).

The fifth witness for the respondent was PW5 John Bosco Muhindo who testified that the suit land was 1 acre. He testified that he handled litigation before the Local Council Courts involving a dispute over the suit land between the respondent and one Isaac Begura. The Court found in favour of the respondent.

The appellant, as the defendant relied, on evidence of three witnesses. The appellant testified as DW1. He stated that he acquired the suit land situated at Kasungu II Cell Village from his late father Mr. Binago Sarapiyo in 1975. Several of his family members including Katuramu Kyomya, Augistine Marayika, Silvan Kahirwe, Joseph Kabachwezi and others were present when he received the suit land. After being given the land, he took possession of the suit land and started cultivating it growing bananas, trees, food crops, maize and cassava. He continued utilizing the suit land from 1975 until 2003 when the respondent forcefully entered on the suit land.

In cross examination, DW1 claimed that he commenced litigation in the Local Council I and II courts for the appellant to be removed from the suit land, and was successful. He also stated that the appellant owned a separate piece of land adjacent to the suit land.

The second witness for the appellant was DW2 Skiran Kahigwa, who testified that he was present when the appellant acquired the suit land from his late father, and that the latter was using the suit land before he gave it to the appellant. DW2 supported the appellant's claims concerning possession of the suit land stating that the appellant was still utilizing the suit land at the time of the trial.

In cross examination at page 36 of the record, DW2 stated that the respondent utilized the suit land for about 3 years. He stated that the suit land is approximately 2 acres. DW2 stated that the boundaries of the suit land were as follows; the late Kapere's land to the North; Kamarampaka's

land to the West; Leo Kiiza (PW2)'s land to the East and Ilumba's land to the South.

The third witness for the appellant was DW3 Patero Katuramu Kyomya. He testified that he was also present when the appellant's late father gave the suit land to the appellant, and that after receiving the land, the appellant started cultivating it growing food crops on it. He stated that the respondent only briefly utilized the suit land for 2 years. DW3 stated that the boundaries of the suit land were as follows; Byaruhanga's land to the North; late Tibhwa's land to the East; a stream to the west; and Bigogo's land to the South.

The evidence indicates that there were contradictions in both the appellant and the respondent's evidence. The law is that major contradictions and inconsistencies in evidence will usually result in the evidence being rejected unless they are satisfactorily explained away. Minor ones on the other hand, will only lead to rejection of evidence if they point to deliberate untruthfulness on the part of the witnesses. **See: Candiga Sadwick vs. Uganda, Court of Appeal Criminal Appeal No. 23 of 2012 (unreported) quoting with approval from Alfred Tajar vs. Uganda EACA Criminal Appeal No. 167 of 1969 (unreported).**

Counsel for the appellant highlighted contradictions as to the people present when the respondent's father gave land to the respondent. From the evidence set out earlier, there were contradictions in the respondent's evidence as to who was present when the respondent was given the land by his late father. The respondent stated that he was the only one present, PW2 stated that he was the only one present and PW3, too stated that he was also the only one present. In my view, the inconsistencies in the respondent's evidence on that point were major and should have led to rejection of the respondent's case that he was given land by his father in 1975. I would accept the submissions of counsel for the appellant on this point.

With regard to the inconsistencies in the respondent's evidence on the size of the suit land, I note that the respondent's witnesses gave the size of the

suit land as follows: the respondent (PW1) as 5 acres; PW2 as 5 acres; PW3 as 2 acres; PW4 as 10 acres; and PW5 as 1 acre. It must be stated that the respondent, PW2, PW3 and PW4's evidence was based on approximation and therefore the inconsistencies in their evidence on that point can be understood. The evidence of PW1 on the size of the suit land is particularly decisive and I will deal with it in my analysis of ground 2.

Ground 1 of the appeal is therefore dealt with accordingly.

Ground 2

Under ground 2, counsel for the appellant faulted the learned trial Judge for relying on Exhibit PE1, a purported judgment of a Resistance Council Court that allegedly declared the respondent as the true owner of the suit land without properly addressing himself on its authenticity. Counsel for the respondent did not respond to the submissions on the authenticity of Exhibit PE1, but insisted that the decision of the learned trial Judge was not based solely on that exhibit.

The relevant court proceedings and impugned judgment are set out from pages 38 to 46 of the record. The proceedings indicate that the dispute was between one Mr. Isaac Begura and the respondent, over an unidentified piece of land situated in Katsungiro Parish. The court visited the disputed land and observed at page 41 of the record as follows:

> **"All wanainchi who had attended went and inspected the land. Their findings were that in the land in dispute, there were no demarcation marks, the ones found in were Karaals (sic). Mr. Ibrahim Kitalibiki had no house in the land."**

There was no mention of PW2 or PW3, whom the respondent claimed were neighbours to the suit land. There was no mention of a stream either, that some of the respondent's witnesses claimed neighbours the suit land. PW5 Muhindo John Bosco was the Secretary of that court, and it was he who read the ruling of the Court as indicated at page 44 of the record, and he told the trial Court that the size of the suit land was 1 acre. This must have been based on his observations during the land inspection that the RC3 Court

conducted. The indication by PW5 that the disputed land in the RC3 proceedings was smaller than the suit land, and the fact that the dispute in that court involved Mr. Isaac Begura and not the appellant makes it highly probable that the dispute in the RC3 Court concerned a different piece of land and not the suit land.

I note that the appellant's late father was mentioned as a witness in the proceedings in the RC3 Court, and he gave evidence stating that the disputed land did not belong to Mr. Isaac Begura but to the respondent. The learned first appellate Judge dwelt a lot on the fact that the appellant's late father testified in the RC3 Court and questioned, why, the appellant's father never laid claim to the suit land if it belonged to him as the appellant now claims. This hugely influenced the Judge's decision. However, since I earlier found that it was highly probable that the disputed land in the RC3 Court was different from the suit land, I find that the learned trial Judge erred to make the inferences he made.

In view of the above findings, I find it unnecessary to express any opinion on the appellant's contentions that the judgment of the RC3 Court was a forgery. My finding is that the impugned judgment related to a different piece of land and not the suit land, and had the learned trial Judge better scrutinized the evidence surrounding that judgment, he would not have relied on it.

Ground 2 of the appeal, therefore succeeds.

Ground 3

Ground 3 was framed as follows:

> **"That the learned trial Judge erred in law when he failed to properly evaluate the entire evidence on the Court file thus arriving at an erroneous decision."**

It is obvious that when he made reference to the learned trial Judge, the appellant meant the first appellate Judge, but other than that ground 3 could have been drafted better and been more concise, as to the evidence that

the learned trial Judge did not properly evaluate. I would have been inclined to accede to the submissions of counsel for the respondent and have ground 3 struck out for contravening Rule 86 (1) of the Rules of this Court, but in view of my findings on grounds 1 and 2, I hold the view that taking that course would leave the question of the true owner of the suit land hanging. I will therefore consider this ground with a view of making a decision on the ownership of the suit land.

I must also comment that the evidence of the appellant as well as that of the respondent gave different boundaries for the suit land, which was remarkable considering that during scheduling in the trial Court at page 29 of the record, it was recorded as an agreed fact that the description and location of the suit land was not in dispute.

I earlier rejected the evidence that the respondent was given the suit land by his father in 1975. I do not find any other evidence pointing to the respondent having received the suit land in 1975. There was no evidence of the respondent having settled on the suit land at any time between 1975 to 2003. On the other hand, the evidence of the appellant was that he settled on the suit land undisturbed from 1975 to 2003, when the respondent went on the suit land. This alone qualified him to be a bonafide occupant under **Section 29 (2) (a)** of the **Land Act, Cap. 227**, as a person who "had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more".

In addition, the evidence of the appellant's witnesses was more consistent than that of the respondent's witnesses, although both sets of witnesses may have been very partisan in giving evidence to favour their side's case. As a result, there were some contradictions on the boundaries of the land in the evidence of either side. For example, it is not clear whether there was a stream bordering the suit land or not, and there was no locus visit to clarify on this point. Yet, the learned first appellate Judge quickly concluded that there was a stream touching the suit land, and that that stream separated

the appellant's real land from that owned by the respondent. The learned first appellate Judge's conclusions on this point were not justified.

Further, I have considered that the suit in the trial Court was instituted by the respondent and it was he who bore the burden of proving that the appellant was a trespasser on a balance of probabilities. I am not convinced that the respondent met this burden.

I would therefore find that the learned first appellate Judge's conclusions were not justified on the evidence on record. I would therefore set aside the judgment of the learned first appellate Judge and restore the decision of the learned trial Magistrate Grade I dismissing the respondent's suit in that court and declaring that appellant had an interest and was not a trespasser on the suit land. I would award the costs of the appeal and those in the two courts below to the appellant.

As Bamugemereire and Musota, JJA both agree, this appeal is allowed on the terms set out in this judgment.

It is so ordered.

Dated at Kampala this ....10th.... day of....Feb.....2022.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 037 OF 2017

{Coram: Musoke, Bamugemereire, Musota, JJA}

BAGUMA STEPHEN :: APPELLANT

VERSUS

BYARUHANGA JOHN :: RESPONDENT

(Appeal from the decision of Batema, J dated the 15th day of March, 2016 in Civil Appeal No. 038 of 2013 sitting at the the High Court of Uganda holden at Fort Portal, on appeal from the decision of Mfitundinda, Magistrate G1 sitting in the Chief Magistrate's Court of Kasese in Civil Suit No. 44 of 2009)

Judgment of Catherine Bamugemereire, JA

I have had the privilege of reading in draft the Judgment of my Learned Sister Hon. Lady Justice Elizabeth Musoke JA, I do not hesitate to say that agree with her reasoning, conclusion and orders.

I would indeed allow this appeal and award the costs to the appellant in this Court as in the Courts below.

Signed and dated this ....10th........ day of ....Feb........................ 2021

Catherine Bamugemereire
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 037 OF 2017

(Arising from the Judgment of the High Court before Justice Batema, J in High Court Civil Appeal No. 038 of 2013 also arising from the Chief Magistrates Court Kasese in Civil Suit No. 44 of 2009)

BAGUMA STEPHEN :: APPELLANTS

VERSUS

BYARUHANGA JOHN :::::::::::::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Elizabeth Musoke, JA.

I agree with her finding that the judgment of the first appellate court be set aside. The decision of the trial Magistrate Grade 1 dismissing the respondent's suit and declaring that the appellant was not a trespasser on the suit land is hereby reinstated.

The appellant is awarded costs of this appeal and the two courts below.

Dated this 10th day of Feb 2022

Stephen Musota
JUSTICE OF APPEAL