THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FROT PORTAL

HIGH COURT CIVIL APPEAL NO. 18 OF 2003

(ORIGINAL CIVIL SUIT NO MSD 45 OF 2001 OF THE CHIEF MAGISTRATE'S COURT OF MASINDI AT HOIMA)

ASIIMWE EDWARD …….. APPELLANT/DEFENDANT

VERSUS

REV. CANON KAKONGORO …….. RESPONDENT/PLAINTIFF

BEFORE: HON. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The appellant Asiimwe Edward was the defendant in the original suit Masindi Court Civil Suit No: MSD 45 of 2001. In the original suit the respondent Rev. Canon Elisha Kakongoro, who was the plaintiff, sought, inter alia, for an order evicting the appellant and other occupants from the land situated at Kabuye – Kitoma Village Kihukya Parish, Busiisi Sub-county, Hoima Road.

The respondent's evidence before the trial court was that he acquired the suit land from one Mazinga who had given it to him in 1959. The land was demarcated by poles and trees planted there when he acquired the land. The boundaries of the land had been demarcated by the said Mazinga in the presence of one Kaahwa. The trees planted had grown into big trees and on them he had put barbed wire to fence the land. The respondent's case was that the appellant or his cows had broken the barbed wire and was committing acts of trespass on the land. Further he claimed that he was offered a lease over the land by the Uganda Land

Commission but the appellant had stopped the surveyors from surveying the land, thus preventing the respondent from obtaining a Certificate of title to the land. The respondent further testified that there was a part of the original Mazinga's piece of land which was given to the respondent, which Mazinga gave to the Appellant and is still vacant.

The appellant's testimony before the trial court was that he is a son of Yosamu Byakutaaga and a grandson of Mazinga. That the suit land was their clan land given to him by his father who had inherited it from Mazinga. That Mazinga, had at the respondents request, only allowed the respondent to temporary stay on the land without building thereon a permanent house. The land where the respondent was allowed to temporary stay had been demarcated by Rukoni Trees, which had grown into big trees. The respondent denied any claim to the land whose boundaries are marked by the Rukoni Trees which had grown into big trees. His interest was in the land newly enclosed by barbed wire and Mitoma trees. That the respondent was grabbing more land than had been given to him.

In his judgment the learned trial Magistrate identified the main issue before him for determination as being how much land was the respondent occupying undisturbed or uninterrupted in peaceful enjoyment for a period of over 12 years. That once this was established, the appellant would not be allowed to make up having slept on his rights beyond what the law can allow.

In his judgment the learned trial magistrate found that the respondent was occupying about ⅔ of the suit land and ordered the appellant to be evicted therefrom. He further ordered the appellant to pay ⅓ of the costs of the suit. The appellant filed this appeal upon the following grounds:-

1. That the learned Magistrate erred in law and in fact in granting the suit land to the respondent on the premises that the respondent had stayed onto the suit land for more than 12 years without any evidence to that effect.
2. The learned Magistrate erred in extending and granting 50 meters of the land from the one originally given to the Respondent by the Appellant's grandfather as evidenced by the mature Rukoni trees.
3. The learned Magistrate erred in finding that because the Respondent had planted beans and maize planted on the suit land such was conclusive evidence that the Respondent had been in occupation for more than 12 years.
4. The learned Magistrate erred in finding that the appellant had slept on his rights, when in fact the Respondent had taken advantage of the fact that the appellant had gone for an in –service course at Uganda Management Institute to grab the appellant's land.
5. The learned Magistrate erred in law and in fact by holding in favour of the Respondent, after rightly observing that there was no evidence that the late Mazinga had given the suit land to the Respondent, but instead there was evidence that it was the undisputed land measuring approximately 2.5 acres which had been given to the Respondent.
6. The learned Magistrate erred in law and in fact in believing the evidence of the wife of the Respondent after rightly observing that she had not been privy to the proceedings on the date the late Mazinga gave land to the Respondent and further erred by holding in favour of the Respondent on the basis of such evidence.
7. The learned Magistrate erred in law in holding that the Respondent/Plaintiff had proved that it was more probable that the Respondent/Plaintiff occupied

⅔ of the said land without showing the parameters of how the ⅔ factor was arrived at.

8. The learned Magistrate erred in holding that the Appellant/Defendant pay ⅓of costs to the suit to the Respondent/Plaintiff.

In his submissions counsel for the appellant handled grounds 1, 2, and 3 together, grounds 4,5, and 6 individually and then 7 and 8 together. I intend however to handle grounds 1, 2, 3 and 4 in that order then grounds 5 and 7 together then 6 and lastly 8. This being a first appellant court it has a duty to re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence the decision of the trial court should stand. See Pandya V/S R (1957) EA 336, Seller & Anor V/S Associated Motor Board Co. Ltd & Others (1968) EA 123.

In the first ground the appellant contends that the learned Magistrate erred in law and in fact in granting the suit land to the respondent on the premises that the respondent had stayed onto the suit land for more than 12 years without any evidence whatsoever. The trial Magistrate in his judgment stated:

> "I believe plaintiff's evidence and that of his witness that he has occupied the land for over 12 years undisturbed except that the area beyond the road leading to the plaintiff's home that is about fifty meters (50) from the road leading to the plaintiff's home from the main Road ---- had no signs of occupation by the plaintiffs for the period of over 12 years. The poles of barbed wire seen relatively new ------ . Though cattle were seen on that piece of land, it is more probable that cattle has recently been

put there. The reasons one that considering the land about 2.5 acres where also cattle is looked after, this land is surrounded by Rukoni trees, making a natural paddock that the trees are now big trees. If the plaintiff had occupied the piece of land I am referring to where I found cattle, the same kind of fences would have been visible, and even if cut down the stalks of such an old fence would be visible.

---- it is therefore believed that the defendant's departure for study was taken advantage of by the plaintiff to fence land that the plaintiff did not occupy before"

The learned Magistrate goes on to conclude as follows:-

"I resolve this issue by saying that the plaintiff is lawful owner of the part of the suit land having proved to this court that it is more probable he occupied about ⅔ of the suit land than not."

The respondent's evidence is that one Mazinga had a piece of land of which he gave the respondents a portion in 1959. The fact that Mazinga gave a portion of his piece of land to the respondent was admitted by the appellant in his testimony though according to him it was for temporary occupation and secondly that the respondent came to the land in 1964. The appellant in his testimony stated

"—The plaintiff came to our land in 1964. Rev. Kakongoro was given a place, well demarcated; he was to stay there temporarily. The demarcation of Rukoni Trees has been there for over 30 years. They are now big trees.

Rev. Kakongoro was given land which is in the confines of the Rukoni ---- I have no claim on the land demarcated by the Rukoni. I still respect the wishes of my grandfather ----"

This suit was filed on 12th October 2001, a period far beyond 12 years whether computed from 1959 or 1964. Therefore the learned Magistrate made a correct finding that the respondent had been on the land for more than 12 years. Further the learned Magistrate finding was not in respect of all the suit land but a portion thereof the location of which he gave in his judgment. This first ground of appeal fails

The second ground of appeal is that the learned Magistrate erred in extending and granting 50 meters of land from the one originally given to the Respondent by the Appellant's grandfather as evidenced by the mature Rukoni trees.

I have herein above already quoted the learned Chief Magistrate finding in this regard. My interpretation of the learned Magistrate finding above is that the approximately 50 meter stretch of land as described above was not within the land originally occupied by the Respondent. At the locus in quo the learned Magistrate drew a sketch plan which I have studied. On the sketch plan he indicated a road marked as leading to the plaintiff's home. At the left of the road is a spot marked A1. Then moving further left for a distance marked 50m is a spot marked B1. Then moving from point B1 upwards towards the area described as Bukya's land is a spot marked C1. From the trial Magistrates findings as quoted above and the sketch map the 50 meter piece of land would be that land between spot A1 and B1 up to C1 on the sketch map.

However, the learned Magistrate further down in his judgment contradicts himself. He drew up yet another sketch map within the judgment. On it he does not indicate spot A1 and B1. He however indicates the road to the respondent (plaintiff's) home. From the road to the left he indicates a stretch of 50 meters which would be the stretch A1 to B1 on the sketch plan drawn at the locus in quo. He also indicates the spot C1. He shades all the area to the right from spot C1 and the spot marked B1 on the original sketch. Then he concludes as follows:-

> "What is proved before me is that the plaintiff has occupied land (suit land) partially as I am to describe. That is the land from point A1- B1 – C1. This includes the land about 2.5 acres surrounded by Rukoni trees, the land where the new home is, the crops, the pine trees, the road leading to the house but not beyond the palm leaves trees at the commencement of the valley. ----"

Then below the sketch plan within the judgment, the learned Magistrate states:-

> "Shaded is declared plaintiff's occupied land and the unshaded remains defendant's inherited land"

I find the learned Magistrates final description contradicting his earlier findings. The decision had the effect of even giving the 50 meters piece of land to the plaintiff. The second ground of appeal therefore succeeds.

Regarding the third ground of appeal the learned Magistrate's statement was:

"The plaintiff has a house now on the land and pine trees and garden on the land, for crops including beans, maize and some bananas."

This was a statement of a finding that the Respondent had gardens of beans and maize among other crops on the suit land. I however fail to see where the learned Magistrate based his decisions on the existence of the two crops on the land. His finding that the respondent had stayed on a portion of the suit land for a period over 12 years was based on other evidence among which was the appellants admission that his grandfather the late Mazinga, had in 1964 allowed the respondent to occupy a portion of the late Mazinga's original piece of land. This ground fails.

In the forth ground the appellant contends that the learned Magistrate erred in finding that the appellant had slept on his rights, when in fact the Respondent hand taken advantage of the fact that the appellant had gone for an in-service course at Uganda Management Institute to grab the appellant's land. The Respondent's testimony before the trial court was that he had occupied the suit land since 1959 on a grant from the late Mazinga. This is corroborated by PW2 Rachael Kakongoro, the Respondent's wife and PW3, Tito Mbahereki Dorotyo, brother of the Respondent who testified that he accompanied the Respondent when he was given the land by Mazinga. According to the appellant the Respondent had come to the land in 1964. However, the appellant gave his testimony on 11th September 2002. If the Respondent came to the land in 1959, the Respondent must have been about one year old. On the other hand if the Respondent came in 1964, then the appellant was only six years. Since he must have been born in 1958. Thus, a minor and it was his testimony that it was his late

father Byaruhanga who had informed him of how the Respondent had come to the land. Therefore all appellant's statements with regard to how and when the Respondent came to the land was hearsay and inadmissible. However, DW4, Edisa Kimanywenda who testified that he is the son of the late Mazinga and was around when land was given to the respondent said that is was in 1964. This is corroborated by DW2, Yubu Kitangaza, who was a neighbour to Mazinga and still a neighbour. Also by DW4Evais Kabahukya, brother of the appellant who testified that he was 52 years on the date of his testimony, that is 13th March 2003 and a young boy when the Respondent came to the land in 1964. That is about 14 years old. One is capable to remember what he had seen at that age.

Section 5 of the Limitation Act provides:

> "No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action occurred to him or her or if it first occurred to some person through whom he/she claims to that person"

This suit was filed on 12th October 2001. If the Respondent had unlawfully entered the land whether in 1958 or 1964 and the appellant land wanted to bring an action in 2001 to recover the land clearly his action would have been time barred by the Limitations Act.

In the instant case the original suit was instituted by the Respondent seeking an eviction order, general and exemplary damages for trespass and costs. In his written statement of defence the appellant denied the alleged act of trespass and raised a defence of rightful entitlement to the area beyond the piece of land given to the respondent in 1964 by the appellant's grandfather Mazinga for temporary

occupation. Throughout his testimony the appellant disclaimed interest in any land given to the respondent by the late Mazinga. Further in his pleadings the appellant did not raise any counter claim. Therefore at no stage had the appellant brought any action for recovery of land. Therefore section 5 of the Limitation Act was of no application in the instant case.

The trial Magistrate statement in his judgment was:-

> "--- the real question to determine is how much land was plaintiff occupying undisturbed or uninterrupted in peacefully enjoyment for a period of over 12 years. Once this land is established, certainly the defendant would not be allowed to wake up having slept on his rights beyond what the law can allow, (see limitation Acts 6 (now section 5)."

The trial Magistrate finding was that the respondent had adduced evidence to show that he had occupied a portion of the land for over twelve years. His worship also found that there was another portion of the land which the respondent had failed to prove was under his occupation for the period of over twelve years. It is this particular portion which the learned Magistrate identified as being in dispute. In respect to that land the learned Magistrate stated:-

> "—It is not doubted that the suit land was land of defendants grandfather which land defendant inherited and had his relatives like Edisa, Kinanyerenda, Bukya and Salia. It is therefore believable that the defendant's departure for study was taken advantage of by the plaintiff to fence the land that the plaintiff did not occupy before."

His conclusion was that “the plaintiff has occupied land (suit land) only partially—“

The learned Magistrate in referring to the twelve years limitation period he was using it as a guiding principle. That had the appellant filed a suit to recover that portion of the land which the respondent had occupied for over twelve years wouldn’t his claim been caught up by the provisions of the limitation Act. Using that yard stick the learned Magistrate on the evidence on record came to a right decision in respect of a portion of the suit land. His find was not in respect of the entire land. It excluded the land which he found had been encroached upon by the respondent while the appellant was away at college. Therefore this ground fails.

The lower court having resolved as outlined above the remaining major issue before it was that of boundaries separating the two portions. This brings me to the grounds 5 and 7 which I will handle together. The fifth ground is that the learned Magistrate erred in law and in fact by holding in favour of the respondent after rightly observing that there was no evidence that the late Mazinga hand given the suit land to the Respondent, but instead there was evidence that it was the undisputed land measuring approximately 2.5 acres which had been given to the Respondent. In ground seven the appellant contends that the learned Magistrate erred in law in holding that the Respondent/Plaintiff had proved that it was more probable that the Respondent/Plaintiff occupied ⅔ of the said land without showing the parameters of how the ⅔ factor was arrived at.

In his submissions before the trial court counsel for the appellant prayed to court to find that land in the mature Rukoni trees should be adjudged as belonging

to the plaintiff (respondent) and land outside that but encompassed in a barbed wire fence is not the property of Rev. Kakongoro. Counsel further submitted that the plaintiff (respondent) had gone outside what he was given and planted pine trees. He conceded that the pine trees were over and above 12 years. And he accordingly, taking into consideration the provisions of the Constitution (1995), the Land Act and the Limitation Act, further conceded that court find that the and on which the pine trees stand be adjudged the property of the plaintiff (respondent).

In his testimony the respondent stated that when he was given the land in 1959 its boundary was planted with trees which have over time grown into mature trees. PW3 Tito Mbahereki testified that he accompanied the Respondent when the acquired land. That boundary of the land was planted with Muwawura and Rukoni trees which are still there.

The appellant's evidence was that the land given to the respondent was enclosed within a boundary marked out by Rukoni trees about 30 years old. That while he was away for studies the respondent extended the land occupied by him and enclosed the encroached on land in a barbed wire fence on Mitoma trees. His claim was to this land which was clearly distinct from the original land as the fence around it was young about one year old. His testimony was corroborated by the other defence witnesses. DW4 Edisa Kimanywernda a son of the late Mazinga further stated that the respondent was not to go beyond the wild palm tree. In the proceeding at locus the learned Magistrate stated:-

"I can recognize the boundaries of the land given to the plaintiff. There are many Rukoni trees around the land"

The learned Magistrate held:

"What is proved before me is that the plaintiff has occupied about 2.5 acres surrounded b y Rukoni trees, the land where the new house is, the crops, the pine trees, the road leading to the house but not beyond the palm leaves tree at the commencement of the valley."

The trial Magistrate while at the locus in quo drew a sketch plan which has the distinct features explained hereinbelow. There is an area which is shaded indicated as free land about 2.5 acres and as undisputed. This is the area agreed by all parties as enclosed in the old Rukoni trees. On the evidence on record the learned Magistrate rightly found that this was the land originally given by the late Mazinga.

At the inner most edge of that land is located an old home of the respondent and further above beyond the house is a new house of the respondent. Beyond the old house but to the inner side opposite the new house on the hill one pine trees. Beyond the pine trees at the extreme boundary is a palm leaves tree. From the palm tree backwards on the side where the undistributed land is located in the valley wherein there is a forest between the forest and the new house are crop gardens.

The evidence on record shows that overtime the respondent went beyond the land granted to him by the late Mazinga. That is the land where pine trees are, the crop gardens, and the hose together with the road leading to the house. I base my finding on the sketch plant drawn at the locus by the trial Magistrate, the evidence of DW4 brother of the late Mazinga, who stated that the respondent was not to go

beyond the wild palm tree. That is considered together with the concession by the appellant's counsel in his submitting at the lower court that pine trees be adjudged as the property of the Respondent as they were clearly older than 12 years. The 50 meters strip of land from the left hand side of the road to the Respondent house was found with no signs of the Respondent's occupations for a period of 12 years by the trial Magistrate. The learned Magistrate findings and sketch drawn at the locus should be adhered to. Therefore, the boundary line should follow the road to the respondent's house, move uphill to enclose in the pine trees proceed down to the valley at the palm tree, so that the land to the right hand side is for the respondent and the land to the left is that which the appellant is entitled to.

There is no evidence on record of any measurements or survey of the land having been undertaken. The sketch plan was neither drawn on scale. I therefore do not find any parameters of how ⅔ for the respondent and ⅓ for the appellant were arrived at by the learned Magistrate. I find the sketch in the judgment contradictory to the sketch drawn at the locus. The sketch at locus should be the one to follow since it was based on what was being observed at the material time when it was drawn. Therefore those two grounds of appeal succeed.

Regarding the sixth ground wherein the appellant contended that the learned trial Magistrate should not have believed the evidence of the Respondent's wife after observing that she had not been privy to the proceedings on the date the late Mazinga gave the land to the respondent and further erred in holding in favour of the respondent on basis of such evidence. Rachael Kangoro's evidence regarding the boundary of the land was that it was planted with Rukoni, Mutoma, and Emiko trees. That to the west their land extended up to near a mango tree on Kahuka's land and to the east it went up to the stream and to a well downward. Looking at

the sketch plan drawn at the locus the boundary as extended up to the stream at the back of which were the fresh barbed wire poles which was found to be only about one to two years old. It therefore included the land found to have been encroached on by the respondent while the appellant was away at college. The learned Magistrate, as the evidence of the Respondent and PW3. Tito Mbakereka Dorolijo did show, rejected and rightly so, the said witness's evidence as to boundaries. However, it was her testimony that she had moved in to occupy the land with her husband. They were married in 1957. Therefore she could competently give evidence regarding the occupation of land and the developments thereon which dated beyond 12 years. The learned trial Magistrate was in fact able to observe such developments on his visit to the locus. This ground fails.

The last ground of appeal is that the learned Magistrate erred in hold that the appellant/Defendant pays ⅓ of costs of the suit to the Respondent/Plaintiff. The law governing costs in suits is laid down in section 27 of the Civil Procedure Act. Under the section the award of costs is in the complete discretion of the judge and cost should follow the event unless the Judge for good reason order other wise. Such discretion should be exercised judicially. See Prince J.D.C. Mpunga Ruhindi V/V Prince Solomon Iguru & Others SCCA No 18 of 1994.

The respondent's case was that the appellant or his cows broken the barbed wire fence around his land and that the appellant had stopped the surveyors from surveying the respondent's land over which he had been granted a leave. The record shows that the respondent had intended to survey land beyond the portion he was actually entitled to. It was found that the respondent had extended his land to the barbed wire fence which was beyond the land he was entitled to. In actual fact it was the respondent according to the evidence on record and the finding of

the trial Magistrate who had committed acts of trespass. In the circumstances I find that the learned Magistrate did not properly exercise his discretion when he ordered the appellant to pay ⅓ of the costs to the respondent, there was no justification for it. The order as to costs should have followed the event. This ground succeeds.

In the final result I make the orders below:

1. The file be referred back to the Magistrate Grade I, Hoima to go to the locus in the presence of the parties and their respective counsel and the local authorities of the area of location of the suit land to mark out the boundary line, guided by the sketch plan drawn at the locus by the trial Magistrate such boundary line to follow the road leading to the Respondents home, move uphill to enclose within the respondent's side the pine trees and proceed down to the valley at the palm tree.

2. The appellant is awarded costs both at this court and the court below.

Lameck N. nsubuga
JUDGE