THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL.

HOT — 01 — CV — CA — 0037—2003

(ARISING FROM FPT-00—CV-CS—0024/02)

ABERI RWABUTITI……

APPELLANT

VERSUS

1. KYENJOJO DISTRICT LOCAL GOV'T
2. NYANTUNGO SUB-COUNTY……

RESPONDENTS

3. LIVESTOCK FARMERS KYENJOJO

BEFORE: THE HONOT3RABLE NR. JUSTICE LAMECK N. MUKASA

JUDGMENT: -

The Appellant filed Civil Suit FPT—00—CV—CS—0024/02 against the 1st and 2ND Respondents, both corporate bodies under the Local Government Act and the 3 Respondent described in the Plaint as a group of Livestock Farmers. The Appellant was seeking a declaration that he is the owner and entitled to possession of the Suit Land, an eviction Order and Permanent Injunction against the Respondents; General Damages for Trespass and Costs.

The Appellant's claim according to the pleadings in the lower Court is that the Appellant is the owner of two pieces of land, one measuring approximately 15.8 acres and the other 9.2 acres. Both pieces of land are separated from each other by a Kibanja (piece of land)

belonging to the Appellant's brother one Rubanza. The land in dispute is the piece measuring approximately 9.2 acres. That the 1st and 2 Respondents hired out the suit land to the third Respondent at monthly rental of shs. 20,000/= and the 3rd Respondent had established a cattle market on the suit land. In their Written Statement of Defence the Respondent pleaded, inter alia, that the Appellant did not have any title or ownership to the suit land. The Respondents counter—claimed in trespass against the Appellant. Their claim was that the Plaintiff was a trespasser to the suit land which they claimed is under the jurisdiction of the 1st Respondent for the 2 Respondent and gazzetted for all vaccination programmes and cattle dipping for the benefit of the members of the 3 Respondent. That the Appellant had fraudulently and illegally obtained a lease—offer over the suit land. The Respondent accordingly prayed for:

(a)A declaration that the 1st, 2nd and 3rd Respondents are the lawful / customary owners of the land.
(b)A declaration that the allocation is illegal.
(c)A declaration that the Appellant is a trespasser.
(d)An order of eviction and vacant possession.
(e)A Permanent Injunction.
(f)General damages for trespass,
(g) Costs of the suit,
(h) Any other relief.

I have carefully perused the Court Record and found that the Written Statement of Defence and Counter—Claim were filed on 10th May2002. There was no Reply to the Counter-Claim filed by the Appellant. There was no Scheduling Conference held as required under Order l0B Rule 1 of the Civil Procedure Rules. Instead on **8th** July 2002 the appellant applied for a hearing date and the case was fixed for hearing on 20th August 2002 when the hearing of the **case** commenced before the Magistrate Grade One Fort Portal

In this Judgment the learned Trial Magistrate made the following findings:

1. The suit Land originally belonged to the appellant who applied for and was granted a lease offer in respect of the Land for a period of Five (5) years under a lease offer dated

24th July 1967

2. The appellant in 1968 gave out the suit Land for the construction of a dip tank and crutch for purposes of treating cattle in the area.

3. The suit Land having been given to the farmers, the Land belonged to the farmers under the umbrella of Kyenjojo Livestock Farmers i.e. 3rd Respondent.

4. The allocation of the Land to the appellant in 1967 was lawful.

5. There was no act of trespass on the Land by the appellant.

In the final result the learned Trial Magistrate gave Judgement in favour of the Respondents and declared the suit Land to belong to the 3 Respondent to whom he granted the exclusive rights to use the suit Land. The appellant's suit was dismissed and the Respondents' claim partly allowed.

The appellant appeals against the Judgement on the following grounds:

1. The trial Magistrate erred in Law and in fact in holding that the appellant gave away his Land to the Respondents.

2 The trial Magistrate having found that the Lend belonged to the appellant should have ascertained as to what area the Respondent's were licensed to carry out their activities on the Land instead of decreeing all 10 acres as belonging to the

Respondent -

3 The trial Magistrate having found that the Respondent's activities on the Land stopped a long time ago, should likewise have found that the Land reverted to the Appellant.

This being the first Appellate Court my duty is to re—evaluate the evidence adduced before the trial Court and determine whether upon such evidence the conclusions reached by the learned trial Magistrate should stand or not.

I will handle grounds one and two together. The Appellant's testimony was that he acquired the suit land by inheritance from his father the late Kabwemera Simeho. In 1967 he applied for and was granted a lease offer over the land by the Toro Kingdom Land Board. This is evidenced by the Lease-Offer Exhibit 9.1. That he would be having a Lease Certificate Title over the suit land hadn't it been for a dispute between him and his brother one Rubanza. The dispute was resolved by Rubanza retaining the Land between the suit land and the Appellant's other land. The Appellant caused the land to be surveyed and the receipts for survey fees were received in evidence as exhibits P.4. That though the suit land was excluded from the Survey, due to the fore stated dispute at the tine, the Appellant has been using the suit land for grazing cattle. To prove his claim to the suit land, at the locus quo, the appellant showed the Trial Court the following futures on the suit land:

-Barbed wire fence erected around the suit land by the Respondents after the suit in the lower Court had been filed.

— Appellant's pit-latrine.

- Appellant's brothers pork muchomo point, one Rubanza.

— Appellant's tea collection shade next to the road but just outside the bribed wire fence.

- Old eucalyptus trees planted by the Appellant's brother Yowana Tinkasimire.

— Appellant's original house about 200m from the road from Ruhoko.

— One Agaba's house, which the said Agaba vacated in 2002 following the suit land

being fenced.
- A path connecting the suit land with the appellant's other land.
- Appellant's father's house and grave yard on the adjacent piece of land which was taken by the appellant's brother Rubanja and which portions his brother has since sold to other people.
— One Sunday Joseph's sweet potatoes garden grown on the suit land on the authority of the appellant.

Yowana Tinkasimire (PW2) a brother of the Appellant testified that the suit land used to belong to their father who in turn inherited it from their grandfather one Kwebiiha. That the Appellant was using the land for grazing. PW3 Andereya Olimi Kabyanga also testified that the suit land used to belong to the Appellant's father. PW4 Mulembe Joseph, a neighbour to the suit lane, testified that his father's land (the land he now occupies) had a common boundary with the suit land which was the appellant's father's land.

With the above evidence on record I find that the learned Trial Magistrate properly evaluated the evidence and made a right finding that the suit land originally belonged to the Appellant. In Erisa Lukwago v/s Bawa Sigh & Anor (1959) EA 283 Bennett J held that it is the essence of the relationship between a mailo owner and the holder of a Kibanja that the letters rights of occupation inures for an indeterminate period and heritable by successor. On the above authority I find that a Kibanja holding is for an indeterminate period and can be inherited by succession. I accordingly find that the Appellant owned the Kibanja interest in the suit land which he had inherited from his ancestors.

In the Respondent's Counter—Claim the Respondent's claimed that the Appellant had fraudulently and illegally obtained a lease offer over the suit land. I: is trite law that fraud must be specifically pleaded and strictly proved. In the instant case though specifically pleaded no evidence was led by the Respondents to prove fraud. As I have already

pointed out hereinabove, though the Appellant did not file a reply to the Counter—Claim no steps were taken by the Respondents to obtain judgment on the Counter-Claim in default of a Reply, instead the suit was set down for hearing. The above notwithstanding, evidence on record shows that the Appellant applied for and was granted a lease over the land by Toro Kingdom Land Board. It is not disputed anywhere that Toro Kingdom Land Board was not the then controlling authority in respect of the suit land. I accordingly find that the trial Magistrate made a proper finding that the suit land was lawfully allocated to the appellant.

Having so found, the issue is whether the Appellant at any time gave away the suit land or any portion of it to the Respondent or any of them. I must point out that it is not pleaded any where in the Respondents Written Statement of Defence or Counter— Claim that the Respondents acquired the suit land from the Appellant. In the Respondents pleadings it is pleaded instead as follows:

> "12 (a) Sometime back early 1940's the suit land used to be farmers operational area under the administration of Veterinary Department. In 1967 the Kabarole District before split into Kyenjojo District. Earmarked the suit land at Keeya — Kamelenge for Livestock farming and constructed thereon a Cattle Crutch and Cattle Dip for dipping and vaccination of cattle for the benefit of over 100 cattle keepers in Nyantungo Sub County.
> (b) After the suit land came under the jurisdiction of Kyenjojo District Local Government for Nyantungo Sub- County Local Government III gazetted for all vaccination programmes and cattle dipping for the benefit of the farmers".

The law is that a party is not entitled to relief except in regard to that which is alleged in the pleadings and proved at trial. In Frank Rwakijajiri v/s Kabayo (1992—93) HCB 165 the Court held that it is trite law that evidence must be consistent with pleadings and the Court is not permitted to reach a decision on grounds which were not pleaded. On the above authority I find in respect of ground one of the appeal that the learned Trial

Magistrate erred in law to hold that the Appellant gave any his land to the Respondent.

However Article 126(2) (e) of the Constitution provides that in adjudicating cases substantive justice shall be administered without undue regard to technicalities. The evidence on record show as a fact that the Appellant gave out land for the construction of a cattle dip for use by the Livestock farmers of the community. It is the appellant's testimony that a dip-tank was constructed on the suit land in 1968 by the Kabarole Local Government for use of the local residents. That the land where the cattle dip is located is about one acre. The Appellant did not protest the establishment of the cattle dip because the dip tank occupied a small part of the land and he was also a beneficiary as he also needed the dip for dipping his cattle.

Yowana Tinkasirriire (PW2) also testified that the dip-tank was constructed on the suit land in 1968 by the District. That the dip—tank was located near the road and occupied a small portion of the land. He went on to say that the District has fenced beyond the area occupied by the tank before. PW4 Mulembe Joseph testified that the dip-tank was established on the land in 1968 by the cattle keepers, who included himself and the Appellant. In cross-examination this witness stated that the land which had been given to the farmers was about one acre but that the Respondents had exceeded that land. DW1 Benjamin Kamegendera testified that he was a Sub-County Chief in 1967 and attended a meeting which allocated out land at Omukyeya, Kyamutasa, Nyantungo Sub County for the establishment of a dip tank. That the land was about half an acre and lies between the path, to Nyarukoma and another one to Ruhoko. That on the Upper-side there were eucalyptus trees but not on the land for the dip-tank.

Stanley Mulindwa (DW2) though a resident in the area, was only 15 years in 1967. John Kitaribara (DW3) became a Chairman LC.III Nyantungo Sub County in 1986. To him the land belonged to farmers since 1945, when he was young. This was Contrary to the other evidence on record. According to DW4, Dr. John Tinkasimire, the cattle dip was constructed before he came into office. I find that apart from DW1, Benjamin

Kamugendera, none of the other Respondents' witnesses could positively testify on how the cattle dip came to be established where it is located.

The learned trial Magistrate found that evidence shows that in 1968 a dip tank was constructed on the suit land with the consent of the Appellant who had acquired the same in 1967. That the Appellant having been allocated the suit land he in turn gave it away. He relied on the letter Exhibit Dl which the Appellant wrote in year 2000 wherein the Appellant is stated to have shown that the land still belonged to the cattle keepers or the farmers to which group he also belonged.

The Appellant when cross- examined about this letter Exhibit Dl he classified the circumstances under which he wrote the letter. He classified that he made the letter appear that he was writing on behalf of the cattle keepers of the area so as to strengthen his case against Mwesige Charles who had planted eucalyptus trees in the suit land. I have also studied the said letter and I find that the Appellant's main concern in the letter was that the eucalyptus trees would drain the swamp which would affect the availability of water in the area and make the dip tank useless.

On a careful evaluation of all the evidence on record I find that the Appellant in 1968 gave out a position of the suit land for the construction of a dip tank for the purposes of treating cattle in the area. That is for the benefit of the Livestock Farmers in the area, himself inclusive.

According to DW2 Stanley Mulindwa the General Secretary of the 3rd Respondent the Respondents want the land for establishment of a market for livestock and another part to serve as a crush and a dip tank. The law on protection of rights to property is very clear. Article 20 of the Constitution provides that fundamental rights and freedoms of the

individual are inherent and that they shall be respected, upheld and promoted by all organs and agencies of Government and by all persons. And 26 provides:

"(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied --.

(a) The taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) The compulsory taking of possession or acquisition of property is made under a law which makes provision for---

(i) Prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(j) A right of access to a Court of Law by any person who has an interest or right over the property".

The Land Acquisition Act (Cap226) provides for the procedure to be followed on compulsory acquisition of land for public purposes. There is no evidence to show that the above Provisions of the Act and the Constitution were complied with.

In the circumstances I find that the trial Magistrate should have ascertained as to what area of the Appellant's land was given out by the appellant to the community for the establishment of a dip tank. It is immaterial that the dip tank is located in the middle of the suit land. What was necessary is an access to it through the Appellant's residue land. The trial Magistrate erred in decreeing all the suit land to the Respondents. Accordingly grounds one and two are resolved in favour of the appellant.

The third ground of appeal is that the trial Magistrate having found that the Respondents' activities on the land stopped along time ago, should likewise have found that the land reverted to the Appellant. There is no evidence to show that the Appellant gave out the land where the dip— tank was constructed from a given period. It was for an endless period. It is not disputed that the dip-tank has for a longtime not been operational but evidence on record shows that at no stage did the Appellant regard, the dip tank structure as his. At the Locus the Appellant showed Court a dip- tank with old iron-sheets. He also showed Court live trees which the appellant said were forming a fence for purposes of vaccination. All these futures are preserved on the land until to date. I therefore find that the portion of the suit land which the Appellant gave out to the Community for the establishment of the Cattle Dip did not revert to the Appellant for lack of use over time. Accordingly ground three is resolved in favour of the Respondents.

In his pleadings before the lower Court the Appellant prayed for general damages for trespass. It was pleaded in paragraph 11 of the plaint that the Chief Administrative Officer on behalf of the 1st and 2rId Respondents wrote a strong letter to the appellant warning him to discontinue using the suit land. And in paragraph 12 that on 29th January 2002, the Chairman of the third Respondent wrote to the Appellant a letter threatening to sue him if at all he continued to use the suit land. The contents of the above two paragraphs were admitted by the respondents in paragraph 8 of their Written Statement of Defence. At the Locus the trial Court was shown a barbed wire fence erected by the Respondents around the suit land. This is sufficient evidence to show that the Appellant incurred damages as a result of the Respondents' conduct in that he was kept out of the land and prevented from using the land. It was the Appellant's evidence that he was

grazing on the land and that he had plans to establish a tea plantation on the land which was put on hold due to the Respondents threats and acts. Trespass to land is unjustifiable interference with the possession of land. See: Winfred and Jolowiz on Tort 11th Ed. Page 335. Once Court finds that a party is the owner of the land, as I have found in the instant case**,** any one who occupies the land without the consent or permission of that party must be held to be a trespasser. See:— Abdu Karim v/s Lt. Kabarebe& Bakitan (1994) 1 KALR 35, In the estate of Shariji Visran & Kirji Karsan v/s Shankerpasad Bhatt and others (1965) EA 789 and Moya Drift Farm ltd. v/s Theuri (1973) EA 114. In his submissions before the lower Court counsel for the Appellant had prayed for general damages in the sum of shs. 2,000,000/= which sum I do not find unreasonable.

In the final result I set aside the Judgment of the learned trial Magistrate Grade I and substitute it with judgment in favour of the Appellant against the Respondents jointly and severally in the following terms: -

1. That one acre of land be demarcated and surveyed off from the suit land to include the dip-tank, the Crush and the live trees which were forming the fence for purposes of vaccination, with an access out of the suit land for the use of the Livestock Farmers in the area.

2. It is hereby declared that the Plaintiff is the owner of the residue of the suit land.

3. Permanent injunction doth issue against the Respondents, their agents or servants from further trespass on this suit land, the bribed wire fence be removed forthwith and the Respondents or persons authorised by them do vacate the appellant’s land decreed above.

4. General damages in the sum of shs. 2,000,000/= for trespass.

5. Interest on the above sum at the court rate from the date of this Judgment until payment in full.

6. Costs of t is peal and of the suit in the Lower Court.

LAMECK MUKASA

AG. JUDGE

11/6/2004.