THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 031 OF 2004

PONSIANO SENYONGA::APPELLANT

VERSUS

JAMES KYALIGAMBA::RESPONDENT

[Appeal from the Judgment of His Worship Isaac Muwata (Chief Magistrate) dated 12th October 2004 in Mukono Civil Suit No. M36 of 1998.]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This is an appeal from the judgment of the Chief Magistrate at Mukono in which it was ordered that the appellant/respondent be evicted from land comprised in Kyaggwe Block 110 Plot 620 situated at Seeta. It was further ordered that a permanent injunction do issue to restrain the appellant from trespassing on the plaintiff/respondent's land and that he pay shs 500,000/= as general damages for trespass and the costs of the suit.

The facts from which the appeal arose as summarised from the evidence that was adduced before the lower court are that the respondent was the registered proprietor of the land known as Plot 620 Block 110 at Seeta measuring 0.410 hectares. He was registered as proprietor on the 22/05/97 by Instrument No. MKO57705. According to the respondent, he purchased the land from Nalweyiso (DW4) in 1984. The respondent testified that when he purchased the land it was

covered by a forest. The appellant's father Nsanziro Yowana Silvester (DW1) was the occupant of an adjoining piece of land. The appellant was present at the time of the sale and witnessed the surveying of the land. Sometime in 1997 the appellant (DW2) who was the son of Nsanziro started encroaching on the respondent's land; he entered the land cut down some trees and constructed a house thereon. On another occasion when the respondent took surveyors to the land to demarcate it into plots the appellant sent the surveyors away. As a result the respondent decided to take legal action against the appellant.

The appellant's case was that his father Yowana Nsanziro had a *kibanja* in Seeta that he acquired from one Sezzi Bagalaliwo in 1938. Nsanziro (DW1) testified that he had occupied the *kibanja* since 1938 and had begotten all his 12 children while he was a tenant on the *kibanja*. He produced *busulu* and *envujo* tickets and a judgment in which he was successful in a dispute against one Christine Nabunya, a daughter of Bagalaliwo who was the original owner of the land (IDE1 and IDE2, respectively).

The appellant confirmed that he was resident on his father's (DW1's) *kibanja* and the respondent had a piece of land adjoining to it. That he occupied one of his father's houses on the *kibanja*. At the *locus in quo* the appellant stated that he built one of the houses on the land in dispute in 1989 and that the dispute between him and the respondent started in 1987. Further testimony was by Alice Nalweyiso (DW4). She confirmed that she sold a piece of land to the respondent. Contrary to the respondent's testimony she stated that she sold the land to the respondent when Nsanziro (DW1) had a *kibanja* on it.

Three issues were framed for determination by the trial magistrate as follows:

i) Whether the plaintiff is the owner of the land in issue.
ii) Whether the defendant is a lawful occupant of the land in issue.
iii) What are the remedies?

The learned trial magistrate found for the respondent/plaintiff on the first issue because s. 59 of the Registration of Titles Act (RTA) provides that a certificate of title shall not be impeached

except for fraud and a certificate of title shall be conclusive evidence of title. He concluded that since the respondent was registered as proprietor he was the lawful owner of the land.

On the second issue the trial magistrate again found in favour of the respondent. He ruled that the appellant was not a lawful occupant of the *kibanja* in the terms of s.29 and 30 of the Land Act because evidence showed that though Nalweyiso claimed to have sold part of Nsanziro's *kibanja* to the respondent she did not prove that she introduced Nsanziro to the respondent as a *kibanja* owner. The trial magistrate also found that there was no evidence that the appellant's father's *kibanja* extended to the land in dispute. He concluded that the appellant's father's *kibanja* was different from the land which the respondent claimed in the suit. The trial magistrate also found that the appellant could not be a lawful occupant of the land in dispute because the appellant testified that he built the house on the land in dispute in 1989 after the respondent bought the land in 1984. As a result he granted the respondent the remedies that he prayed for.

The appellant appealed and framed three grounds in his memorandum of appeal as follows:

1. The learned trial magistrate failed to make a correct evaluation of the evidence adduced as a whole and consequently came to a wrong decision that the piece of land in dispute is not part and parcel of the customary land holding of the appellant's father.

2. The learned trial magistrate failed to properly weigh the evidence on record regarding the interest of the defendant's father in the piece of land and ended up making a wrong judgment that the scale had titled in favour of the plaintiff/respondent.

3. The visit to the locus in quo and the proceedings thereat were a complete farce as (the trial magistrate) and *(sic)* flagrantly disregarded the principles governing inspection of sites by the courts and thus occasioned gross injustice to the appellant/defendant.

He prayed that the trial magistrate's orders be set aside, the respondent's suit be dismissed, and judgment be entered his favour with costs in this court and in the court below.

Counsel for both parties filed written submissions. The appellant's advocate filed submissions on the 5/02/09 while the respondent's advocate filed his on the 19/03/09. The appellant's advocate did not file a rejoinder.

The duty of this court as the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law [**Pandya v. R [1957] EA. 336; Father Narsension Begumisa & Others v. Eric Tibekinga, SC Civil Appeal No. 17 of 2002 (unreported)**]. It is therefore incumbent on this court to re-evaluate the whole of the evidence adduced before the trial court and I shall do so by answering the questions raised in the memorandum of appeal as follows:

1. Was the disputed land part of the appellant's father's *kibanja*?
2. Did the appellant's father have an interest in the disputed land?
3. Was the visit to the *locus in quo* and the proceedings thereat conducted according to principles governing such visits?

Was the disputed land part of the appellant's father's kibanja?

It was submitted for the appellant that the piece of land in dispute was part of the appellant's father's *kibanja* because Nalweyiso (DW4) testified that she sold one acre of land which was part of the land she inherited from her father (Bagalaliwo) to the respondent but part of the land was occupied by DW1 as his *kibanja*. Further that DW1 had stayed on the land since 1938 before DW4 was born. The appellant's father (DW1) also testified that Bagalaliwo gave him land in 1938. Sebuza (DW3) confirmed that DW1 had stayed on the land for a long time. That as a result of these testimonies there was overwhelming evidence that the disputed land was part of the customary land holding of the appellant's father.

In reply, Mr. Munulo for the respondent submitted that the trial magistrate had properly evaluated the evidence in this regard and come to the correct finding that the land was not part of the appellant's father's kibanja. In coming to this conclusion, Mr. Munulo relied on the respondent's evidence that when he bought the land it was under forest cover. That at the *locus in quo* tree stumps were seen and this proved that the land was originally under forest cover. Mr.

Munulo further submitted that the testimony of DW4 who sold the land to the respondent should be disregarded because in his view DW4 conspired with her relatives (DW1 and the appellant) in a bid to grab the land that she had sold to the respondent. Further that DW1 could not have been on the land before the respondent sold it because he raised no complaint at the time of the sale; neither did he declare that he had a *kibanja* on the land. It was also Mr. Munulo's submission that in order for the appellant to successfully challenge the respondent's title, he ought to have pleaded and proved fraud in order to negative the provisions of s.59 of the RTA but he did not do so. He concluded that since the respondent was the registered proprietor of the land and his title had not been challenged the magistrate came to the correct finding on this issue and his decision should be upheld.

The evidence on record showed that the respondent (PW1) bought the suit property from Nalweyiso (DW4) in 1984 and he was in possession of a certificate of title in respect of the land. A certified copy of it was produced in evidence as Plaintiff's Exh. 1.

DW1 who was the owner of the *kibanja* occupied by the appellant testified that the respondent claimed to have bought part of a *kibanja* which he acquired in 1938 and on which the appellant occupied one of his houses. Further, that as a tenant on the respondent's land he was willing to pay ground rent to him. The appellant testified that he occupied part of his father's *kibanja*. DW3 and DW4 also testified that the respondent bought the piece of land in dispute from DW4. Neither of the appellant's witnesses challenged the respondent's title for fraud or any other fault as is required by s.59 of the RTA in order to impeach a registered proprietor's title. I therefore find that the trial magistrate properly evaluated the evidence on record and came to the correct finding that the respondent is the registered proprietor and thus the owner of the mailo land in dispute.

As to whether DW1's *kibanja* was part of the respondent's titled land, DW1 testified that he had a *kibanja* which bordered with the respondent's land. That he built a house for his porters at the edge of his *kibanja* so that the porters could ensure that no one encroached on the *kibanja*. In a year that he did not state DW1 authorised his son, the appellant, to live in the porters' house because he had married. DW1 admitted that he built two new houses but not on the respondent's land. He further testified that "recently" LCs notified him that the respondent bought land that comprised part of his *kibanja* and he agreed to pay rent to the respondent according to the law.

However, DW1 was of the view that his rights on the land were protected by the Constitution which he had been informed provides that a holder of a *kibanja* should not be evicted. DW1 was still willing to pay rent to the respondent in respect of the *kibanja*.

Though DW1 was sure that Seezi Bagalaliwo gave him the *kibanja* in 1938 he was not very clear about the boundaries. In his description of the boundaries of his *kibanja* DW1 clearly identified the boundaries on all sides except on the respondent's side. However, although he stated that he built a house for porters at the end of his *kibanja* he did not state when he constructed the first house on the disputed land. This left doubt whether the house was built before the respondent bought the disputed piece of land or not.

Sebuza Moses' (DW3) testimony was not useful in resolving this question either. He testified that he had a *kibanja* on the late Seezi Bagalaliwo's land for 32 years. That DW1 already had a *kibanja* on Seezi Bagalaliwo's land by the time DW3 acquired his *kibanja*. That DW1 had five houses on the *kibanja*, 3 for his residence and 2 near DW3's *kibanja*. Further that DW1's *kibanja* was fenced with *mituba* and *misambya* trees and in addition to the growing of crops the other activity on DW1's land was making bricks. DW3 also did not help court in establishing when the two houses on the disputed *kibanja* were built. Neither did he help in establishing the boundary between DW1's and the respondent's land.

Alice Nalweyiso (DW4) testified that she sold one acre of land to the respondent. However, she did not remember the year in which she sold him the land. She further testified that at the time she sold the land to the respondent, Nsanziro (DW1) was already an occupant of part of the same land. Further that the appellant's house was on the part of the land that the respondent bought from her. DW4 should have resolved the issue regarding the boundaries of the land that she sold to the respondent but she did not. Though she stated that DW1 already held a *kibanja* when she sold the land to the respondent, she could not tell court how big DW1's land was. And although she testified that the appellant's home was on the disputed land, she did not clarify to court whether DW1 had a house on the land when she sold it to the respondent or not. On the whole, her evidence was inconclusive and left a lot to be desired.

Graphic evidence on record about the position of the disputed land in relation to the appellant's father's *kibanja* was contained in a sketch map. This was drawn at the *locus in quo* on the

25/03/04. The map indicated that the disputed piece of land was between the respondent's and DW1's homes. It had crops and two houses. One of the houses was designated as the "old house" and the other as the "new house." Both houses were within the area marked with stones; most probably indicating the land that had been surveyed by the respondent. Contrary to Mr. Munulo's submissions, the sketch map did not show the tree stumps that the respondent testified about.

The appellant was the only witness who testified at the *locus in quo*. He stated that he built the brick house on the disputed land in 1989. That he first occupied the old house before shifting to the brick house. He further stated that the dispute began in 1987. The appellant was re-called after the visit to the *locus in quo* to enable his lawyer to put questions to him. He then testified that the new house on the land was Nsanziro's (DW1). That DW1 allowed him to live in the new house which he built after selling a plot of land. On cross examination the appellant stated that he began to stay in the old house in 1984 but he did not remember when he moved into the new brick house. That he now occupied both the old house and the new house because he had two wives.

It would appear that the appellant was not willing to tell court the truth about the events surrounding the building of the new brick house. It is inconceivable that he could easily recall when he moved into the old house but he could not remember when he moved into the new brick house. This is especially so because it was also the appellant's testimony that he helped to make the bricks that were used to build the new brick house. From the appellant's testimony it was clear that the dispute over the land with the responded began after 1984 when the respondent bought the land from DW4, i.e. either in 1987 or 1997.

The testimony of the appellant, about the boundaries of his father's *kibanja* was also not very helpful. He testified that he was resident on DW1's *kibanja*. That the land was bordered by roads on two sides and by Serwanga's and the respondent's land on one side and Sebuza's (DW3's) land on the other side. The appellant also testified that his father's land was surrounded by a wire fence, *mutuba* trees, jack fruit, *misambya* and other trees all round the *kibanja*. The map drawn at the *locus in quo* did not bear this out. It therefore appears that the land described by DW3 was different from that which the respondent claimed.

On the other hand the respondent's testimony was clear. He was sure that he bought the land from DW4 in 1984. There was no one on the land and it was covered by trees. That the appellant was present when he bought the land and he witnessed part of the surveying. DW1 did not protest the sale of the land at the time of sale. According to the respondent, in 1997 DW1's sons entered onto the land that he had bought and started felling trees. That when this happened he complained to the LC in September 1997. The appellant and his father were summoned and they admitted that they were in the wrong. That the land was the respondent's land but they would buy it. However, the parties failed to agree on the purchase price. While the respondent wanted them to pay shs 8m, the appellant and his father offered to pay shs 1.5m. The respondent further testified that when they failed to agree on the price, the LC members advised him to sue the appellant and thus the suit. The respondent's testimony was not challenged at all.

The respondent also complained to the Sub-county chief. Exh. P2 shows that on 28/05/97 the Sub-County Chief invited the appellant to attend a meeting with the Assistant Chief Administrative Officer (ACAO) of Mukono about a land dispute. This confirms that respondent's testimony that the dispute over the land or the respondent's incursion into his land began in 1997. According to the respondent's testimony DW1, the appellant and he attended the meeting with the ACAO but they failed to settle the matter. Though they agreed that the land belonged to the respondent, the appellant and his father were of the view that they had a right to stay on the land because the President of Uganda had informed the public that *bibanja* holders should not be evicted from land. On the basis of this evidence I find that the appellant's father's kibanja was not part of the land that the respondent bought. Ground 1 therefore fails.

Was the appellant a lawful occupant of the disputed land?

Mr. Iyamulemye submitted that the appellant had a customary interest over the disputed land and this was borne out by DW2's testimony that he had acquired a *kibanja* from Sezi Bagalaliwo in 1938; DW4 and DW3 confirmed that DW1 had been on the land for a long time. Relying on the decision in the case of **Eria Lukwago v. Bawa Singh [1959] EA, 282**, Mr. Iyamulemye submitted that the right of occupation of a *kibanja* holder inures for an indeterminate period and is inherited by his heirs. He further submitted that if a person purchases an estate which he knows to be in occupation of another, then he is bound by all the equities which the parties in

such occupation may have had (**Uganda Posts and Telecommunications v. Abraham Kituma & Another, SCCA 36 of 1998**). It was finally submitted for the appellant that where a purchaser, despite the knowledge of occupation of the land under a contract of sale proceeds to transfer title into his name in order to defeat an occupier it constitutes fraud (**Katarikawe v. Katwiremu [1977] HCB 187**). For the respondent, Mr. Munulo submitted that the appellant and his father encroached on the respondent's land and that the submissions in respect of ground one would answer ground two.

The appellant ostensibly occupied the disputed land on the basis of his father's title as a customary holder. According to his own testimony and that of DW3 and DW4 he was resident on his father's *kibanja*. In order to prove his title as a *kibanja* holder and validate the appellant's claim that he lawfully occupied the land, DW1 produced two tickets for *busulu* and *envujo* which he paid in 1959-60. However, they were not admitted in evidence. DW1 also produced two judgments from the Magistrates' Court in Nakisunga in respect of a dispute between DW1 and Christine Nabunya (IDE1 and IDE2). Nabunya was one of the daughters of Seezi Bagalaliwo who gave a *kibanja* to DW1. The two judgments were admitted in evidence on the 29/01/2005 though they remained marked as IDE1 and IDE3. A translation of IDE1 into English was admitted in evidence but continued to be marked as IDE2.

According to the decision in IDE2, the principal court of Buganda in Civil Appeal No. 146 of 1959 found that Semakula, the heir of Sezi Bagalaliwo allowed DW1 to enter onto a piece of land that was part of his father's estate. However, Semakula did this before he was given his share of the estate. The court found that Semakula did not have the power to do so but DW1 could not be blamed for entering onto the land and cultivating it. DW1 was ordered to agree with the owner of the land, i.e. Nabunya on the amount of rent that he had to pay to her under the Busulu and Envujjo Law of 1923.

It is my view that the judgment IDE2 proved only one thing. It showed that DW1 had a *kibanja* on Sezi Bagalaliwo's land. However, that *kibanja* was on land that was owned by Christine Nabunya, sister to Alice Nalweyiso. It was not the same piece of land owned by Nalweyiso and part of which was Nalweyiso sold to the respondent.

Turning to the rest of the evidence on the record, the respondent testified that he bought the land in dispute in 1984. That sometime in July 1997, the appellant who was resident on his father's *kibanja* adjoining to his entered onto his land to fell trees. Further that when the respondent approached him and confronted him about it the appellant chased him away. That on another occasion when surveyors went to the land to demarcate it for plotting the appellant again sent them away. It was also the respondent's testimony that on one of the occasions when he went to confront the appellant he chased him away with a stick. There is no doubt from the evidence on record that sometime after 1984, i.e. either in 1987 or 1997 the appellant built a brick house or houses on the respondent's land. The respondent also testified, and DW3 confirmed that DW1's children made bricks on the disputed land. The respondent's main complaint against the appellant was that he constructed a permanent house on his land.

In the absence of evidence that the land occupied by the appellant was the same land that his father (DW1) won in a suit against Christine Nabunya, I am convinced that the appellant wrongfully entered onto or trespassed on the respondent's land. This was encouraged by his father (DW1) because he (DW1) thought his actions would be protected by the law and he would not be evicted without compensation. He imagined that the respondent would compensate them for the houses and other developments that were made on the land even after he had bought it. I therefore find that the trial magistrate properly evaluated the evidence on that point and came to the correct finding. Ground 2 therefore also fails.

Was the visit to the locus in quo and the proceedings thereat conducted according to principles governing such visits?

Mr. Iyamulemye for the appellant submitted that the trial magistrate used the visit to the *locus in quo* to fill in gaps in evidence contrary to the principle that the trial magistrate should not use the visit to the *locus in quo* to carry out a personal investigation of the case (**Yeseri Waibi v. Edisa Lusi Byandala [1975] HCB 28; Alice Namisango v. Galiwanga [1986] HCB, 37**). It was Mr. Iyamulemye's view that the impressions that were made on the trial magistrate at the locus led him to disregard DW4's evidence that she sold the land to the respondent when DW1 already had a *kibanja* interest in it. He concluded that had the trial magistrate properly applied the principles relating to visits of the locus in quo he would have found in favour of the appellant.

With regard to the third ground, Mr. Munulo submitted that his submissions in answer to the first two grounds answered it. In reply to the submission that the trial magistrate wrongly carried out a personal investigation at the site Mr. Munulo submitted that the purpose of such visits is to identify the suit land on the basis of the evidence adduced in court by parties to the suit. Further that it is the duty of the trial court to compare the evidence on the court record with its observations at the locus in quo. Mr. Munulo concluded that the trial magistrate did not descend into the arena when he described the features of the land that he was shown at the *locus in quo* and therefore ground three of the appeal should fail.

The record shows that the trial magistrate visited the *locus in quo* on 25/03/04. Both parties were present and so were both their advocates. The defendant/appellant testified briefly but it appears he was not cross-examined. There is no evidence that any of the other witnesses that testified in the case were present. There next appears a sketch map of the land in dispute and adjoining plots.

Direction 3 of Practice Direction No. 1 of 2007 lays down the ground rule that during the hearing of land disputes courts should take interest in visiting the *locus in quo*. That while there the court should ensure that all parties, their witnesses and advocates if any are present. The parties and their witnesses should then be allowed to adduce evidence at the locus in quo. Any cross-examination should also be done by either counsel or the parties. All proceedings should be recorded together with observations, views, opinions or conclusions of court. This should include a sketch plan, if necessary.

It is clear that the trial magistrate did not follow the direction to the letter. However, he took care to allow the defendant/appellant's advocate to examine him further on return to court and he allowed the respondent's advocate to cross-examine him. Most importantly, he drew a sketch map that represented what he observed at the locus in quo. I therefore come to the conclusion that the visit was not conducted according to the accepted principles but I do not agree that it occasioned a miscarriage of justice to the appellant. He was the only person who was allowed to testify, or at least whose testimony made it to the record of proceeding. Ground 3 therefore only partially succeeds.

In the end result, this appeal fails. The orders made by the trial magistrate are hereby upheld and the appeal is dismissed with costs to the respondent here and in the court below.

Irene Mulyagonja Kakooza
JUDGE
13/07/2009