THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 008 OF 2000

MALIKI KISUBI::APPELLANT

VERSUS

CHRISTOPHER JAMES BYANSI::::::::::::::::::::::::::::RESPONDENT

[Appeal from the Judgment of Ms. Margaret Tibulya, (Chief Magistrate) dated 11/1/2000 in Iganga C.S. No. 56 of 1999]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arises from the judgment of Her Worship, Ms. Margaret Tibulya, sitting as the Chief Magistrate at Iganga, in which she ruled that the land in dispute belonged to plaintiff and granted him an order to evict the defendant, a permanent injunction restraining the defendant from trespassing on the land, as well as the costs of the suit and.

The facts from which the appeal arose are briefly that the plaintiff, who is now the respondent, was the administrator of the estate of the late Semu Waibi. He sued the defendant (now the appellant) for trespassing upon a piece of land situated at Ntinda village, Iwawu Parish in Iganga District. It was the plaintiff's case that his father, Semu Waibi bought a piece of land from one Budhala and he took possession of the same. Thereafter, he transferred his home from its old location and created a path leading to the main road on the land he purchased from Budhala. The plaintiff's family occupied both pieces of land and used the path for over 50 years without any disturbance until the defendant and his brother inherited a neighbouring piece of land from their father. It was the plaintiff's case that his father bought the disputed piece of land long before the defendant was born. The defendant's land was separated from the land in dispute by a road.

According to the plaintiff, sometime in 1992 the defendant left his family land across the road and fraudulently blocked the path on the plaintiff's land. He started cultivating it and planted boundary marks on it and even constructed houses on it. The plaintiff thus sued him for trespass and damages therefore.

In his Written statement of defence (WSD), the defendant stated that he would raise a preliminary objection that the suit was bad in law and should be dismissed with costs. He did not disclose what the preliminary point of law was, but he denied every allegation in the plaint and asserted that the plaintiff would be put to strict proof thereof. In spite of the fact that the defendant's only defence was the preliminary objection he intimated he would raise, the trial court allowed the defendant to adduce evidence of facts that had not been pleaded in the WSD.

According to that evidence the defendant's case was that he shared a boundary with the plaintiff. That over the years there had been a dispute between him and the late Semu Waibi over the boundaries of the land but Semu Waibi lost the suit. That Semu Waibi appealed to the LCII Court but he again lost to the defendant. Further that Semu Waibi appealed to the LCIII Court but he again lost to the defendant. It was also his case that as a result of the judgment in the LCIII Court, the land was handed over to him and the sub-county chief planted new boundary marks between the pieces of land in 1977. The defendant also denied that the plaintiff or his family had ever occupied the land in dispute. He called witnesses to try and prove this fact.

The trial court framed three issues for determination, i.e. whether the defendant trespassed on the suit land, or whether the land in dispute belonged to the plaintiff, and whether the plaintiff was entitled to the remedies that he sought. The court found in favour of the plaintiff on all issues and made the orders stated above. The defendant thus appealed and raised 5 grounds of appeal as follows:

1. That the trial magistrate failed to evaluate the evidence and acted contrary to overwhelming evidence in favour of the defendant.

2. That the trial magistrate did not put into consideration the long period that the defendant had been in possession and ownership of the disputed land.

3. That the trial magistrate erred and acted contrary to law in entertaining a matter that was *res judicata*.

4. That the trial magistrate misdirected herself on the burden and standard of proof.

5. That the decision of the trial magistrate occasioned a miscarriage of justice.

The appeal lay in abeyance from 2000 when it was filed till 2006 when it was first called on for hearing. Even after that, for various reasons, the appeal did not take off till 27/10/08 when the parties' advocates appeared before me and began to argue it. In the process of the arguments by counsel for the appellant, it came to my attention that the record seemed to have an error. The defendant's testimony had been typed three times and the testimonies appeared to be different. In addition, the record had not been certified by the lower court before it was sent to the High Court. I therefore stopped the proceedings and requested that the record be put in order. The record was then retyped at the High Court in Jinja.

On reviewing the retyped copy of the record, I compared it to the original record of proceedings and confirmed that the defendant had actually testified two times. He first testified on 14/09/99 when he appeared *pro se*, his advocate having been allowed to withdraw from representing him. The plaintiff cross-examined him and there was a re-examination, I think by the court. When the case next came for hearing on 28/09/1999, the defendant again took the stand to testify. This time he was represented by Mr. Sanya Luwande who examined him in-chief. The plaintiff cross-examined him and he was re-examined. I will therefore consider both testimonies as the evidence given by the defendant in the suit.

When the parties appeared before me on 11/10/2009, I decided that previous arguments advanced in court would be ignored. I ordered that both parties refer to the re-typed record of proceedings and that their advocates file written submissions in the appeal. Mr. Balyejjusa Ivan who represented the appellant filed written arguments on 17/12/2009, while M/s

Okalang Law Chambers for the respondent filed their written arguments on 2/02/2010. The appellant's advocate did not file a rejoinder.

In his submissions, Mr. Balyejjusa addressed grounds 1 and 4 together, and grounds 2 and 3 separately. It appears he abandoned ground 5. With regard to grounds 1 and 4, Mr. Balyejjusa submitted that the respondent's claim in the suit seemed to be over a path and not the whole piece of land. Further that though Tezira Tezikya (PW2), Kosamu Muludhaya (PW3) and Tibaganhakwaga (PW4) testified that Semu Waibi bought the land in dispute, they produced no evidence to prove this. Counsel for the appellant further contended that PW3 contradicted the testimonies of PW2 and PW4 who testified that Semu Waibi bought the land from Budhalla when he stated that Semu Waibi bought the land from one Amisi. He also challenged the testimonies of PW3 and PW4 about the dispute because they had already left the area when it occurred.

Mr. Balyejjusa contended that the trial magistrate ought to have found in favour of the appellant because he had proved that he litigated with the respondent's father and his cousin Paul Kiyuba and he won on all occasions and this was not disputed. Mr. Balyejjusa then submitted that the trial magistrate erred in fact when she found that the previous disputes over the land related to a path and not the land. Further that she erred when she relied on documents that were not produced in evidence to come to the conclusion that the previous disputes were over a path. Mr. Balyejjusa also submitted that the trial magistrate erred when she came to the finding that the respondent had proved that his family had been using the land in dispute. He contended that as opposed to the findings of the trial magistrate that the appellant's evidence had contradictions, it was the evidence adduced by the respondent that had contradictions.

Mr. Balyejjusa also challenged the trial magistrate's finding that the appellant's family had not been in quiet possession of the land in dispute because of the previous complaints by the respondent's family. That to the contrary, the appellant had proved that the disputes were resolved in his favour and new *birowa* (boundary marks) were planted in his favour after both disputes. He further challenged the trial magistrate's reliance on the evidence at the *locus in quo* that the *birowa* demarcating the disputed land from the respondent's land were new plants, as compared to the rest of the *birowa* demarcating the land from other

neighbours. That this was contrary to the evidence that members of the respondent's family kept cutting the *birowa* and new ones were always planted in favour of the appellant. In his view, the trial magistrate misdirected herself when she relied on the fact that the appellant and his family had not been in quiet possession of the land when it was only in the 1990s that the respondent and his family began to lay claims to the suit land.

It was also Mr. Balyejjusa's opinion that given the evidence adduced by the appellant, the burden on the respondent to prove his title to the land became higher and he did not discharge it. That as a result, the trial magistrate ought to have found in favour of the appellant.

Turning to ground 2, Mr. Balyejjusa submitted that the appellant did not show court that his family was in occupation of the land after the dispute in 1977 was cleared. But on the other hand the appellant and the court witnesses at the *locus in quo* proved that the appellant's family was in occupation of and using the land for a long period of time and they had never seen the respondent's family use the land. It was also Mr. Balyejjusa's view that there was no evidence to show that there was a dispute over the land, save for a boundary dispute in 1977 which was resolved by planting *birowa* to demarcate the boundary. Mr. Balyejjusa then submitted that the respondent had never used the land and did not even reside in the area. He further pointed out that there were contradictions between the testimonies of Tezira Tezikya (PW2) and the respondent. While PW2 testified that the land was used for grazing cattle, the respondent testified that it was used for cultivation. In his view, the trial magistrate ought to have taken the appellant's family's long period of possession of the land into consideration.

With regard to the 3rd ground of the appeal, Mr. Balyejjusa submitted that the matter was *res judicata* because the respondent testified that there was previous dispute between him and Paul Kiyuba in the Chief Magistrates Court at Iganga. Further, that in that regard, the respondent testified that he authorised Kiyuba to proceed in the suit. Mr. Balyejjusa concluded that it was irregular for the trial magistrate to allow this suit to proceed in spite of testimonies that there was a previous suit over the same piece of land between the appellant and others litigating under the same title as the respondent.

In reply, counsel for the respondent addressed the grounds of appeal in the same manner that Mr. Balyejjusa had. With regard to grounds 1 and 4, he submitted that the trial magistrate had

properly scrutinised the evidence of both parties to the suit and all their witnesses. He asserted that the testimonies of PW2, PW3 and PW4 that Semu Waibi bought the land were not challenged in cross-examination nor contradicted. Counsel for the respondent relied on the decision **Uganda Revenue Authority v. Stephen Mabosi, SCCA No. 26 of 1995** for the submission that an omission or neglect to challenge evidence in chief of a material proposition by cross-examination would lead to the inference that the evidence given is accepted. That on the other hand, the appellant had not proved how or when his father came to have ownership of the land in dispute. In his view, the contradiction about the name of the vendor of the land (Aminsi as opposed to Budala) was a minor one that was properly ignored by the trial magistrate.

Counsel for the respondent argued in support of the trial magistrate's finding that there were contradictions in the evidence adduced by the appellant. Examples of this were about the appellant's testimony that his father's use of the land had been undisturbed for a long time, yet he testified that his father litigated over the same land with Semu Waibi. In addition to that DW3 testified that there had never been any dispute over the land, yet DW4 testified that there was a dispute between the appellant's father and the respondent's father.

Counsel for the respondent also argued in support of the trial magistrate's finding that the appellant had not adduced any evidence to show how his father acquired his title to the land. He also supported the trial magistrate's finding that the previous dispute between the appellant and Kiyuba was over a right of way and not the land. Counsel for the respondent also submitted that there was evidence to show that the respondent's family was in use and occupation of the land before 1992 when the appellant blocked the path. It was also Counsel for the respondent's submission that the appellant's witnesses did not seem to know the exact piece of land that was in dispute. He concluded that in light of the discrepancies and contradictions in the evidence adduced by the appellant, the trial magistrate correctly found in favour of the respondent. He relied on the decision in the case of **Kifamunte Henry v. Uganda SCCA No. 10 of 97** for the submission that major discrepancies and contradictions in the evidence of a witness will normally lead to that evidence being rejected unless the said discrepancies are satisfactorily explained, and minor discrepancies have no such effect unless they point to deliberate falsehoods. He concluded that the discrepancies in the evidence adduced by the appellant in this case were never explained.

Counsel for the respondent finally submitted that the trial magistrate who had the benefit of seeing and hearing the witnesses in the case had preferred the evidence adduced by the respondent to that adduced by the appellant. He referred to the case of **Peters v. Sunday Post United [1958] EA 424** where it was held that it is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case who had the advantage of seeing and hearing the witnesses. Further that an appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion reached, upon that evidence should stand, but this jurisdiction to review the evidence should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. He then submitted that this court had no justification to interfere with the trial magistrate's findings because she had properly evaluated the evidence.

With regard to the standard and burden of proof, Counsel for the respondent submitted that the trial magistrate was very much alive to this. He further submitted that the burden of proof was on the party asserting a fact and the standard in civil cases is on the balance of probabilities. He challenged Mr. Balyejjusa's submission that there was a heavier burden on the respondent in this case to prove his ownership of the land in dispute than was cast on the appellant.

Turning to ground 2, counsel for the respondent submitted that the trial magistrate considered the period of time that the appellant had used the land and correctly came to the conclusion that the respondent's family had been in occupation of the land for a longer time than the appellant's family. Further that the respondent's family's occupation of the land had only been interrupted in 1992 when the appellant took a tractor and ploughed the land and blocked the road. In his view the trial magistrate correctly found that the appellant's family's occupation of the land was always challenged by the respondent's family and therefore the appellant's family had not been in undisturbed occupation of the land for a period of 10 years.

Counsel for the respondent challenged the appellant's reliance on the statements of the witnesses at the *locus in quo* because they did not take the witness oath. He contended that according to the provisions of s. 10 of the Oaths Act and the schedule thereto, the taking of

the evidence in court is mandatory. That since the persons who testified at the *locus in quo* did not take the oath their testimonies should be disregarded by this court.

Counsel for the respondent then concluded that the respondent's family had proved that they were in occupation of the land from 1930 to 1977, and from 1977 to 1992; that in the circumstance they had proved that they were customary owners of the land in dispute. He relied on the decisions in the cases of **Rutsigazi Deo & 2 Others v. Edward Rutenga, HCCS No 26 of 1995** and **Matovu & 2 Others v. Seviri & Another [1979] HCB 174** for his submission.

With regard to ground 3, Counsel for the respondent submitted that the issue of *res judicata* had not been raised in the lower court. Relying on the decision in the case of **Warehousing & Forwarding Co. of East Africa v. Jafferali & Sons Ltd [1963] EA 385,** he submitted that courts of law are reluctant and often decline to take on new issues which were not argued in the trial court. Counsel for the respondent further submitted that there were no judgments produced in evidence to prove that previous disputes over the land had been adjudicated upon and determined in order to enable the court to make a finding on the issue. In his view, the evidence on record seemed to indicate that the previous dispute between the parties had been over a right of way, not the land. He relied on the decision in the case of **Mbabali v. Kizza & Administrator General [1992-93] HCB 293** for a definition of the principle of *res judicata* and submitted that there was no judgment to show that the matter that was litigated upon before was the same matter now before court. He then asserted that all the grounds raised in the appeal were devoid of merit and the appeal should be dismissed.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and come 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 [**Father Narsension Begumisa & Others v. Eric Tibekinga, S.C Civil Appeal No. 17 of 2002 (unreported)**]. I will therefore re-evaluate the evidence on record while taking into considerations the submissions of counsel on each of the grounds of appeal. I will address the grounds of appeal in the same order that they were addressed by both counsels.

Grounds 1 & 4

These two grounds related to the evaluation of evidence and the burden and standard of proof. But before I re-evaluate the evidence, it is necessary to dispose of the question raised by counsel for the respondent as to whether this court can rely on the testimonies of the witnesses at the *locus in quo* who took no oath before they testified. S.10 of the Oaths Act provides that no person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation.

What needs to be done in such a situation therefore is to establish whether the evidence given by Martin Waibi and Zabiya Babirye who did not take oaths before testifying is corroborated by any other evidence on record; it is not to straight away disregard the evidence. I reviewed the evidence of the two witnesses but I found little use for it. I therefore thought a search for evidence to corroborate it would be a futile exercise.

It was strenuously contended that the respondent's claim was over a path and not the whole piece of land. In order to establish whether this was the case, we must first go back to the respondent's pleadings. In paragraph 4 of the plaint it was stated as follows:

> "4. The plaintiff is suing the defendant for trespass to land situated at Ntinda Village, Iwawu Parish, Iganga District which the late Semu Waibi bought from Budhala and owned/possessed/utilised after the said purchase."

In his prayers in the statement of claim, the respondent stated that he wanted the court to issue a declaration that the land in dispute is his property, an eviction order against the defendant, a permanent injunction restraining him from further trespassing on the land and damages for trespass.

Turning to the testimonies of the key witnesses for the respondent, at the end of his own testimony the respondent prayed that the court orders the defendant to give them a right of way; that the defendant removes the illegal boundary marks from the land, and that he be evicted therefrom. He also prayed that court awards him damages and costs of the suit. Similarly, Tezira Tezikya (PW2) prayed that court orders that they have a right of way as well

as the removal of the boundary marks. She also prayed that the court makes a decision about the two houses on the land.

Given the circumstances above, there is no doubt in my mind that the respondent sued the appellant for the whole of the piece of land in dispute, as well as for blocking the path to his home. But the two actions could not be mutually exclusive because the respondent's claim, right from the beginning, was that the path that he wished to have access to run through the piece of land in dispute.

The next sub-issue that was raised in the submissions of counsel for the appellant was whether the respondent proved that Semu Waibi purchased the land in dispute. On this point the trial magistrate held thus:

> *"The plaintiff's evidence that his father bought the land from Budhala was not challenged in any significant way. The defendant apart from saying that he inherited the land from his father did not prove a better title than the plaintiffs."*

In this regard, PW2 who was the widow of Semu Waibi testified that Semu Waibi had a piece of land that neighboured that of Budhala. Budhala wanted to go to his homeland in Bugabula and his land remained in the hands of the chiefs. Eventually, Budhala sold the land to Semu Waibi. PW2 was present together with her co-wife and one called Kosamu Ludhaya. She further testified that her husband paid two goats as consideration for the land. Thereafter, the family used the land for grazing cattle and for stores. PW2 further testified that their land had a path leading to the main road to Bunya. She also described the land as being separated from the appellant's piece of land by a road.

When she was cross-examined, the purchase of the land by her husband was not challenged. Instead, counsel for the appellant questioned her about the use of the land. PW2 then testified that the land was used generally by all the children. She also stated that the respondent did not use the land because he resided in Luuka, but some of his children were resident with PW2 and the respondent had a house in her home. She clarified that Kiyuba had no land in

the area but was allowed to use some of the respondent's family land till he could acquire his own land.

Kosamu Muludhaya testified as PW3. He stated that he was a relative of the respondent. He referred to PW2 as his sister and the defendant as her neighbour. He testified that he was a *muluka* chief and that he was present when Semu Waibi bought the land in dispute from Amisi who migrated and left the area. He stated that the consideration for the purchase was two goats, one white and the other black. He described the land in dispute as being separated from the appellant's land by a path (road) that leads to Bunya County. He further stated that the appellant's land was in a different village from the respondent's land, i.e. in Busu sub-village. When he was cross-examined, the court recorded that he gave no clear answer to the questions. However, there was no indication as to whether the questions related to the purchase of the land or to trespass on the land.

Tibaganhakwaga (PW4) testified that the respondent was his grandson. Further that the appellant was his in-law since he was married to his relative. He stated that he knew the land in dispute was the land that Semu Waibi purchased from Budhala. Further that he was present when Waibi bought the land and that the purchase price was two goats, both female. He also described the land as being separated from the appellant's land by the road to Bunya and some schools. He clarified that the appellant's land and the respondent's land were on different villages. While the respondent's land was situated in Clement's *kisoko*, the appellant's land was in Lukeeta's *kisoko*.

When he was cross-examined, PW4 stated that he left Iwawu long ago, before independence. He did not go to that village and did not know which part of the land the appellant had trespassed on. He clarified that he only knew about the early demarcations of the land in dispute. In re-examination he stated that he had come to court to testify about the ownership of the land, and as far as he knew, the land belonged to Semu Waibi.

I agree with the trial magistrate that the testimonies above that the respondent's father bought the land were all not challenged in cross-examination. And an omission to challenge the evidence in-chief of a material proposition by cross-examination leads to the inference that the evidence given is accepted (See **URA v. Steven Mabosi**, supra). In addition, compared to

the respondent's witnesses, the appellant's witnesses could not trace the appellant's father's title to the land. The fact that PW3 contradicted the testimonies of PW2 and PW4 about the person he bought from was a minor contradiction given the fact that many years had gone by since the respondent's father bought the land. The trial magistrate therefore correctly ignored it (See **Kifamunte Henry v. U**, supra).

In addition to the above, according to PW4 when Semu Waibi bought the land, his son, the respondent was still very young. According to PW2, his mother, the land was bought in 1930 and the respondent was born in 1936. That means the respondent was about 62 years old in 1998 when he testified, which is not such a significant difference from his testimony that he was 60 years old. Given those facts, it was about 68 years between the time the land was bought and the time that the suit was heard in the lower court. Now, PW3 was a *muluka* chief. He testified that the appellant's land was in a different village from the respondent's land. I am of the strong opinion that the testimony of a former *muluka* chief over land held under customary tenure in his area, and which was acquired 68 years before, would have greater credibility than that of a member of a Local Council Executive like DW5 was. I was therefore more inclined to believe PW4 than all the appellant's witnesses.

The testimony of PW4 who stated that the appellant's land was on a different *kisoko* from the respondent's land also carried more weight than that of the DW5 and the rest of the appellant's witnesses. According to the Encyclopaedia of World Cultures (2002 Supplement), in those days, a *kisoko* was the third level in the administrative structure in Busoga. One of its functions was the administration of land. The *kisoko* chief (headman) was approached by persons seeking land for daily use. He would take them through the steps required before land could be allotted to them. After they paid the required dues and fulfilled the customary obligations, they could claim tenure over a piece of land. It is inconceivable that the appellant's father acquired his one piece of land in two *bisokos*, i.e. Clement's *kisoko* and Lukeeta's *kisoko*. If he did, then the appellant's witnesses failed to clarify how this came about.

According to his WSD no defence was disclosed. But when he testified, the appellant led evidence that there were previous suits betweem him and the respondent's family. As to whether the appellant proved that he won previous suits against the respondent's father and

Kiyuba, in his testimony in chief, the appellant testified that during his father's lifetime, the respondent's father sued him. Because the appellant's father was ill, he took up the suit and defended it and the dispute went up to the sub-county chief who decided the dispute in his favour. However, the appellant clarified that the dispute at the time was over a portion of the land and that after it, in 1977, the *muluka* chief went and planted *birowa* that were later removed.

The appellant further testified that in 1992, there was another dispute between him and one Kiyuba Paul, the respondent's brother (cousin). This dispute was before the LCI Court. According to the appellant, the dispute went on to the LCII Court and then to the LCIII Court. He further testified that he was successful on all occasions but he did not see any of the judgments of the three courts. It was also his testimony that the LCIII Court wrote to them handing over the land to him and *birowa* were re-planted in the same boundary that they had been planted in 1977 but he did not produce a copy of the letter. The appellant further testified that he subsequently got summons to go to the Magistrates Court at Jinja but he did not go on to testify about what happened there.

When he was cross-examined, the appellant stated that at some point, there was an LCII Chairman who was biased against him and he ruled in favour of Kiyuba, but it seems another Chairman or member of the LC found in his favour. He stated that he had documents to show that the dispute was about the whole piece of land which was about 2 acres and not just the road, but he did not produce them. The respondent then challenged him about the nature of the dispute and produced some documents on which he cross-examined him. Although these documents were not admitted in evidence, the trial magistrate looked at them and noted that the documents showed that the dispute between the appellant and Kiyuba was about a road/path. The appellant concluded by stating in cross-examination that he did not have the judgments from the LCI, LCII and LCIII Courts.

The next material witness with regard to the previous disputes was Lukeeta Yosamu (DW5). He testified that he was the LCI Chairman since 1986. He testified that there had been a dispute between the appellant's and the respondent's fathers in 1977. That as a result, a *muluka* and a *kisoko* chief went and tried to plant boundary marks for them. That subsequently, there was a dispute between Kiyuba Paul and the appellant in 1992, again

about the boundary, and that dispute was taken to the LCI Court, with the appellant's side claiming that their land went past the road to Bunya, while the respondent's side claimed the road was the boundary. The appellant then complained that Kiyuba was cultivating his land. DW5 also testified that the dispute went to the LCI through to LCIII Court because Kiyuba kept on appealing when the appellant won the case. He further testified that when the appellant succeeded in the suit at the LCIII level, although the matter went up on appeal to the Chief Magistrates Court, in 1994, he as LCI Chairman together with the LCIII Chairman went and planted *birowa* in the disputed boundary.

When he was cross-examined, DW5 stated that the LCI Court did not write a judgment. Also that he came to know that the land around which they went to plant *birowa* belonged to the appellant's father when he went to participate in planting the *birowa*. Further, that there was a report which came from the LCII Chairman after he decided the case. He clarified that there was no written judgment pursuant to which the *birowa* were planted by the LCIII Chairman. Later on in cross-examination, DW5 changed his position and stated that the LCIII Court wrote a judgment but it was still at the LCIII Court. He further asserted that the respondent and his family had uprooted *birowa* and that is the reason why the LCIII Chairman went to replace them.

On the other hand, the respondent's evidence with regard to the disputes was that the earlier dispute was the one that involved the appellant and his cousin, Paul Kiyuba. When he was cross-examined, the respondent stated that the boundary marks were planted forcefully by the LCIII in favour of the appellant. Further, that the LCI was a brother of the appellant while the LCIII Chairman was his brother in law. He also clarified that the suit in Jinja court between the appellant and Kiyuba was about the path and it was dismissed with costs without being heard. Further that unlike the previous suit between Kiyuba and the appellant, the current suit was about both the path and the land. Tezira Tezikya's testimony corroborated that of the respondent in that she also testified that the boundary marks were planted forcefully. She said that she saw about 50-60 people planting the boundary marks and she made an alarm. Her testimony was not challenged in cross-examination.

In view of the evidence above, I am of the view that if there was a suit between Kiyuba and the appellant, then that suit was never completed. There was no judgment by the LCI Court

of which DW5 was a member. That being the case, it is difficult to comprehend how an appeal was ever filed in the LCII Court. S. 17 (1) (a) (viii) of the Executive Committees (Judicial Powers) Act, which was the law at the time the suit was alleged to have been heard, required that the record of any of the LC Courts had to have a judgment or final orders of the court and the date of the judgment or final orders. It is the judgment that is appealed against and one cannot appeal unless there is a written judgment of the LC Court from whose orders the appeal is preferred. DW5 stated that there was a report from the LCII court about the appeal to it. However, that too would not be a judgment within the meaning of the Executive Committees (Judicial Powers) Act. It then becomes most improbable that there was an appeal to the LCIII Court.

In the alternative, if there was a valid appeal at LCII and LCIII level, from which Kiyuba appealed to the Chief Magistrates Court, then the LCIII Court's execution of its orders was unlawful. I say so because s. 27 (2) of the Executive Committees (Judicial Powers) Act provided that an appeal would operate as a stay of execution until the final disposal of the appeal. Only the appellate court had the power to order execution where an appeal was pending before it.

In addition to the above, the respondent's testimony on cross-examination that the LCI Chairman was the appellant's brother and also that the LCIII Chairman was his brother-in-law was never challenged or rebutted. That being the case, I was inclined to believe the respondent's and PW2's testimony that the *birowa* that the LCIII Court planted were planted forcefully in favour of the appellant because due to the fact that the two courts had his relatives as members; both were biased in his favour. This finding is strengthened by the appellant's own testimony that when they went to the LCII Court, there was a Chairman who ruled in favour of Kiyuba, but another LC Chairman (I think the LCIII) ruled in his favour. In addition, DW5 came up with a testimony contrary to the appellant's pleadings, that the respondent uprooted *birowa* that had been planted around the disputed land. This testimony could not be admitted because it offended the rules of pleadings. I was therefore not satisfied that the appellant had been successful in several suits against the respondent's cousin, Kiyuba.

As to whether the respondent had a higher burden than the appellant to prove his title to the land, the general principles flow from the Evidence Act. According to s.101 (1) of the Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts do exist. And when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person [s. 101 (2) Evidence Act]. According to s. 102 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. S. 103 of the Act goes on to provide that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

That being the law on the burden of proof, the respondent had to prove the facts alleged in his plaint. He therefore had a higher burden than the appellant who alleged no facts at all in his WSD.

Regarding the appellant's WSD, Order 6 rule 8 provides:

> "It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages."

Given that the appellant merely denied the respondent's allegations of fact in the plaint and did not plead any facts to rebut them, he had no right to call any evidence to do so. If the rules relating to pleadings had been followed to the letter, his WSD ought to have been struck out because Order 6 rule 30 provides that the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer.

I therefore find that not only did the appellant fail to provide a reasonable answer to the respondent's pleadings but he also failed to produce evidence to rebut the respondent's assertion that his father (Semu Waibi) bought the land in dispute from Budhala. As the

administrator of his father's estate, the respondent was the lawful owner of the land and the trial magistrate correctly found so. Grounds 1 and 4 of the appeal therefore fail.

Ground 2

Ground 2 was a complaint that the trial magistrate failed to take it into consideration that the appellant's family had been in occupation of the land in dispute for a longer time than the respondent's family. It is true that the trial magistrate made no finding on this point, and rightly so. The appellant did not plead this as a fact and therefore there was no issue framed in that regard. Though he later adduced evidence to try and prove that his family had been in occupation of the land for a very long time, such evidence was not properly taken and was properly ignored by the court.

As to whether the respondent proved that his family occupied and used the land in dispute, the testimonies of PW2 and the respondent were not seriously challenged. It was therefore proved that the respondent's family had used the land since it was bought in 1930. Though the respondent did not reside in the area, and he admitted so, his claim was not based on his own residence on the land but on the fact that his family used the land and also that he had the letters of administration to the estate of his father. The fact that the respondent had letters of administration to his father's estate was not challenged. He thus had the right to bring the suit by virtue of his office as administrator.

As to whether the appellant's family had been in quiet possession of the land for longer than the respondent's family, the current dispute over the land seems to have begun in 1992 when the appellant brought a tractor and blocked the path leading to the respondent's family home. The trial magistrate took this into consideration and came to the finding that the respondent's family had been in occupation of the land before the appellant's family. She based her decision on the apparent age of the *birowa* surrounding the disputed land and ruled as follows:

> *"What I saw at the locus in quo goes to give weight to the plaintiff's case. The birowas at the eastern boundary were the defendant maintains his land ends are very young trees. If indeed that was the boundary separating his father's land from the plaintiff's father's land, how come there are no old birowa*

trees? There are only new ones recently but erroneously planted by LCs. Yet on the sides the defendant showed the court (there were) very old trees which give credence to his story that they were planted long ago. …

On defences, I find none that can be availed to the defendant. He has not been in quiet possession for over a number of years. The plaintiff has always challenged his claim to date."

The sketch map drawn at the *locus in quo* bore out the fact that there were young *birowa* trees representing the boundary in dispute. Though it was contended for the appellant that he proved that his family had been in occupation of the land in dispute after the dispute in 1977, I find that this was not proved. The appellant produced evidence contrary to his pleadings and such evidence was not supposed to have been admitted by the court.

In addition, the appellant admitted that the current dispute began in 1992. Also that he gave away the land to his sons who then built houses on it in the same year. I was of the view that this was not a coincidence but that it advanced the respondent's case that the appellant entered onto the land in dispute in 1992. I therefore find that the trial magistrate properly considered the length of each party's occupation of the land and ground 2 of the appeal also fails.

Ground 3

Ground three was that the trial magistrate improperly entertained a suit that was *res judicata*. It was contended for the respondent that this was an issue that was only raised on appeal but I do not agree with that contention. Though the appellant did not specifically state that the suit was *res judicata*, in his WSD he had pleaded that he would raise a preliminary point of law that the suit was bad in law and should be dismissed. His lawyer abandoned this pleading and instead called evidence to prove that the dispute had previously been litigated upon. I therefore agree that this was a ground that was properly raised on appeal.

S. 7 of the CPA provides that:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been ***heard and finally decided by that court."***

As to whether the suit was *res judicata*, the testimony of Yosamu Lukeeta (DW5) was that in 1992 there was a suit before the LCI Court, of which he was a member, but they did not write a judgment. This implies that the dispute was not conclusively resolved by that court. According to DW5 the respondent appealed to the LCII and finally to the LCIII Court after which he participated in planting *birowa* because the appellant won the suit in the LCIII Court. However, his testimony about whether there was a judgment was contradictory. In his testimony in chief he stated that there was no judgment pursuant to which they planted the *birowa*. In cross-examination he stated that there was a judgment of the LCIII Court but it was still at the LCIII. The judgment was never produced in court. On his part, the respondent contended that the *birowa* were planted forcefully before an appeal pending in the Magistrates Court was disposed of. PW2 corroborated this.

Since there was no judgment of the LCIII court or any court at all produced by the appellant, I find it difficult to believe that there was any judgment in respect of the disputes before the LC Courts. I am thus more inclined to rule that the appellant failed to prove that the dispute between Kiyuba Paul and he was heard and finally decided by any court of law. Ground 3 of the appeal therefore also fails.

In conclusion, this appeal fails and the judgment and orders of the trial magistrate are hereby upheld. The appellant shall pay the costs of this appeal and those in the court below.

Irene Mulyagonja Kakooza

JUDGE

14/06/2010