

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
AT MBARARA HCT-05-CV-CA-48-2003**

**BYABAGAMBI ===== APPELLANT**

**VS**

**E. KENZIREKWIJA ===== RESPONDENT**

**BEFORE: HON. JUSTICE LAWRENCE GIDUDU JUDGMENT:**

This is a second appeal from the decision of the Chief Magistrate, Mbarara who in exercise of her appellate jurisdiction overturned the judgment of the LC III court of Kichwamba-Bunyaruguru.

This case has a long history having started in the LC court system in 1995 through the Chief Magistrate's Court Mbarara where a judgment was passed in 2003 and an appeal filed in this court the same year (2003) but the appeal was listed in 2010 before me and I regret to be giving the judgment several months later.

The appellant - Byabagambi, is a nephew to one Kanyankore, who is the father of one Kabahakane who sold the disputed land to the respondent.

It has always been the appellant's case in the courts below that the late Kanyankore inherited his (appellant's) father's land in 1968 when the appellant was 36 years and that Kanyankore died in 1993 before he had given the appellant the share of his father's land. After the death of Kanyankore, the elders decided to divide Kanyankore's land to four people who included the appellant and Kabahakane.

Kabahakane is then said to have sold off his share including the portion given to the appellant to the respondent hence these proceedings.

The Chief Magistrate reviewed the case on appeal and held that Kabahakane was the surviving son of Kanyankore and was entitled to inherit the whole land. That the appellant who was 36 years in 1968 could not have waited till Kanyankore died in 1993 before staking his claim. It was the reasoning of

the Chief Magistrate that the appellant was old enough to sue the Kanyankore between 1968 - 1993 to recover his land. She further held that Kabahakane was right to sell the land because he had just been forced to sign a document that shared out the land to three other people including the appellant. The appellant disputed the Chief Magistrate's decision and filed 5 grounds of appeal but dropped two and argued three of them.

The three grounds of appeal may be summarized as follows:-

- (i) That the suit was resjudicata and failure by the Chief Magistrate to hold so occasioned a miscarriage of justice.
- (ii) That the Chief Magistrate erred in Law when she held that the sale to the respondent by Kabahakane was valid.
- (iii) That the Chief Magistrate erred in Law when she failed to appreciate that Kabahakane had no right to sell to the respondent.

My duty as a second appellate court is quite different from the duty owed by the first appellate court. Though the case has been through the appellate courts of LC II, LC III and the Chief Magistrate's Court, I would treat the Chief Magistrate's Court as the strict first appellate court because all the LC Courts heard the matter de-novo by recording evidence afresh.

The duty of the Chief Magistrate as first appellate court was to subject the evidence to fresh exhaustive scrutiny by weighing conflicting evidence and drawing her own conclusions bearing in mind that she did not hear nor see the witnesses testify. Regard must be heard to the judgment of the LC court by weighing and considering it against the evidence, See **D.R. Pandya Vs R.(1957) E.A. 336.**

As a second appellate court, my duty is to decide whether the 1<sup>st</sup> appellate court on approaching its task applied or failed to apply such principles as appear in the case of **Pandya** (Supra).

Indeed, the Supreme Court in **Kifamunte Henry Vs Uganda Criminal**

**Appeal 10/97**(unreported) noted that a second appellate court would only be required to re-evaluate the evidence like the first appellate court in the clearest of cases.

The first ground of appeal is that the respondent's suit was res-judicata. Learned counsel for the appellant in his written submissions asked me to find that the suit was res-judicata on the basis that Kabahakane who gave evidence before the LC III court admitted that he once sued the appellant before the Kyarutakobe LC I court and lost the case. It was counsel's submission that once he lost the case to the appellant he had no title to pass to the respondent in a subsequent sale.

Learned counsel for the respondent disagreed on the basis that the Kyarutoba LC I judgment was not availed for the court to decide whether the case was res- judicata or not.

A case is said to be resjudicata when the matter in issue was directly and substantially the issue in a former suit - the subsequent suit should be between the same parties under whom they or any of them claim. The court which tried the first suit must have been competent to do so and the issue must have been heard and finally determined. A plea of resjudicata goes to jurisdiction of the court and is so fundamental to the effect that there must be an end to litigation. How then does a court ascertain what the issue was in the first suit and whether it was finally determined or decided?

Learned counsel for the appellant submitted that Kabahakane told the LC **III** court that he lost the case to the appellant. Is this enough to determine what issue was before the LC I Court? Was it about ownership of the disputed land or was it whether the appellant had his share confiscated by

Kabahakane's father - the late Kanyankore? Was it a case of inheritance or trusteeship?

The relevant extract is as follows before the LC **III** court.

**From Court:** You said you were forced to sign on the document, did you accuse them to LC immediately?

**Kabahakane:** Yes in Kyarutakobe **From Court:**

Who lost?

**Kabahakane:** I lost the case. “

How can this or indeed any other court determine what issue was before the Kyarutakobe court? Was it about the signature or the documents being obtained by duress or was it about whether the appellant's land was held by the late Kanayankore or was it whether the appellant could share in the late Kanyankore's land?.

Counsel for the respondent submitted that the court needs to look at the Kyarutakobe LC I judgment before ascertaining the issues. I agree. The availability of a judgment and record of proceedings of the LC I court would have put this matter to rest at the earliest opportunity. Indeed in **Semakula Vs Magala & Ors (1979) HCB 90** at page **91**, the Court of Appeal in holding number four held that in order to ascertain what issue was between the parties in the earlier suit, the judgment and verdict if any and the proceedings forming part of the record may be looked at to determine if the judgment had exhaustively dealt with the issues raised.

There is no judgment or record of proceedings from which this court may ascertain if the issues in the first case were about inheritance, trusteeship or ownership. It may well be explained that the LC I of that time and indeed many of them even today do not keep records. It may be for this reason that in the LC system, appellate courts start cases de-novo. But this does not provide the excuse rather it makes it difficult for any party who wants to raise a plea of resjudicata to do so without supporting evidence. I can not guess what the proceedings were in order to rule on this ground. I would say that it is not substantial and it fails since issues that were determined in the

first case cannot be ascertained.

The second ground of appeal is that the learned Chief Magistrate erred when she held the sale to the respondent to be valid.

It was submitted for the appellant that since Kabahakane had lost the suit to the appellant, the subsequent sale to the respondent could not be valid.

Learned counsel for the respondent supported the Chief Magistrate's decision that Kabahakane was the sole survivor of his father the late Kanyankore and therefore, he was entitled to inherit the suit land.

I understand the appellant's complaint in ground 2 to be based on the success of the first ground. Certainly if the suit had been resjudicata, then ipso facto, the sale to the respondent would be invalid. However, I have found that there is no evidence upon which a plea of resjudicata can be sustained.

In deciding this issue, the Chief Magistrate held that the fact of sale is not in dispute because an agreement to the effect is available and that it could not be vitiated by minor contradictions in oral evidence. She further observed on page 4 of her judgment that Kabahakane was the rightful heir to late Kanyankore's

estate and could not be challenged when he inherited the late Kanyankore's land.

Finally, she faulted the appellant for waiting too long from 1968 till 1993 before claiming the land from Kanyankore's estate. It was her reasoning that the appellant should have sued the late Kanyankore instead of merely grumbling about the land. The death of Kanyankore obscured his claim.

I understand the Chief Magistrate to mean that the appellant sat too long on his rights and could not be helped to enforce them when Kanyankore is dead. Having found that the case is not barred by resjudicata, the validity of the sale cannot be challenged on that basis. What is strange is for the appellant who claims to have been 36 years in 1968 to wait for 25 years to stake his claim on land after Kanyankore has died.

The law of limitation which has been held in a number of cases to apply to customary land would bar the appellant from claiming any land. As a 36 year old adult, he should have inherited his father's land straight away and did not need a guardian in Kanyankore to keep his land. If he claimed his land as he says in the lower courts, then he should have filed a suit in time instead of waiting for 25 years.

The appellant sat on his rights and the doctrine of laches applies to him with full force. Mere grumbling without taking legal steps to recover land does not help a party even in equity.

On second appeal, the findings of fact of the lower court cannot be questioned provided there is evidence to support those findings. This court could only interfere where it considers that there was no evidence to support the findings of fact. See **Kifamunte's case (supra) on page 7.**

In the premises, ground 2 fails.

The 3<sup>rd</sup> ground is that Kabahakane had no right to sell the land. With respect, it would be a waste of time to repeat what I have discussed in grounds one and two. The sale was valid since there is no proof of resjudicata. In absence of a judgment to the contrary, Kabahakane had a right to sell the land. He may have lost the case in the LC I but this court cannot ascertain the issues on the grounds of which that loss was occasioned. Beside, between Kabahakane and the appellant, Kabahakane has superior title of inheritance than the appellant who is barred by the law of limitation to claim land after 25 years without a disability. In the final, I dismiss the appeal with the attendant costs here and below.

**JUDGE**

19/5/11

**Court:** Since I am no longer at Mbarara, I direct the Assistant Registrar,

Mbarara to summon the parties and urgently and read this judgment



Lawrence Gidudu

**JUDGE**

19/5/11