

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA**

**CIVIL APPEAL NO. 0041 OF 2008**

|                        |   |           |
|------------------------|---|-----------|
| 1. JENINAH NANYONGA    | } | APPELLANT |
| 2. EGRANSI KYOTUNGIRE  |   |           |
| 3. VANGIRINA KAMARINDA |   |           |

VRS

AMOS KYANGUNGU \_\_\_\_\_ RESPONDENT

**BEFORE HON. JUSTICE LAWRENCE GIDUDU**

**JUDGMENT**

The three Appellants being aggrieved by the Judgment and decree of the trial Magistrate Grade I Mbarara dated 14/07/2008 Appeal to this Court against the whole decision.

The appellants sued the respondent in the lower Court for trespass, general and special damages but lost the case when the lower Court decreed the land to the respondent.

The appellants' case in the lower Court was that the late Zedekia Rubahabura who died in 1993 had acquired the disputed land by first occupation in 1965 when he arrived from Mubende. He settled in present Kasenyi village, Kayanga, Kazo, Kiruhura District.

The respondent later followed them and settled in the same area as a neighbor with his own land. A boundary of "Oruyenje" trees separated their land.

Before Rubahabura died in 1993, he had called Local authorities to re-establish the boundary between him and the respondent and when they did so in 1991, he made his WILL bequeathing the suit land to beneficiaries.

In May, 1999, the respondent entered upon the appellants' portion by destroying the fence which had been re-enforced by barbed wires. The plaintiffs filed a case against him from which this appeal originates.

The Respondent denied the appellants' allegations and on the contrary claimed to be the one who received the late Rubahabura in the area in 1968. The Respondent had settled in the place in 1960 and had bought land from some people while he had acquired other portions by first occupation.

He allowed Rubahabura to stay on his land since he was his uncle who was old and weak. It was the respondent's case that Rubahabura later bought his own land on Kijuma and used to go there to develop it.

In 1979, the respondent surveyed his land then measured 210 acres and when Rubahabura died in 1993, the respondent buried him on his land at Kashenyi because it was not convenient to take the body to the deceased's distant land at Kijuma.

The respondent further contended that when Rubahabura died, the appellants sold the land at Kijuma and they now want to fraudulently lay a claim to the respondent's land at Kashenyi.

The parties are relatives. The 1<sup>st</sup> appellant is daughter to the 3<sup>rd</sup> appellant who together with 2<sup>nd</sup> appellant are widows of the late Rubahabura.

The respondent is the son of Late Rubahabura's brother.

Five grounds of appeal were filed and are summarized as below;

- 1. The Learned trial Magistrate relied on extraneous matters and reached wrong conclusions.*
- 2. The Learned trial Magistrate erred in law when she held that the late Rubahabura was a licensee.*
- 3. The Learned trial Magistrate erred in Law when she held that there was no proof of damages.*
- 4. The Learned trial Magistrate erred in Law when she misapplied the law on contradictions.*
- 5. The Learned trial Magistrate erred in law when she failed to evaluate the evidence properly.*

Before I delve into the grounds of appeal, there is one procedural matter I wish to dispose of.

At the hearing of the appeal, Mr. Mwene Kahima Learned Counsel for the respondent raised a preliminary objection that the Memorandum of Appeal offends order 43 rule 1 (2) CPR and should be struck out.

It was Counsel's submission that the grounds of appeal were not concise. He faulted ground one for failing to state the law and extraneous matters; ground two did not reveal the facts complained of; Ground three does not reveal the evidence that was omitted; Ground four does not state the inconsistencies while Ground five was vague.

In reply Mr. Ngaruye, Learned Counsel for the appellants agreed that to do what Counsel for the respondent is faulting would in fact amount to offending the Rule in Order 43. He submitted that the grounds as framed conform to the Rule in Order 43 governing appeals.

Sub Rule 2 of Rule 1 of Order 43 provides this:-

***“The Memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative and the grounds shall be numbered consecutively”.***

The sub-rule speaks for itself and is clear enough. The grounds of Appeal must only state the objection to the decree without any argument or narrative.

The Case of **NIC Vrs. Pelican Air Services C.A No. 15/2003 (Court of Appeal)** cited by Counsel for the respondent explains what should constitute a ground of Appeal, however, with respect, it is not relevant to the respondents' objection because in the case of **NIC (Supra)** the ground of appeal was a quotation from the Judgment of the Lower Court which is not the case in the appeal before me.

In the case of **NIC (Supra)**, what was quoted was a narrative. Counsel for the respondent has not indicated in his objection that the grounds of this appeal are also narrative. His objections are that ground one did not cite a law that was offended; that ground two did not cite the facts omitted; that ground three does not reveal the evidence omitted; that ground four does not reveal the inconsistencies and that ground five is not a ground of Appeal.

It is clear to me that the objection was raised in jest because if what the objection wanted was included by the appellant, then the grounds of appeal would have offended sub-rule 2 of Rule I of order 43.

A ground of appeal is a ground of objection without argument and without details which may be constructed as the narrative.

The argument and narrative is given to Court either orally or in writing when the appellant is called upon to substantiate those grounds of objection. In my view, the grounds of appeal before me are compliant with order 43 rule (1)(2), CPR as they are framed and the details being mentioned by Counsel for the respondent are only relevant when responding to arguments of the appellant during the hearing of appeal.

The objection lacks merit and is dismissed.

Turning to the appeal proper, I shall dispose of the grounds as they were presented and argued.

## **Ground one**

It was the appellant's objection that the trial Magistrate relied on extraneous matters in deciding the case before her and thereby occasioned a miscarriage of Justice.

The respondent defended the Judgment on grounds that there was no law that was pointed out as breached.

When an appellant complains to Court that the decision of the lower Court is based on extraneous matters, the meaning of this complaint is that the decision was not based on evidence adduced before the Court but on other information that is not on the Court record.

I am therefore, surprised that the respondent criticized this ground by arguing that no law was cited to have been breached.

It is my view that the respondent did not answer appropriately to this complaint by the appellants.

What the appellants are saying in ground one is that they presented evidence before the trial Court as did the respondents. But when the Court decided the dispute, it did not rely on the evidence adduced in Court but went outside the evidence and imported other matters that it used to decide the case.

The appellants illustrated this argument with the following examples.

i.e. that the trial Magistrate referred to PW1 as aged 40 years when she had recorded her as 90 years and above. That the Judgment quotes PW1 as saying the 1<sup>st</sup> plaintiff was born on the disputed land yet in the proceedings PW1 did not state so; that the trial Magistrate stated in her Judgment that PW1 did not know when she left Mubende yet the record of PW1's testimony does not contain such a statement and on the contrary she says she came onto the land in 1960s, that the trial Magistrate wrote in her Judgment that PW1 went to the disputed land in 1964 with the 1<sup>st</sup> plaintiff yet PW1 in her testimony did not state to have gone there in 1964 with the 1<sup>st</sup> plaintiff.

It was the appellants' case that false statements which were wrongly attributed to PW1 (now 3<sup>rd</sup> appellant) biased the Magistrate to decide the case against the appellants yet PW1 had not adduced such evidence in Court.

The respondents' Counsel submitted that no Law was cited to have been breached as if to indicate that the trial Magistrate has discretion to decide the case basing on any information whether on the record or not. This, with respect, is erroneous.

A case before the Court must be decided only on the evidence adduced before that Court.

Black's Law Dictionary defines a Judgment as

*“The official and authentic decision of a court of Justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination..... The Law's last work in a judicial controversy is being the final determination of the rights parties upon matters submitted to it in an action or proceedings”.*

*(Emphasis mine).*

Halsbury's Laws of England 3<sup>rd</sup> Edition defines a **Judgment** as “Any decision given by a Court on a question or questions or issue between the parties to a **proceeding properly before Court.**” (Emphasis mine).

Under Order 21 rule 4 CPR, it is provided that Judgments in defended suits shall contain a concise **statement of the case**, the points for determination, the decision on the case and the reasons for the decision (Emphasis added).

The above definitions read together with the provisions of Order 21 Rule 4 emphasize the point that a decision of the Court must be based on the evidence or case or issues that arose in the proceedings before the Court and not on matters that were not before the Court. This is also a common sense position that the Court decides upon what is before it and not what is outside it.

Are the allegations of importing statements into PW1 and PW2's evidence correct?

I have perused the seven page typed and signed Judgment of the trial Magistrate. It is clear that she did not have a proper grasp of the facts of the case before her. The record reveals that two earlier Magistrates Grade I had recorded part of the evidence and the one who wrote the Judgment was the 3<sup>rd</sup> Magistrate.

It appears to me that she mixed up the evidence of PW2 who was 40years with that of PW1 who was 90 years and above. She attributes the evidence of PW2 to PW1 on page 2 of the Judgment. The entire first paragraph on page 2 of the Judgment is a mess. The trial Magistrate mixed up the evidence of PW1 with that of PW2 and created contradictions which she held against the appellants. All the observations of Counsel for the appellant in regard to matters in the Judgment which were not in evidence are correct.

Failure by the trial Magistrate to study the evidence recorded by her predecessors led her to believe there were contradictions which she relied on to disbelieve the appellants' case.

It would be correct to say that the contradictions were in the mind of the Court and not in the evidence on the record with the result that the appellants' were adjudged not on the evidence they adduced but on the evidence imported into the proceedings by the Court. These are properly called extraneous matters. The respondent did not respond to them in reply.

PW1 is noted to have been a liar on page 6 of the Judgment on the basis that she told Court she went to the disputed land in 1964 with the 1<sup>st</sup> plaintiff yet the 1<sup>st</sup> plaintiff testified that she was born in 1965. The testimony of PW1, PW2 and PW3 which appears on pages 7-10 of the proceedings does not justify the conclusion reached by the trial Magistrate to declare PW1 a liar.

Besides, between the mother and child, who is more truthful about the place of birth? Is it the child (PW3) or the mother (PW1)? The trial Court believed that the child knows her place of birth better than its mother and found that the mother must be the liar regarding the place where her child was born.

How strange is this finding of fact by Court? It is trite that a decision which is not based on the evidence adduced before the Court cannot be allowed to stand.

The Court cannot be allowed to substitute itself as a witness. Ground one must succeed.

### **Ground two**

The complaint in this ground is that the learned trial Magistrate erred when she held that the late Rubahabura was a licensee. Substantiating on this argument, learned Counsel for the plaintiffs cited the **Oxford Dictionary of Law, 6<sup>th</sup> Edition; Megarey's Manual of the Law on Real Property, 6<sup>th</sup> Edition and Cheshire and Burn's Modern Law of Real Property, 15<sup>th</sup> Edition** and advanced the proposition that for that relationship to be created, the licensee must have the permission of the owner and the terms of occupation must be in writing or in form of a document.

With respect, documentation of the terms of the license is not provided for in the definition of a licensee in the texts given by the Learned Counsel. It may as well be written where it is deemed necessary but it is not always the case nor is it a requirement of the Law. The relationship can be proved by oral evidence and in this regard Counsel for the respondent's submissions about the "bare license" is correct.

However, was the trial Magistrate right to conclude as she did that the late Rubahabura was a mere licensee and that the respondent who had allowed her to stay and live on his land was the actual owner?

The relevant part of the holding is at page 5 of her Judgment where the Learned Magistrate wrote;

***"My finding is that the late Rubahabura was a licensee on the defendants' land and this evidence was supported by the defense witnesses as well as some of the witnesses of the plaintiff as nobody knew how Rubahabura had got that land, they had no proof of ownership. They did not even produce a will to support their claim of ownership."***

The basis for these findings can be traced from page 4 up to page 5 of the Judgment.



From page 4, the trial Magistrate believed that the respondent settled in the area in 1960 and acquired the land by purchase whose agreements he tendered in Court plus other land allocated by the Chiefs whose receipts he tendered.

That the action of allowing Rubahabura to live on this land was out of sentimental feelings for his Uncle.

Further, that when DW4 (YosiaBuhwa) surveyed the land, Rubahabura did not protest.

Further, that PW3 must have lied to say the house the Court saw at locus was built in 1995 yet Rubahabura died in 1993.

During the hearing, Kamalinda who was PW1 testified that she has lived on the land since 1960s having arrived from Mubende with her late husband the late Rubahabura. Her evidence is that the respondent found them already in occupation of the land and also acquired land as their neighbor and nephew. She is recorded as being 90 years and above when she testified on 5<sup>th</sup> February, 2004. She could not remember the exact dates or year when she and her husband first occupied the land and the year she produced her daughter PW3.

When the trial Magistrate concludes that nobody knew how Rubahabura got the land, what does this mean in view of PW1's evidence? Is the trial Court implying that if one cannot tell the exact date when she came to the land or produced her daughter, then such a person does not know how she and her husband acquired the land? At 90 years and above what is the memory of this witness regarding dates of events that took place 40 years ago?

With respect, the trial Magistrate did not appreciate that due to passage of time and her advanced age, PW1 was still a credible witness.

On the other hand, because the respondent tendered sale agreements made in vernacular without the English translation, he was found to be the owner of the land.

I have considerable difficulty placing any value to the exhibits of the agreements by the respondent.

First, these documents were not admissible without their English translation.

Surprisingly, Counsel for the plaintiffs did not object but asked Court to translate them and what is more surprising the Court admitted vernacular documents in direct contravention of section 88 of the Civil Procedure Act which provides that the language of all Courts shall be English and evidence in all Courts shall be in English.

These exhibits are therefore, inadmissible in their form and should have been rejected by Court. Secondly, exhibits 1 and 2 are suspect because the respondent who testified that in 1960 he went to Kazo as the Senior Veterinary Field Officer appended a signature on the agreement of 9/3/1961 (exhibit 1) which is materially different from the one on the agreement of 24/10/1962 (exhibit 2).

In fact in exhibit 2, he signs like an illiterate person. Where is his seniority as a Veterinary Field Officer?

Further, the authors of the said agreements, though inadmissible, did not testify creating the impression which is very strong that exhibits 1 and 2 were manufactured after the death of Rubahabura, to defeat the interests of the beneficiaries of his estate. No reason was given why those who witnessed those said agreements could not testify.

I would, therefore, hold that the finding of the learned trial Magistrate that the respondents' agreements had evidential value to tilt the balance in favour of the respondent as being unjustified and erroneous since the said documents were useless in the eyes of the law governing proceedings before the Courts in Uganda. The no objection to their tendering by opposite Counsel did not clear them of that illegality.

The finding of fact by the trial Court on page 5 is not supported by evidence on the record. It is, with respect, based on a misapprehension of the law governing evidence in Courts of Law and as an appellate Court, subjecting the evidence to fresh scrutiny, my own conclusion is that those documents were not admissible and since they were the basis for deciding that the land belonged to the respondent and Rubahabura was a mere licensee, then I set that holding aside thus leaving the respondent's claim to own the land without foundation.

Perhaps one other fundamental matter that affect the credibility of the respondents claims of ownership is his age.

On 4/11/2005, the respondent who testified as DW1 gave his age as 59 years.

This means that in 1960 when he claimed to have been posted to Kazo as a Senior Veterinary Field Officer, he was aged 14 years and bought land in 1961 as a 15 year old and other piece of land in 1962 as a 16 year old. At that age he could not validly contract and his claim that he was a Senior Veterinary Field Officer in the service of Government can only be a lie. How could such a juvenile receive his aged Uncle and look after him the way he did in the 1960s when he was himself supposed to be looked after by his parents.

On the contrary PW1's testimony that it is her late husband who received the respondent as his nephew is more logical and believable as against the respondent.

If the trial Magistrate had approached this case from the legal point of view, she would have found that the documents tendered by the respondents are not only illegal for offending section 88 of the CPA but that they are also suspect considering the variance in the respondent's signatures.

Further, at his tender age, the respondent had no legal capacity to enter into any valid contract. The age of majority being 18 years.

At locus, the trial Magistrate confirmed that the late Rubahabura was buried on the disputed land. The respondent reasoned that the burial was for convenience because Kijuma was very far the place where Rubahabura had his other land.

I would not believe that a person would bury somebody on his land when that person has his own land. The long stay on the land by the appellants tends to confirm that Rubahabura owned that land and was buried on it. DW4 who was the surveyor gave evidence which I would disregard as hearsay when he said that Rubahabura did not object to the survey. The trial Magistrate should have rejected this evidence as hearsay. In any case the alleged survey did not add value since there is no evidence that the respondent went ahead to get a land title because if the land Committee had visited the place, they would have found the old man Rubahabura on the ground and would not offer any form of lease to the respondent.

The trial Magistrate was, therefore, not justified to refer to Rubahabura as a mere licensee and the finding that the disputed land belonged to the respondent is not supported by credible evidence but by suspicious and illegal documents.

Ground two of the appeal succeeds.

### **Ground three**

The appellants criticized the learned trial Magistrate for failing to find that boundary marks like fencing poles had been damaged.

The respondent supported the Judgment on the basis that the trial Magistrate visited the locus and did not see any uprooted poles.

In her Judgment at pages 5-6, the learned trial Magistrate observed thus on this issue.

***“On the trespass, I find that one cannot trespass on his own land because the defendant had receipts of purchase of land from the people he bought from and a receipt from the Gombolola and besides, under Section 58 of the Evidence Act, all evidence must be direct with somebody (sic) who saw a thing being done testifying against it. But in the instant case I find that no evidence was brought to prove that actually the defendant uprooted the poles of the plaintiffs.”***

I should point out that S. 58 of the Evidence Act is misquoted by the Magistrate.

Earlier on page 2 of the Judgment the trial Magistrate wrote about the Evidence of PW2 thus:-

***“.....she testified that she saw the defendant uprooting her boundary marks and uprooting the poles. However, this evidence was not corroborated by any other person and evidence of such nature must be treated with caution.”***

The Judgment went on to fault PW2 for failing to raise an alarm in order to have other eye witnesses at the scene. Further that PW2 did not produce receipts to the claim special damages of the barbed wires and nails.

With great respect, the trial Magistrate misunderstood the Law applicable to the circumstances.

There is no requirement for corroboration in a Civil Suit claiming damages and her view that such uncorroborated evidence should be treated with caution in a complete misunderstanding of the case before her. She tried to import the law in Criminal Cases governing identification by a single witness under difficult conditions and applied it wholesale to a Civil Suit claiming damages for trespass on land.

In this matter, Section 133 of the Evidence Act does not support the Magistrates' observations. No particular number of witnesses was required to prove damages.

Further, the requirement to adduce evidence of receipts in all cases is an error in the Judgment. While special damages must be strictly proved, they need not be supported by documentary evidence in all cases. Where a person in the village buys 2 rolls of barbed wires and nails to fix them, such a person may not contemplate to keep the receipts or indeed such small items may not be receipted. All that the Court has to do is to assess the credibility of the evidence regarding proof of the fact that the damaged property was bought by the owner and it is damage for which the defendant is liable. See. **Kyambadde Vrs. Mpigi District Administration (1983) HCB. 44.**

The evidence of Kyotungire (PW1) is that on 4/5/1999, she saw the respondent destroy the barbed wire fence. She had bought 2 rolls at 40,000/= and used nails worth 4000/= to fix it. She paid 200,000/= for labour. In cross-examination, she emphasized this evidence and added that the destruction of the fence is the reason she teamed up with the other appellants and sued the respondent.

The evidence of Kabwohe (PW4) supports PW2 on the damage. He (PW4) also saw the damaged boundary. It is therefore, an error to state as the trial Judgment does, that no other witness saw the damage.

Moreover, Ryogoza Peter (PW5) was clear that PW2 reported to the Local authorities about this damage.

PW5 was the Local LC Chairman, he went to the scene and saw 101 holes from which poles had been uprooted but the poles were not present. The respondent was suspected to have done it. The

act had been done at night. However, the LCs did not call the respondent to admit or deny destroying the fence.

In cross-examination, PW5 was not challenged on the evidence about the damaged fence but was attacked in his character by suggestions that he had a sexual affair with PW2.

In a nut shell, I find as a fact that the fence which had been separating the land of the appellants from that of the respondents was damaged. There is ample evidence to prove this fact; however, the respondent only remains a suspect because he was not seen doing so though he was a beneficiary of the damage when the Court went to locus, no attempt was made to verify this evidence. The Court was concerned with other features like old home steads and the grave of Rubahabura.

I agree with the trial Magistrate that there was no proof that the respondent had destroyed the fence but my reasons are quite different from those of the trial Court. I do not believe that corroboration or receipts were required. To me the damage was proved but the culprit to pay for the loss has not been proved.

Ground three fails.

#### **Ground four.**

In this ground, the appellants complain that in dismissing their claim, the learned, trial Magistrate relied on trivial, inconsequential and minor inconsistencies.

The respondent supported the finding of the inconsistencies as found by the trial Magistrate.

I have already expressed myself on this aspect of the evidence when discussing the merits of ground number 2. I need not repeat it here. The inconsistencies were largely a result of the miscomprehension of the facts of the case by the trial court, while extraneous and indeed trivial matters were relied on to decide the case in favour of the respondent. I have already said much about this in ground two and without much ado, I find substance in ground four and allow it.

#### **Ground five**

Lastly, the appellants complained that the evidence adduced was not properly evaluated leading to a miscarriage of Justice.

The respondent's Counsel referred to this as a clumsy and vague ground.

Evaluation of evidence is the gist of Judgment writing. It is a technical principle that requires a Judicial Officer to balance his/her appreciation of facts by stating them objectively followed by a correct understanding of the law applicable. The Court then has to discuss the facts and assign reasons why it believes one side against the other.

Each issue framed is then resolved by proper application of the law and reasons given for each decision reached on every contested issue.

As a first appellate Court, I have endeavored to subject the evidence to fresh and exhaustive scrutiny. I have in a way heard the case a fresh only giving allowance to the fact that I did not hear or see the witness testify.

I have sympathetically read the Judgment of the trial Court and with all the respect I can marshal, I have found it wanting because of its failure to state facts correctly and the misapplication of the Law of Evidence to the case.

I am aware that the evidence was partly recorded by two other Magistrates which may have impaired the trial Magistrates' Judgment. The plaintiffs' case was not properly evaluated against the defence case and the respondent benefitted from the errors committed by Court in allowing on record inadmissible evidence which, in my view, led to injustice. Ground five succeeds in the main because of my findings in ground two.

In conclusion, save for ground three which failed, I allow the appeal and set aside the orders of the lower Court in regard to the ownership of the disputed land. I substitute the same with the order that the disputed land belongs to the appellants. Since ground three failed, there is no proof that the respondent caused the damage so the prayer that the respondent pays 284,000/= and another shs. 15,000,000/= as special and general damages is dismissed.

The law on costs is that they follow the event. The lower Court ordered each party to bear their own costs. It's not clear why it ordered so. I can only presume that because the parties are relatives and neighbours. There was no appeal against that order and I shall not disturb it.

However, on appeal, the appellants prayed for costs. When they lost the case, no order as to costs was made against them. Now they have won against the respondent. In fairness the respondent who has lost should not be condemned in costs when he was denied costs when he won in the lower Court.

I order that these close relatives and neighbours in Kashenyi cell shall each bear their costs.

**Sign**

.....

Lawrence Gidudu

**JUDGE**

20/01/2012

**Court:** Since I am no longer a Judge at Mbarara, I direct that the Asst.

Registrar Mbarara delivers this Judgment on my behalf on

30/01/2012.

**Sign**



.....  
Lawrence Gidudu  
**JUDGE**

20/01/2012