

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE

HCT CIVIL APPEAL NO.043 OF 2010
(From Ruk. Civil Suit No.83 of 2009)

1. TURIAHIKAYO JAMES
2. CECILIA KATERA (MRS)..... :APPELLANTS
3. GAUDENSIA KEMIGISHA

VERSUS

RUREMIRE

DENNISRE

SPONDENT BEFORE HON. MR. JUSTICE J.W.

KWESIGA JUDGMENT

This Appeal arises from the Judgment of The Chief Magistrate, Rukungiri Court, Her Worship Wanume Deborah dated 15th September, 2010 where she decided that the suit land belonged to the Respondent.

The Plaintiff, now Respondent, sued the Appellants seeking orders for vacant possession and permanent injunction restraining the Appellants from further use or occupation of the suit land. He claimed that in 1950s he got the land from his Late father Petero Katainama. The Defendants/Appellants are successors in title of the neighbouring pieces of land held by customary tenure. The Defendants/Appellants claim is that their late fathers together with the Respondent's father reserved parts of

their respective pieces of land, alienated from their cultivatable land, to form a common grazing and resting place for their cattle. That the land ceased to be a grazing land and that they are entitled to their portions which has been resisted by the Respondent who, in 2008 starting using the land alone

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despite LC 2 and LC 3 court's decision that the land be shared equally. The Chief Magistrate set aside the Local Council Judgments and this case was filed and heard before her. The issues drawn for determination were two, namely;

1. Whether or not the Plaintiff/Respondent is the owner of the suit land?
2. What are the remedies available to the parties?

In the Decree dated 15th September, 2010 the trial Magistrates Judgment is that:-

The Plaintiff (Respondent) is the owner of the suit land, granted permanent injunction and ordered the Appellants to give vacant possession and pay costs for the suit. The Appellants filed five (5) grounds of Appeal which were repetitive and argumentative and I find it undesirable for me to reproduce them in this Judgment and out of these mixed up grounds the following have been identified as the appropriate grounds:-

- (a) The trial Magistrate erred in Law when she relied on the proceedings at the Locus-in-quo which were grossly irregular and she pass a Judgment against the Appellant which was a nullity.
- (b) The Chief Magistrate erred in Law when she failed to properly evaluate the evidence and based her Judgment on testimony of unreliable witnesses.
- (c) The record of the proceedings was tampered with which occasioned a miscarriage of Justice to the appellants.

Findings on the above grounds compressed from the original five grounds would dispose of the whole of the Appeal. Right from the start it must be settled, this is a first appeal and therefore this court has a duty to retry the case based on the evidence on record by reevaluating the case as a whole a fresh and make finding bearing in mind that unlike the trial court who had the benefit of seeing and hearing witnesses testify I did not observe their demeanor. These were settled in PANDA VS REPUBLIC [1957] E.A 336 UGANDA BREWERIES LTD VS UGANDA RAILWAYS CORP. CIVIL APPEAL 19 OF 1995 (SUPREME COURT).

GROUND II: Whether the trial Magistrate erred in Law and fact by passing Judgment at the Locus-in-quo which were grossly irregular and rendered the entire proceedings and Judgment a nullity? At the commencement of the proceedings at the Locus-in-quo the trial court made this record:-

“So many people gathered at the land in dispute which is the top of the hill, court picks some elderly people in the area at random who did not testify in court to testify.” Following this stated position the learned trial Chief Magistrate picked six (6) witnesses who testified as court witnesses. None of them had testified in court although all the parties were given opportunity to cross-examine these witnesses. This procedure forms the main ground for impeachment of the

Magistrate's Judgment and I will consider it first before indulging in examination of the rest of the evidence on record.

The principles guiding proceedings at the Locus-in-quo have been discussed and settled in a number of cases which include YESERI WAIBI VS EDISA LUSI BYANDALA [1982] HCB 28, in which MANYINDO J (as he then was) held that the usual practice of visiting LOCUS-IN-QUO is to check on the evidence given by the witness and not to fill-up the gaps for then the Magistrate may run the risk of turning himself into a witness in the case, such a situation must be avoided. Also see:- DAVID ACAR & 3 OTHERS VS ALFRED ACAR ALIRO [1982] HCB 6 and ALICE NAMUSANGO VS GALIWANGO [1986] HCB 37.

The general procedural rule of Law from these decisions is that the ;

- (i) Witnesses who testify in court would clarify what they stated in the court room. They must testify on oath and the parties have the right to cross-examine these witnesses at the Locus- in-quo.
- (ii) The purpose of these proceedings is to check what the witnesses stated in court and not to fill up gaps.
- (iii) The Trial court may call court witness strictly for clarification of any existing evidence but the trial court must guard against

descending into the arena to solicit for the evidence that supports any of the parties or to create an alternative story to the existing versions.

In the instant case the trial Magistrate randomly called (6) six people from the crowd that had gathered and who had not been witnesses in the case, it is not clear what was the basis of selecting these witnesses who testified. I have examined the evidence irregularly obtained. The record has more evidence that the Appellant, in the submissions, failed to address. In my view if the evidence obtained at the Locus in quo is set aside or disregarded and leaves evidence which is sufficient to determine the rights and obligations of the parties there would not be any miscarriage of justice. Irregularity in receiving evidence at the Locus-in-quo does not parse render the proceedings a nullity provided the court can make an affective, practical and workable decision that resolves the conflict on merits of the case. Therefore in resolving the first ground of this appeal my finding is that for the reasons discussed hereinabove the proceedings at the Locus-in-quo was contrary to the settled principles of law governing the hearing at the Locus-in-quo. I hold that those proceedings were irregular and can not be relied upon.

However this does not render the trial a nullity as a whole. This court can still make a decision on the paramount issue, “Whether or not the Plaintiff/Respondent is the rightful owner of the suit properly?”

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The suit land, un surveyed piece of land and held by customary tenure. This piece of land at Kambira, Kambuga, Kanungu District. Before the litigants were either born or became of age or understanding, their late parents commonly used the piece of land in dispute as a common grazing or resting grounds for their cattle. This piece of land lies between the parties’ fenced piece of land and this customary joint occupancy dated as far back as 1950s. Over the years this land ceased to be used for cattle benefits. The Appellants attempted to cultivate parts of the land that they claimed had been contributed by their respective deceased predcessors in title which prompted the Respondent to sue claiming this piece of land exclusively belonged to his late father and by virtue of customary succession he is the sole rightful owner.

In my view the burden of proof is upon the Plaintiff now Respondent to prove on a balance of probabilities that the whole suit land belongs to him and that the Defendant/Appellants are trespassers. Each of the parties claim is by virtue

of succession by customary practice and ownership. The Plaintiff contended that the Defendant had no written agreement to prove how the deceased parents contributed land to create the communal grazing land. However it is not contested this land had been under joint utilization for a long time by the parties which is a proof that they had joint interest in the land. Customary holding can be proved by cogent oral evidence by the people who were old enough at the time the predecessors of the parties jointly occupied this land. Article 237 (3) (a) of The Constitution of The Republic of Uganda 1995 recognizes customary land ownership in Uganda section

2 of The land Act (Cap 227) also provides that subject to Article 237 of The Constitution , Land shall, among other systems, be held by customary holding. This court acknowledges that customary transactions overland, more often than not were by oral agreements and mere absence of written documents is not enough to defeat such transaction provided. There is evidence whether oral or circumstantial that make it most probable that the transaction took place. The standard of proof is on the balance of probabilities. In my view this standard of proof does not depend on which party calls more witnesses because a single witness's evidence could weigh more than several witnesses evidence if he/she gave more cogent evidence. The Plaintiff, PW 1 testified that he inherited the suit land from his father Kateinama who gave it

to him while he was still alive. He described the land by its boundaries. He claimed the Defendants/Appellants grabbed the land in 2004/2005 and he sued them. He tendered (P.1) an agreement dated 14th September, 2001 in which he sold to James Turyahikayo D1 part of the land. The agreement serves the purpose to show that Ruremire (Plaintiff) remained with a piece of land on the left, a path on the right and Tigakanya on the lower side. It further describes that the land sold on the upper side borders with land of Ruremire and a path. (See Plaintiff exhibit P1).

The second exhibit (P.2) dated 17th November 1991 between SIMON KATEERA and JAMES TIGAKANYA further supports that Kateera's land sold was bordering that of Ruremire on the upper side. These two agreement made separately confirm that the land on the upper side of Kateera, husband to Cecilia Kateera D2, belonged to the Plaintiff. It further shows that D1 Turyahikayo James, as far back as 14th September, 2001 knew and recognized that Ruremire, Plaintiff, owned the land on the left and on the upper most side Ruremire's land neighbours with Tigakanya. The above description of the remaining land of Ruremire after the sales adds to the description and location of the land in dispute. Under cross-examination, the Plaintiff maintained he sold part of his land and what remained is his personal land and seek court declaration.

PW 3 Mugisha Joseph, the Plaintiff's neighbour supports the plaintiffs claim. PW 3's father as far back as 1967 rented this land from the Plaintiff's father to cultivate maize for 2 years. In 1971 he hired it again for 3 years. He confirms the boundaries of this land. As recent as 2005, PW 3 hired this land from the Plaintiff and planted millet and sorghum. Under cross-examination third Defendant/Appellant he made it clear that his father and subsequently himself rented the land in dispute in 1965 and 1971, by his father and 2005 by himself. That the land belonged to the Plaintiff and he knew the boundaries because he used the land for a long time as the plaintiff's tenant. The Plaintiffs version of ownership of the suit land as corroborated by PW 4 Cleopas Kabeba aged 72 years. The Appellant's claims of rights, that they derive their ownership from their late parents, 2nd Appellant from her late husband has not been proved on balance of probabilities. None of the three clearly explained what portion of the land was contributed by their predecessors in title as they claim. There was no evidence to rebut the Plaintiff/Respondents evidence of continuous use or occupation of the suit land from 1950s. none of the Respondent's was present at the time of contribution of the land. The alleged contributors are all dead. It may be true that as neighbours they ever used the land jointly as a resting place for their cattle this can not be proof of ownership. It is more probable that it belongs to the Plaintiff because from 1965 up to 2005 he continuously, un disruptedly hired

it out for cultivation and grazing to the father of PW 3 and later on to PW

3 for a period ranging into about 40 years. There is no explanation why the Appellants never laid claim over this land for such a long time if they had legitimate claims. There is no explanation why in the agreements P.1 and P.2 all the witnesses to the agreements who included some of the Appellants and some of their neighbours acknowledged that this piece of land belonged to the Respondent. The most probable explanation is that this land belonged to the Respondent. The Agreements, in my view, and the fact that the Respondent and his late father used to hire out this suit land corroborate the Respondent claim of right over the suit land. In the final analysis despite that this court, in evaluation of the evidence on record disregarded the proceedings at the Locus-in-quo the final decision is that the suit land belongs to the Plaintiff/Respondent and therefore the trial Magistrates orders are upheld. The Appeal is dismissed with orders:-

- (a)The Plaintiff/Respondent is declared the owner of the suit land.
- (b)The Plaintiff/Respondent is entitled to vacate possession of the suit land.
- (c)The order of permanent injunction is hereby granted against the Defendants/Appellants and anybody else claiming under their name.
- (d)The Plaintiff/Respondent is granted costs in this appeal and the lower court to be paid

by each Defendant/Appellant in equal (1/3)
proportions.

Dated at Kabale this 7th day of August, 2012.

J.W. KWESIGA JUDGE

Read in presence of:-

Mr. Rukundo Fred for the Respondent.

The Respondent is present.

The Appellants are absent.

Mr. Joshua Musinguzi Court-Clerk.