

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE

HCT CIVIL APPEAL NO. 20 OF 2011
(From Rukungiri Civil Suit No. 188 of 2010)

1. Busingye Josephine }
2. Naturinda Margaret } :::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

1. CONGO LIVING }
2. ATWINE EDITH } :::::::::::::::::::::::::::::::::::RESPONDENT
3. TUMUSHABE LYDIA }
4. TUMUSIIME ALLEN }

BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

This is an Appeal from the Judgment of His Worship Twakyire Samuel, Magistrate Grade One, Rukungiri Magisterial area which was delivered on 30th June, 2011.

The trial Magistrate decided that the suit land belonged to the Plaintiffs now the Respondents and ordered that he issued a permanent injunction against the Defendants. He awarded the Plaintiffs/Respondents general damages of Sh. 200,000/= . The Appellants filed 4 grounds of Appeal which in my view were un professionally drawn by an Advocate. It takes a lot of efforts to understand what are the Actual Criticism of the trial courts Judgment. All in all the following is what has been understood as the grounds of Appeal:-

1. That the trial Magistrate erred in law and fact when he failed to evaluate the evidence leading to a wrong conclusion that the suit land belonged to the plaintiffs.

Considering the issues settled by the trial court namely;

- (a) Who are the lawful owners of suit land?
- (b) Remedies?

When these issues are answered by this court the grounds of Appeal filed will have been settled or resolved by this court. I am aware of my duty as an appellate Judge to evaluate the trial court's evidence afresh and arrive at my own conclusion bearing in mind that unlike the trial court I had no opportunity of hearing and observing witnesses while they testified. It is not the duty of this court to determine whether the trial court's decision was right or not but to determine the issues stated in the trial based on the evidence on record. Keeping the above principles I will proceed to examine the evidence.

Brief facts of this case are that The Appellants are widows of the late Bunagwa while the Respondents are children of the said late Bunagwa and step-children of the Appellants. Bunagwa alias Ntonyo died in June 2003 subsequent to the burial, on 15th June, 2003 a memorandum (Plaintiffs exhibit P.2) was signed by family members and Bataaka (neighbours) in which they declared that land at Nyakigera, the suit land, previously belonged to the mother of Kongo (1st Respondent), Masanyu and their sisters and had been given to them by Bunagwa while he was still alive. It further declares that the land was being left in care of the step-mothers (the Appellants) who will use it and would have the first option when the owners decide to sell this land. The owners were listed as:- KONGO

LIVING, now 1st Respondent, TWINE EDITH, 2nd Respondent, TUMUSIIME ALLEN 4th Respondent and TUMUSHABE LYDIA, 3rd Respondent.

According to the evidence of PW 1 Kongo Living, this particular land was once a subject of a suit in 1982 before Grade two Magistrates court at Nyarushanje. Civil Suit No. 32 of 1982. It appears that in this court a settlement was reached before the trial Magistrate where the Respondents took the land at NYAKIGERA and leaving the land at MUKATABA to their father BUNAGWA. PW 7 Babyebuza (retired Magistrate Grade II) corroborated this evidence when he recognized Exhibit P.1 (without cancellations) as the record of that court and he identified it by his signature. He disowned the cancellations and changes which were inserted by a pen. Most relevant he clarified this land was at Nyakigyera and not land at Omukataba as stated by D1 Kobusingye (first Appellant). However in cross-examination she corroborated the fact that there had been court proceedings between the late Bunagwa and the Respondents or some of them over land which was given to them in court. D2 NATUKUNDA, 2nd Appellant only stated that the land given to the Respondents was OMULATAABA. She does not give explanation or the basis of her evidence.

I have not found the evidence of DW 3 and DW 4 helpful on the issue of ownership of the suit land and do not need to indulge in it at this stage.

PW 3 Rev. Maguru Erimest, PW 4, MPUNGIREHE RICHARD and PW 6 KAGANGI EMMY clearly told court that they knew the suit land and that it was given to the Respondents by Bunagwa before he died. I have evaluated the contents of a document admitted in the proceedings as Exhibit P.2 dated 11th December 1982. This document was made later than the document made before the Magistrate (P.1). This document though not signed is said to have been written by Late Bunagwa declaring the land at

Nyakigyera as belonging to the Respondents. I have found it difficult to rely on this document for the reasons that notwithstanding that it is a photocopy, it was not witnessed and there was no evidence led to prove that this was the handwriting of Bunagwa.

Reverend Bikangiso, the Advocate for the Appellants made a number of criticisms against the Lower Courts Judgment which need addressing at this stage. It is irrelevant that some of Respondents were not parties in civil Suit No. 32 of 1982 between KONGO LIVING and others Vs BUNAGWA (see P.1) my appreciation of the relevancy of this document is to prove that the land in issue was at Nyakigyera. It further proves that it is not true that the Respondents were given land at Omukataaba as the Appellants would like this court to believe. The evidence in the case as a whole shows that the suit land belonged to the mother of KONGO and others and Kongo was not suing or otherwise following the land for himself alone but for himself, his brothers and sisters whose names are alive in the proceedings. This does not render the trial Magistrates Judgment erroneous in law or in fact since the parties to these disputes are clearly defined and their rights can be determined without prejudice to any of the parties. There was no fault by the Magistrate relying on the photocopy of the court record (P.1) since any fears associated with it were cured by the testimony of The Magistrate Grade 2 who presided over the matter and signed as a witness to the settlement. I have already disregarded the photocopy (P.2) given reasons for it in this Judgment. The suggestion by the Appellants Advocate that the Magistrate should have subjected the documents to handwriting expert is wrong and misleading. Magistrates do not have any duty to look for evidence outside what has been adduced by the parties to fill in any gaps left by the evidence received. This would make the Magistrate a party to the suit and would violate the court's role of impartiality. I only hope that this Advocate did not seriously believe in this aspect of his submissions.

Finally I find the Advocates submission that P.2, which I have already rejected was a will and a basis of determination of this suit to be misconceived. On the face of the document and by its contents would only amount to a declaration that this land belonged to the named children and not being willed. I have not found it necessary to follow each and every contention in the Advocates submission to do so would be following a truck of a lost guide in this proceedings. In my view this was as simple a case as appreciated and adjudicated by the learned trial Magistrate Grade One. It is the finding of this court that considering the evidence as a whole, the Plaintiffs/Respondents, on the balance of probabilities proved to the satisfaction of this court that land belonged to them. In view of the above this Appeal is hereby dismissed with costs of this Appeal. The trial Magistrate awarded no costs in the trial and I will award none. This court order as follows:-

- (a) This Appeal is dismissed with costs to the Respondents.
- (b) The trial court orders of vacant possession, permanent injunction against the Appellant and general damages of Sh. 200,000/= granted to the Respondents are hereby confirmed.

Dated at Kabale this **21st** day of **September, 2012**.

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J.W. KWESIGA

JUDGE

In the Presence of :

Rev. Bikangiso for the Appellant.

Mr. Muhangi Justus holding brief for Mr. Beitwenda.

All the parties are absent.

Mr. Jushua Musinguzi Court-Clerk.