

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO.56 OF 2010

(Arising Out Of Civil Suit No. 006/2007 Mwanga II Road)

1. KAGWA SAM

2. A. S. C. KIGULI.....APPELLANTS

VERSUS

MPOMBA WASHINGTON.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This was an appeal from the decree of His Worship Wamala Boniface Magistrate G.1 in Mwanga II Road Civil Suit No. 006 of 2007 dated 8th February 2008. The background to the appeal is that the appellants, then plaintiffs filed Civil Suit No. 006 of 2007 against the respondent/defendant seeking a permanent injunction restraining the defendant and his agents from encroachment into their land, general damages and costs of the suit. The plaintiffs/appellants' claim was premised on grounds that their father Christopher Kibuuka bought a piece of land at Kawaala from the defendant's father James Lubulwa. It was measuring 100 feet from the main feeder road. An agreement was made for the land on 25/7/1978 clearly showing the boundaries. The plaintiffs alleged that the respondent/defendant encroached on the said land to the extent of tampering with boundary marks, cutting one of the kokowe trees demarcating the boundary. That despite several warnings the respondent/defendant continued with encroachment to the detriment of the appellants' developments. The respondent however denied the appellants' claims stating that on 25th July 1978 the plaintiffs' father Christopher Lubulwa was given a plot of land at Kawaala by the defendant's father Lubulwa James. He

contended that the agreement shown by the plaintiffs with measurements of 100 feet from the road prior to the defendant's father's death is a forgery, and that the proper measurement of the appellants/plaintiffs' land is as demarcated on the sketch map witnessed by the 2nd appellant.

The trial Magistrate passed judgment in favour of the defendant that the plaintiff's land only measures 72 feet from the road and not 100 feet from the road as claimed.

The appellant being dissatisfied with the judgment appealed against the decision on the following grounds:-

- 1. The learned trial Magistrate erred in law and fact when he decreed that the defendant had proved on balance of probabilities that the plaintiffs trespassed onto part of the defendant's kibanja when he relied on disputed facts regarding the exact boundary between the appellants and the respondent.*
- 2. The learned trial Magistrate erred in law and fact when he disregarded the clear evidence on record showing that the defendant tampered with boundary marks thereby arriving at a wrong conclusion that the appellants had trespassed onto part of the respondent's land.*
- 3. The learned trial Magistrate erred when he failed to judiciously evaluate the evidence on record particularly regarding the appellants' rebuttal of the sketch map exhibit D1 thereby coming to a wrong conclusion regarding the exact measurements of the appellant's land and the plaintiff's land.*

At the hearing of this appeal, Counsel Kajeke for the respondents informed court that there was an agreement between both Counsel to file written submissions. This was done in accordance with time schedules set by this court.

Ground 1: The learned trial Magistrate erred in law and fact when he decreed that the defendant had proved on balance of probabilities that the plaintiffs trespassed onto part of the defendant's kibanja when he relied on disputed facts regarding the exact boundary between the appellants and the respondent.

Ground 2: The learned trial Magistrate erred in law and fact when he disregarded the clear evidence on record showing that the defendant tampered with boundary marks

thereby arriving at a wrong conclusion that the appellants had trespassed onto part of the respondent's land.

In his written submissions, learned Counsel for the appellants chose to submit on grounds 1 and 2 together arguing that they were interconnected as they refer to the boundary marks. He referred to the agreement dated 25/7/1978 **exp.1**. He submitted that the appellants in their case clearly stated that it was the basis of their claim since it indicated the boundaries between the appellants and the respondents. He relied on the testimonies of PW1 (2nd appellant) on pages 8 – 11; PW2 (1st appellant) on pages 13 – 14; and PW3 William Kaggwa on pages 18 – 20 which all support the contents of **exp.1**. He argued that the respondent in his testimony does not dispute the authenticity of **exp.1** as per his testimony that he recognizes **exp.1** and respects the boundary mark of the kokowe tree. Counsel for the appellant also maintained that the first visit to the *locus in quo* was of little evidential value since both parties were not present at the site. He submitted that at the subsequent visit the court should have established the boundary marks between the appellants and the respondents but this was not done. It was his submission that the trial court ignored the appellant's evidence that the boundary marks were tampered with as the kokowe tree had been removed but that the tree stump was still there. He maintained that the tree stump was ample crucial evidence of where the boundary was but court ignored it.

In reply, Learned Counsel for the respondent submitted that the basis of the respondent's claim is **exd.1** signed by the respondent and witnessed by the 1st appellant among others. He argued that the said agreement stated the measurements of the disputed land. He maintained that the trial court relied on the said agreement to reach its decision. He also submitted that the 2nd appellant in his evidence never denied executing the same agreement whose essence was to clearly determine the boundaries of the land in dispute. He argued that **exp.1** did not state the measurements of the plot save for features like the kokowe tree which was cut by some people. He submitted that the trial Magistrate properly analyzed the evidence adduced before him and concluded that **exd.1** represented the true picture of dealings between the parties, and that it was the basis for determining the boundary disputes.

The trial Magistrate on page 11 of the judgment concluded on the first issue as follows:-

“In all therefore I find that there is ample evidence to satisfy the court on a balance of probabilities that the best guide as to where the correct boundary between the plaintiffs and the defendant, is the sketch on EXD. 1.”

The record of proceedings on page 9 indicates that the 2nd plaintiff, testifying as PW1, referred to the original agreement **exp.1**, a sale agreement dated 25/7/1978 made by the late Lubuulwa who was the defendant’s father. He testified that later a sketch was made but it was not part of the agreement as it was made in response to another dispute. In cross examination by court he testified that they failed to agree on the sketch. On page 15 of the same proceedings, PW2, the 1st plaintiff identified **exp.1** but denied any knowledge of the drawing/sketch, **exd.1**. In cross examination, he stated that he agreed with the original agreement of 25/7/78 **exp.1**, but he also did not agree to the document that contains measurements **exd.1**. PW3 the appellants’ uncle also identified **exp.1** and stated that it was made at his home when the appellants’ father, who was his brother, was buying the plot in issue. He testified that he signed the document together with Kiguli Nakagulire and others. Both PW1 and PW2 talked about the boundary on the lower side of the plot being marked by a kokowe tree which has since been removed by the defendant. PW2 stated that where the kokowe tree was there is a sort of a pit and a young musambya tree which is growing. PW3 stated on pages 18 to 20 of the record of proceedings that there was a kokowe tree on the lower side of the plot which he no longer sees, and that he can still show that point to court if they went there. In cross examination, he said that the agreement they made had no measurements, but only had physical demarcations.

The respondent testifying as DW1 stated that around 1999 or 2000 he was shown **exp.1** and a sketch indicating measurements by the caretaker a one Jackson Lukoma. He testified that Lukoma requested him to get in touch with Kibuuka so that he brings his children to sign the agreement, and two of them, Kiguli and Ssentumbwe, eventually signed. The record shows that the document they signed was admitted in evidence as **exd.1**. DW1 also testified that from the time he started understanding, the kokowe tree was not there. In cross examination however he said there is another place where he knows the kokowe tree was, at the lower right end of the sketch on **exd.1**. He said in cross examination that he did not participate in the drawing of the sketch, and that the measurements were taken by Mzee Kibuuka and Mzee Lukoma. DW2 the defendant’s mother testified that she together with Jack Lukoma and Mzee Kibuuka measured

the land from the road sometime in 1998 and the measurements were recorded on a copy of the original agreement. After some time they went back to the land and signed on the document bearing the sketch and measurement **exd.1**. In cross examination she said she recalls where the kokowe tree was, on the lower side of the land bordering Nankabirwa's land.

Court Witness No.1 Francis Kigongo testified at the *locus* that he started living on the land below the disputed land in 1990. He testified that the person who had sold him land showed him a stump of a tree indicating the boundary on the side bordering the defendant. In cross examination by the plaintiffs' Counsel, he said that he later came to know the stump as the kokowe tree. On page 34 of the record of proceedings, he testified that, "*What can show me now that that is where the tree stump was, is the fact that it was near to that musambya tree there.*" Court at this point noted that the tree is a young musambya tree. Court Witness No.2 Ssentumbwe Francis also testified at the *locus* that that he came to know about the land in 1999. In cross examination by the plaintiffs' Counsel he testified that on the lower boundary there was a stump of a kokowe tree. He testified that he could show where the tree stump was. He went and stood where there is a young musambya tree.

The English translation of **Exp.1** (the agreement of 25/7/78) states in part that the lower side of the appellants' plot shares a boundary with another plot given by the appellants' father to his sister, and that the hind side of the appellants' plot ends at the kokowe tree. This clearly reflects the evidence of PW1, PW2, PW3 and DW2 that the appellants' boundary was formerly marked by the kokowe tree at its lower end. The respondent himself as DW1 does not dispute the authenticity of exhibit **Exp.1**. He stated in cross examination on page 25 of the proceedings that he recognizes **Exp.1** and respects where the kokowe tree was as a boundary mark. This evidence was further corroborated by the evidence of Court Witnesses No.1 and No.2. Who clearly identified where the kokowe tree was.

The trial Magistrate however ignored all that incredible evidence. He went on to base his decision on **exd.1**, even after acknowledging that **exp.1** sets out boundaries of the land that was given to the late Kibuuka by physical features. He completely ignored the evidential value of **exp.1**. The evidence from both the plaintiff and the defendant side reveals that **exd.1** was made around 1998, 1999 or 2000. This was some twenty years or more after the execution of **exp.1** which was signed on 25/7/78. The evidence on record is even clear that the sketch **exd.1** was

made under different circumstances to determine a different boundary dispute with issue. The trial court ignored the appellants' evidence that the boundary marks were tampered with as the kokowe tree had been removed. PW3 who had witnessed **exp. 1** indicated in his testimony that that he can still show that point of the kokowe tree to court if they went there, but court did not follow up this vital piece of evidence. Yet it could have followed up this matter by calling him to testify at the *locus* where he would have pointed out the boundary. Nevertheless, the record shows Court witnesses No.1 and No.2 pointed out where the kokowe tree had been during the trial court's subsequent visit to the *locus* on 17/12 2010.

In my opinion the evidence of Court Witness Nos.1 and 2 at the *locus*, together with **exp.1** was sufficient to establish where the boundary between the appellants' land and the respondent's land was. The tree stump was ample crucial evidence of where the boundary was but court ignored it. The same evidence amply corroborated the plaintiffs/appellants' evidence on the boundaries. This is the evidence that the trial court should have relied on to establish the boundary marks between the appellants and the respondents but this was not done. The trial court also ignored the appellants' evidence that the boundary marks were tampered with as the kokowe tree had been removed. Considering that this was a case of trespass where a boundary was disputed it was pertinent upon the trial magistrate to establish the boundaries through the *locus* visit to competently determine who had trespassed on whose land.

After analyzing and evaluating the evidence on record as a first appellate court, it is my finding that the learned trial Magistrate erred in law and fact when he decreed that the defendant had proved on balance of probabilities that the plaintiffs trespassed onto part of the defendant's kibanja when he relied on disputed facts regarding the exact boundary between the appellants and the respondent. It is also my finding that the learned trial Magistrate erred in law and fact when he disregarded the clear evidence on record showing that the defendant tampered with boundary marks thereby arriving at a wrong conclusion that the appellants had trespassed onto part of the respondent's land.

Grounds 1 and 2 of the appeal are therefore allowed.

Ground 3: The learned trial Magistrate erred when he failed to judiciously evaluate the evidence on record particularly regarding the appellants' rebuttal of the sketch map

exhibit D1 thereby coming to a wrong conclusion regarding the exact measurements of the appellant's land and the plaintiff's land.

The appellant's Counsel submitted on this ground that the trial Magistrate disregarded **exp.1** and relied solely on exhibit **exd.1** which had additional sketches made on the original agreement. He contended that the evidence of PW1 and PW3 who was present when **exp.1** was made at his home points out that the document is genuine and shows the clear boundaries of the land, and that the respondent does not dispute its being genuine. He argued that the trial Magistrate did not attach evidential value on **exp.1** but instead attached evidential value on **exd.1** which was a photocopy of the original agreement. He contended that **exp.1** was signed by all parties in 1978 and **exd.1** is not an amendment of the earlier agreement. He argued that the trial Magistrate disregarded the appellant's evidence that **exd.1** was for purposes of sorting out a dispute with Nalongo, and instead reasoned that since the same was signed by the appellant's father and the 2nd appellant it amounted to amendment of the earlier agreement of 1978. Counsel for the appellant referred to the record which shows that **exd.1** was made in 1998 when there was a standing dispute with Nalongo a neighbor, and that the additional sketch on **exp.1** was to establish the boundary between the appellant's father and Nalongo. He contended that the measurements were meant to resolve the dispute with Nalongo who was present but declined to sign **exp.1**. Counsel for the appellants submitted that had the trial Magistrate given evidential value to **exp.1** court would have arrived at a different decision.

The appellants' Counsel also referred to the trial Magistrate's laying emphasis on the discrepancy between the appellants and respondent during measurements taken by court during the visit to the *locus* and preferring to rely on **exd.1** which was a photocopy of the original agreement and its sketch map. He submitted that the appellants discharged their burden of proof on the balance of probabilities that the respondent had tampered with the boundary marks and consequently trespassed on the appellants' land. He argued that had the trial court judiciously exercised its mind to the evidence on record it should have found in favor of the appellant. He beseeched this court as the first appellate court to analyze and evaluate the evidence and arrive on its own conclusion.

Counsel for the respondent agreed that the duty of the first appellate court is to analyze and evaluate the evidence and arrive on its own conclusion. He maintained that the trial Magistrate

properly evaluated the evidence and reached the decision judiciously as evidenced on pages 7, 8 and 9 of the judgment. He submitted that the trial Magistrate gave reasons why he believed the evidence in **Exd.1** and rejected that in **Exp.1** which was not clear in as much as it never indicated the measurements. It was his submission that the appellant has failed to raise sufficient grounds to warrant the setting aside of the orders of the lower court.

Exp.1 is the original agreement signed by Mzee Lubuulwa and three other witnesses namely Kaggwa, Kiguli and Nakagulire. It has no sketch or measurements. **Exd.1** on the other hand is a photocopy of **Exp.1**. On **Exd.1** there is a drawing or sketch with measurements signed by Lubulwa, Kibuuka, Kiguli and Ssentumbwe. A blue biro pen was apparently used to make the drawings or sketch and countersign. The said sketch or signatures do not exist on the original **Exp.1**. PW1 and PW3 clearly identified **Exp.1**. PW3 gave evidence that he was present when **Exp.1** was made at his home. There is ample evidence therefore that the **Exp.1** is genuine. It shows the physical boundaries of the land. The respondent did not dispute the genuineness of **Exp.1**. The trial Magistrate however disregarded **Exp.1** and relied solely on **Exd.1** which was a photocopy of **Exp.1** but with additional sketches. The trial Magistrate did not attach evidential value on **Exp.1**. He instead attached evidential value on **Exd.1** which was a photocopy of the original agreement. **Exp.1** was signed by all parties in 1978. The evidence of PW1, PW2, PW3 and Court Witness No.3 reveals that **Exd.1** was for purposes of sorting out a dispute with Nalongo. The evidence adduced by both the plaintiff's and the defendant's side shows that **Exd.1** was made around 1998 when there was a standing dispute with Nalongo a neighbor. Nalongo, who testified as Court Witness No.3, confirmed during cross examined by the plaintiffs' Counsel that she had a misunderstanding over the land with the 1st plaintiff. She had earlier stated in her examination in chief that after the measurements she saw some boundary trees, and that Mzee Kibuuka passed by her house and sent assurances through her workers that the matters had been solved.

The adduced evidence from both sides is clear that the additional sketch **Exd.1** was to establish the boundary between the appellant's father and Nalongo. The measurements were meant to resolve the dispute with Nalongo who was present but declined to sign **Exd.1**. The trial Magistrate in his judgment however reasoned that **Exd.1** amounted to amendment of the earlier agreement of 1978 since the same was signed by the appellant's father and the 2nd appellant. With

respect, I do not agree with this position. In the first instance, nothing was mentioned about varying or amending the agreement of 1978 anywhere in the evidence of all witnesses, or even on the agreement itself. In any case one of the parties to the agreement, Mzee Lubuulwa, had already passed on at the time. The question of varying the 1978 agreement could not therefore arise. In my opinion **Exd.1** is not an amendment of the earlier agreement **Exp.1**. It is rather a sketch drawn on the photocopy of the original agreement to address another boundary dispute not connected with the instant case.

It is my opinion that the appellants as plaintiffs in the lower court discharged their burden of proof on the balance of probabilities that the boundary marks were tampered with and consequently trespassed on the appellants' land. After analyzing the evidence on record, it is my finding that the boundaries of the land in dispute are as per the agreement of 25/7/1978 **exp.1**. The boundary between the appellants' land and the respondent's land on the lower side are clearly identified by Court Witness Nos. 1 and 2, in line with **exp.1**. The boundary point is where the kokowe tree used to be but a musambya tree was growing there at the time the trial court visited the locus on 17/12/2007. Court witnesses Nos. 1 and 2 identified this point to the trial court during the trial court's subsequent visit to the *locus* on 17/12 2010. Had the trial Magistrate given evidential value to **Exp.1** which amply corroborated the evidence of the appellants' witnesses and the court witnesses, it would have found in favour of the appellants.

Ground 3 of the appeal is therefore allowed.

All in all this appeal is allowed. The orders made by the trial Magistrate are set aside and the following orders are made:-

- i) ***A permanent injunction is issued restraining the respondent, his agents and all those claiming and/or deriving authority from him from encroaching on the appellants' land.***
- ii) ***The costs of this appeal and in the court below are awarded to the appellants.***

It is so ordered.

Dated at Kampala this 18th day of October 2012.

Percy Night Tuhaise

JUDGE.