THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT JINJA
CIVIL APPEAL NO. 44 OF 2005
(Arising from Original Kamuli Civil Suit No. 135 of 1990)

1. ERISA GAWUNYE
2. DAVID BUYINZA
3. SAMWIRI KAWONGOLYA

:::::::::::::::::: APPELLANTS

VERSUS

HABIB MUWATA :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT:

Background facts.

This appeal arises out of the judgment and orders of His Worship Masaba S.M. Magistrate Grade 1 sitting at Kamuli *(hereinafter referred to as 'the trial court")* delivered on 30.8.2005.

Habib Muwata *(hereinafter referred to as "the Respondent")* sued Erisa ***Gawunye, David Buyinza,*** and two others who did not appeal; (herein after referred to as "Appellants") in the trial court at Kamuli on 03/10/10. The Respondent's claim against the Appellants was for the declaration that he is the owner of a piece of land situated at Nakibungulya Bukamwami village, Bugulumbya sub-county *(herein after referred to as the "suit land").*

The Respondent purchased the suit land from two different people; one part from one Grace Sajjabi on 5.3.1983 and another from Kadiri Minsi in 1978. The two pieces were joined to make one, which is the suit land now measuring approximately 5 acres.

The Respondent occupied and utilized the said land until in 1990 when the 4th Appellant Patrick Buyinza who was the R.C. official of the area invited the other Appellants who took over the lower part suit land by planting "birowa" boundary marks; and they gave it to the said 4th Appellant.

The dispute arose as a result of the Appellants attempting to make a boundary between Buzaya and Bugabula counties. After the demarcation, the 4th Appellant took occupation of the suit land and started using it after chasing away the Respondent's porters and harvesting the crops on the suit land. The trial court decided in favour of the Respondent and the Appellants filed the instant appeal. They advanced six grounds of appeal as follows:

1. ***The learned trial Magistrate erred in law and act when he failed to consider all the evidence adduced during trial and to evaluate it so as to reach a just decision, which prejudiced the Appellants.***
2. ***The Learned Trial Magistrate erred in law and fact when he decided the land dispute in favour of the Respondent without evidence to support his findings and conclusions.***
3. ***The learned trial Magistrate erred in law and fact when he decided the dispute between the Appellants and the Respondent basing on contradictory evidence.***
4. ***The Learned trial Magistrate erred in law and when he failed to consider evidence adduced at the Locus-in-quo and showed extreme bias in favour of the Respondent through out the trial and in his judgment.***
5. ***The Learned trial Magistrate erred in law and fact when he ordered the Appellants to pay the Respondent costs of the suit when he did not find as a fact that they committed the wrongs attributed to them in his pleadings which were not borne out by the evidence.***
6. ***The learned trial magistrate erred in law and fact when he made vague orders against the Appellants thus giving the Respondent benefits on the land in dispute which he did not prove belonged to him or that he deserved them.***

The Appellants also sought that the appeal by allowed with the following orders:

a) ***A declaration that the disputed land belongs to Buyinza David not Habib Muwata.***

b) ***An eviction order against the Respondent.***

c) ***A permanent injunction restraining the Respondent from trespassing on Buyinza David's land.***

d) ***Damages for trespass on Buyinza David's land.***

e) ***Costs of the appeal and the suit below.***

The Appellants are represented by ***M/s. Kafuko Ntuyo & Co. Advocates*** while the Respondent is represented by ***M/s. Tuyiringire & Co. Advocates***. Both Counsel filed written submissions to argue their points. Ounsel for the Appellants argued Ground 1, 2, and 3 together and Couonsel for the Respondent also replied to them in similar manner.

Ground 1, 2 and 3.

These are general grounds whose main thrust relates to the evaluation of evidence by the trial court. Counsel for the Appellants argued that the trial court did not find for a fact that the suit land is situate at Nakibungulya village or Mpakitoni village, yet the Respondent had, in his pleadings, claimed the suit land is situate at Nakibungulya, Bakamwami village, Bugulumbya sub-county. Further, that it is not indicated in which place or village - whether Nakibungulya or Mpakitoni, the *locus-in-quo* visit took place. Counsel faulted the trial court for not drawing a sketch map of the disputed land. Counsel opined that the matter was a boundary dispute between villages, sub-counties and counties not merely individuals.

In response Counsel for the Respondent argued that the Respondent purchased the land in two transactions in 1978 from Kadri Minsi and in 1983 from Grace Sajjabi. That he occupied and used the land until 06/03/1990 when the 4th Appellant using his position as the RC (now LC) official invited the other Appellants and planted the boundary marks on the Respondent's land, which resulted into the 4th Appellant taking the lowe lying portion of the Respondent's land.

Resolution of Issues.

A lot of arguments were made by both Counsels, which I am constrained to say are invariably beside the core issue in this case. On revisiting the record of the lower court, particularly the testimonies of the witnesses, there appears to be total confusion; and a rather intense mix-up of issues in the dispute as it relates to boundaries between individual/personal land, villages, sub-counties and counties.

The Appellants' case, as is be evident from submissions of their Counsel, (2nd page 13th paragraph four bottom) is that they perceive the dispute to be on administrative boundaries between village, sub-counties and counties, and not mere individuals. I believe that this is the genesis of where the Appellants got the whole matter wrong. The record bears uncontroverted evidence in *Exhibits "PE No. 1 (a)" and "PE No. 1 (b)"*, which are *Sale Agreements* of one part of suit land the Respondent purchased from one Kadri Minsi on 11/10/1978 at a price of Shs. 4000=; and *Exhibits "PE No. 2 (a)" and " PE No. 2(b)",* which are *Sale Agreements* between the Respondent and one Grace Sajjabi dated 05/3/1983 for the rest of the suit land, at a price of Shs 20,000 =. The first Sale Agreement was witnessed by five people, while the latter was witnessed by eleven people; all residents of the same area where the suit land is situate. (*See page 4 of the copy of the typed proceedings).*

It would appear clearly that by 1990 when the so-called boundary dispute as it relates to village, sub-counties and counties arose, the Respondent was already enjoying quiet possession of the suit land, which could not be disturbed merely by any subsequent re – arrangement of the administrative units in the area. The demarcation only affected the administrative boundaries which did not affect on the proprietary rights of the Respondent as to ownership of the suit land, which could have traversed, or been traversed by the various administrative demarcation.

Therefore, with due respect to Counsel for Appellants, the argument that the disputed was about administrative boundaries not individuals is misplaced. The Respondent did not sue because of the administrative boundaries, but for the recovery his land that was taken by the 4th Appellant under the guise of administrative boundaries're- arrangement.

Even if the suit land fell outside one administrative unit unto another, still it remained the property of the owner, who could not be deprived of it merely because of the latter demarcated boundaries. The three grounds of appeal fail because what determined ownership of the suit land were not the administrative, but individual boundaries. Let it be emphasized that there is no law against a person owning property in two adjacent

administrative units. I believe that this is a cross-cutting issue in the entire appeal; which makes pronouncing on other grounds purely an academic exercise. I will however, briefly comment on few of the grounds below.

Ground 4.

In this ground the Appellants fault the trial court for failing to consider evidence adduced at *locus in-quo*, and allege extreme bias on part of the trial court in favour of the Respondent. I will start with the issue on bias (which appears on second last page, 1st two paragraphs of the Appellants' submissions). Allegations were levied against the trial court for deliberately not recording all the evidence of what transpired at the *locus in-quo.* In particular, Counsel referred to contents on pages 34 -36 of proceedings, and opined that this was evidence of bias.

Allegations of bias are serious, and must be strictly proved by the maker. A look at the (page 34 - 36 of the proceedings referred does not, in the least, show any evidence of bias on part of the trial court. Counsel for the Appellant in marking such a serious allegations should have fortified it by showing what evidence of value was left out by the trial court at the *locus in – quo,* and that it was deliberate and intended to favour one party against the other. Failure to show that only left the allegations of bias unproven, and this court can only go by the trial court's record.

Regarding the purpose of visits and manner of conducting *locus in-quo* proceedings, the position of the law was succinctly stated by Sir Udo Udoma C.J., (R.I.P) in ***Mukasa v. Uganda (1964) EA 698 at page 700*** that:

> ***"A view of a locus in-quo out to be; I think to check on the evidence already given, and where necessary, and possible, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. "***

In light of the above authoritative position, this court cannot fault the trial court for failing to consider evidence adduced at *locus in-quo,* fault the trial court for failing to consider evidence adduced at *locus in-quo,* as it falls outside the scope of the evidence that be considered. *Ground 4* lacks merit and it fails.

Ground 5.

The major complaint against trial court in this ground relates to the awarding of costs to the Respondent. Counsel for the Appellants contends that the Respondent had not proved his case, and ought not to have been awarded costs. Counsel for the Respondent (at page 8, of his submissions, 1st line) argued that costs are within the discretion of the court and they follow the event.

The law as it relates to costs is provided under ***Section 27 (2) of the Civil Procedure Act*** to the effect that the costs of any action shall follow the event unless the court shall for good reason otherwise order. Costs being a matter of courts' discretion this court as appellate court would be reluctant to interfere with the lower court's exercise of such discretion, except where the trial court applied a wrong principle of the law or was manifestly erroneous in awarding costs. This ground of appeal lacks merit and fails. It also disposes of *Ground 6* of the appeal.

The appeal fails in its entirety, and it is dismissed with costs here on appeal and in the court below.

BASHAIJA K ANDREW

JUDGE

30/11/12

NOTE

Pursuant to provisions of ***Section 99 of the Civil Procedure Act***, the slip in this judgment where the names of the 3rd Appellant "***SAMWIRI KAWONGOLYA"*** had been inadvertently omitted is corrected and inserted, owing to the fact that ***Civil Appeal No. 43 of 2005 Samwiri Kawongolya v. Habib Muwata*** had been earlier consolidated with the instant Civil ***Appeal No 44 0f 2005 Erisa Gawunye, David Buyinza v. Habib Muwata.*** Accordingly, all orders obtaining in the instant appeal equally obtain as against ***SAMWIRI KAWONGOLYA*** as a 3rd Appellant.

BASHAIJA K ANDREW

JUDGE

30/11/12