REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 011 of 2012

ARISING FROM CIVIL SUIT KAB No. 011 of 2007

MWESIGYE KETTY :: APPELLANTS

VS

1. MWESIGYE NATHAN
2. DR MUGYENYI MEDARD :::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal against the decision and orders of His Worship **Praff Rutakirwah, Chief Magistrate Kabale**, delivered on the 2nd of February 2011.

The appellant, **MWESIGYE KETTY**, is aggrieved by the decision of the learned Chief Magistrate who dismissed her suit against **MWESIGYE NATHAN** and **DR MUGYENYI MEDARD** with costs.

The background to this matter is that the appellant is the wife of the 1st Respondent. The two live together at a place called Ahumugwogwi village in Kyanamira Sub County in Kabale district. The appellant's claim in the lower court was for eviction of the second plaintiff from land situate at Kabatogote cell in Kyanamira Sub County in Kabale district. She stated that this land was used by the family for sustenance by farming thereon crops for consumption and sale and as such was family land.

She discovered in 2007 when the suit land was fenced off and that her husband, without her knowledge, had sold the land, in 1999, to the second respondent. She filed this claim against the two respondents.

The trial Magistrate found against her and dismissed the claim hence this appeal. Two grounds of appeal were filed.

1. The learned trial Magistrate erred in law when he held that the Suitland did not qualify to be family land under the 1998 Land Act.
2. The learned trial Chief Magistrate erred in law and fact when he failed to fairly evaluate evidence on record which if he had done he would have allowed the claim.

The appellant prays the appeal be allowed and the suit land is declared family land then an order evicting the second respondent is issued by this Court.

The appellant was represented by Mwene Buhazi & Co Advocates while Mr Wilfred Murumba represented the second respondent.

It is submitted for the appellant on the first ground that the Suitland was critical for the survival of the appellant and her family. That the appellant (PW 1), PW 2 and PW 3 all testified that this land was the primary source of livelihood for the family. Counsel submitted that the trial chief magistrate unjustifiably ignored this evidence in his decision.

Counsel submits farther that under S. 39 (i) of the **Land Act 1998**, it is not mandatory that for land to qualify as family land, one must be both resident on and deriving sustenance from the suitland. That it was sufficient for one of these arms to be satisfied. In the instant case the appellant was dependant on the land for livelihood. Secondly that the first respondent had included the appellant on the sale agreement he made for the sale of the land. The argument is that he did this because he knew that the land was family land.

Mr Murumba submitted for the second respondent that the law applicable is the **Land Act** as it stood in 1999 where its Section 39 requires that the written

consent of a spouse must be produced before such land was sold. He submitted that to qualify as family land the spouse must be resident on the land. In this case she was not. The land was in Kabatogote while the family was resident in Ahumugwogwi. That the said land was not family land. He relied on **Lamulati Nakanwagi Vs. Haji Asumani Jumba C.S. No 18 of 2005.**

As this is a first appeal, this Court must subject the entire body of evidence to a fresh scrutiny and arrive at its own conclusions bearing in mind that it has not seen the witnesses testify. Each ground must be proved on a balance of probabilities.

In this case the appellant admits she was resident away from the suitland. The land was in Kabatogote village while the family lived in Ahumugwogwi village both found in Kyanamira Sub County. There is a distance of a few kilometres between the two pieces of land. The land originally belonged to her husband who inherited it from his father in the 1980s. The husband had sold the land to the second respondent in 1999 with payment made in two instalments. A sale agreement was executed on payment of each instalment. The first was made in 1998 and had a provision for the appellant to sign but she has never signed this agreement. The second was in 1999 but the appellant was not included this time. The second respondent apparently took possession of the land immediately although he fenced it much later in 2007 and it was then that the plaintiff filed the suit in the lower court claiming that the land was family land.

Secondly it has not been proved on a balance of probabilities that the plaintiff was deriving sustenance from this land. It is the case for the plaintiff that the family is educating their children paying school fees at the university in spite of this sale. The family also has several other pieces of land that the plaintiff continues to farm. The family has continued to educate their children despite the sale of the land.

The law applicable here is the Land Act as it stood in 1999.

S. 39 (1) (c) (i) of this Act provides,

No person shall—

(c) give away any land inter vivos, or enter into any other transaction

in respect of land—

(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;

The spouse must seek the consent of the other spouse before a sale is made in respect of land where the family is resident and derives sustenance from. Clearly for the restrictions in this section to apply all three conditions must be met before land is considered family land, that the plaintiff must be a spouse; must ordinarily reside on the suitland with their spouse; and must derive sustenance from the land. It is not that the presence of one of these grounds is sufficient for land to be described as family land.

The section was considered in the case of **Lamulati** (supra) which agreed with the above laid out conditions.

In this case although the plaintiff and the first respondent were spouses they did not live on the suitland. An essential element of the preconditions required for land to be deemed family land is missing. It was therefore not obligatory that the first respondent obtain the consent of the appellant before any sale of the land was made.

For this reason the first ground of appeal fails and effectively disposes of the appeal as whatever the findings on the second ground will not alter the finding that this was not family land.

In the result this appeal stands dismissed with costs.

Dated at Kabale this …..**28th…** day of October 2015

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MICHAEL ELUBU

JUDGE