THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 029/2014

(Arising from Ruk Civil Suit 8 of 2013)

AHIMBISIBWE EMMANUEL :::::::::::::: APPELLANT

VERSUS

KHASOSO BYRONE :::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an Appeal against the Judgment and orders of **HW SANDE BEN DUNCAN** Magistrate Grade I delivered at Rukungiri on the 5th day of December 2014.

The background is that the appellant, **EMMANUEL AHIMBISIBWE,** was the plaintiff and the respondent, **BYRON KHASOSO,** the defendant in a civil suit filed at the Rukungiri Chief Magistrates Court.

The appellant/plaintiff filed a suit against the then defendant praying for orders that the defendant/respondent be declared a trespasser and a permanent injunction issue against him. The suit land in contention is located at Plot 10 Nyabitete in Buyanja Sub County. It was the appellant's contention that he had been given the land by one Wilson Khasoso and has been in occupation from 1975 to date. That the defendant had entered the land and cut down trees and the plaintiffs crops claiming ownership which the appellant rejects.

The respondent rejects the appellant's assertions and set up a counterclaim. The respondent states that the appellant is a brother of his late father Wilson

Khasoso who died in 1981. That the deceased left the land to appellant to use for sustenance and obtain school fees. He was to return it to the deceased persons children when they were of age. The respondent alleges, as a beneficiary of Wilson Khasoso's estate he is entitled to the land and the appellant should be ordered to give vacant possession to the respondent.

The learned trial magistrate believed the respondent and entered Judgment in his favour. The appellant being dissatisfied with that judgement filed this appeal.

The appellant filed four grounds of appeal. The parties have however, without the leave of this court, argued a different set of grounds. The respondent protested but still went ahead to put in arguments in rebuttal. In light of that this Court will adopt the new grounds of appeal. They are:

1. That the trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at the wrong conclusion which occasioned a miscarriage of justice
2. The trial magistrate erred in law and fact when he held that the appellant was a caretaker to the suit land despite the overwhelming evidence that the suit land was donated as a gift inter vivos to the appellant by the late William Khasoso
3. The trial magistrate erred in law and fact when he ignored the major contradictions in the defence case and went ahead to hold that the suit land formed part of the estate of the late William Khasoso without giving reason.
4. The trial magistrate erred in law and fact when he ignored the long period that the appellant had lived and utilised the suit land.

Of note is that this is a first appeal and as such this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witnesses and should make due

allowance in that respect (see ***Selle Vs. Associated Motor Brad Company (1968) EA 123, Uganda Breweries Limited Vs. Uganda Railways Corp S.C.C.A. No. 6 of 2001).*** I am mindful that the standard of proof in a civil case of this nature is on a balance of probabilities.

The parties have argued Grounds 1 and 4 jointly. I will follow the same order.

1. **That the trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at the wrong conclusion which occasioned a miscarriage of justice**
4. **The trial magistrate erred in law and fact when he ignored the long period that the appellant had lived and utilised the suit land.**

Counsel for the appellant argued that the Trial Magistrate held that PW 3 and PW 4 were not present when the land was given to the appellant. However the plaintiff's witnesses PW 1 and PW 2 were present and testified to that effect. Counsel argued that the law provided that no multiplicity of witnesses is required to prove any fact.

Counsel argued farther that the land must have been given to the appellant as a donation and not for him to hold as a caretaker because the appellant was too young in 1975 to have acted as a caretaker. The more plausible position therefore is that he received a donation.

It is also submitted that the fact that the land was given to the appellant is not in contention. What is disputed is the purpose the land was given. The defendant's witnesses stated that the land was given to the appellant to help him with his studies DW1 and DW2 state so. It is also submitted for the appellant that the land belonged to him and that the respondent was only trying to grab it basing himself on the fact that when it was gifted to the appellant no documentation was made. None the less the respondents' argument that the plaintiff was a

caretaker is not proved. Farther the respondent's witnesses all agree that the respondent had been in occupation since 1975 and that he had entered upon the land with the consent of the then owner Wilson Khasoso. To that end therefore the appellant was a lawful occupant within the meaning of S. 29 (1) of **the Land Act** and for that reason has security of tenure.

The respondent opposes the appeal. It is the contention of Counsel for the respondent that that it was stated by DW 1 that the land was left to the appellant's mother with the appellant as a caretaker. That PW2, DW1, DW 2, DW 3, DW 4, DW 5 and DW 6 all confirm that the appellant lived with his mother and one Anne (a step sister of the respondent).

It is argued that the claim made by the appellant that the land was gifted to him is unbelievable. Besides there being no documentary evidence of the gift inter-vivos all the witnesses the appellant relies on give hearsay testimony and were not present. These are PW 3, PW 4 and PW 5. So there is no evidence that Khasoso gave out the land to the appellant during his life time.

Counsel for the respondent disputes the contention made by the appellant's Counsel that the appellant gave valuable consideration for the land in form of serving the late Wilson Khasoso and milking his cows. He contends that this is evidence given from the bar and is not anywhere on record.

He also argues farther that DW 1, DW 2, and DW 6 all stated that the land was being jointly cultivated by both the appellant and the defendant.

It is also the contention of Counsel that the evidence one PW 5 Prisca should be treated with caution as she is a witness with a motive. She states that she is awaiting the outcome of the suit to determine her way forward.

Turning now to the merits of these first two grounds, it is clear that the appellant has been in physical possession of the suit land. It is the evidence of the appellant that one Wilson Kasoso, his elder brother, was bequeathed the land by

their late father Musa Ndyanga, in 1974. He then orally gifted the appellant his share of the land for use to obtain school fees.

He also relies on the testimony of PW 2 who claims to have been the other person present at the time the gift was made.

The respondent disputes these claims by the appellant. Firstly the respondent was a minor of 9 years old in 1975 which is the year the gift is alleged to have been made. It is his evidence that the appellant was instructed to utilise the land for the upkeep of one Anna Kembabazi, a daughter of Kasoso Wilson and the appellant. It was not given to the appellant to keep.

The appellant's claim is that he was orally given the land. PW 2, his father's sister, Eva Tinkasimire, says she was present at the time. The respondent on the other hand relies on his mother. She is the widow of the deceased Wilson Kasoso and told the court that her late husband, the original owner of the suitland, told her he gave it to his mother to be utilised by her in bringing up the plaintiff and Anna Kembabazi [daughter of Wilson Kasoso from another person not being PW 2, his wife]. The plaintiff is a younger brother of Wilson Kasoso. It was when their mother passed away that the plaintiff laid claim to ownership of the land.

The deceased grandmother lived with Anne Kembabazi who has testified that her grandmother, before she passed away, told her that the land on which they lived was held by her pending the children of Wilson Kasoso attaining maturity.

I have compared the two versions. I note that it appears that there was no conflict between the appellant and respondent in the grandmother's lifetime. In my view this is because at the time it was assumed that ownership was not in dispute. That the land was held in trust for Wilson Kasoso's children.

In addition, the plaintiff, according to DW 6 Stanley Turytemba, did not bring up the question of the gift at the time of the death and burial of Kasoso in 1991.

The only reason he did not do so, in my view, is because it was not necessary. Ownership was held in trust of the respondent and his siblings.

On the whole and for these reasons above I reject the evidence of the plaintiff. It was not possible for the land to be given to a 9 year old boy as a caretaker, when his mother was alive and apparently in good physical health.

Lastly the appellant could not be described a lawful occupant within the meaning of S. 29 of **the Land Act**. Lawful occupant under that section provide for persons falling within the confines of the description and relating to registered land. The suitland here is not registered land. That notwithstanding and for avoidance of doubt, even if the land had been registered the appellant would not fall within the perimeters of a lawful occupant. The long period for which he had lived on the land, as can be seen from the foregoing evidence was because he was, along with his mother, caretaking the land on behalf of the respondent and his siblings.

Looking at the evidence in its totality, the balance of probability tilts in favour of the ownership of the respondents' family and not the appellant because I found the evidence of DW1, DW 2 and DW5 more credible than PW 1 and PW 2. There is a consistency to the respondent evidence which, on a balance, resonates as plausible.

2. **The trial magistrate erred in law and fact when he held that the appellant was a caretaker to the suit land despite the overwhelming evidence that the suit land was donated as a gift inter vivos to the appellant by the late William Khasoso**

The submission of Counsel for the appellant is that DW 1 and DW 2 testified showing that the land was left to the appellant for the appellants own benefit and cited pages 24, 25 and 26 as proof.

As I have already found in Ground 1 and 4, the appellant was never given the suit land as a gift. The evidence of DW 1 and DW 2 relied does not support any such contention. At pg 22 of the record DW 1 states that his father told the appellant to pass the land over to them when they need it. He repeated it on Pg 24 in cross examination. Then DW 2 at page 26 and 28 stated the same thing. DW 5 at pg 42 stated that the land belongs to Khasoso and she was told so by her late grandmother with whom she lived up to the grandmothers death.

In the result there is no merit in this ground of appeal.

In the result this ground must fail.

3. **The trial magistrate erred in law and fact when he ignored the major contradictions in the defence case and went ahead to hold that the suit land formed part of the estate of the late William Khasoso without giving reason.**

The appellant has pointed out contradictions in the evidence on record about where the appellant lived when the land was given to him or for what purpose.

What is not in dispute is that the land was given to the appellant to care take. He later turned around to claim a gift. In the result I do not find the contractions pointed out to be material. They do not go to the root of the matter and should be considered minor.

This ground accordingly fails.

In light of the foregoing this appeal stands dismissed with costs. The orders of the trial court stand confirmed.

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Michael Elubu

Judge

14.09.2017