

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

CIVIL APPEAL No. 037/2012

(Arising from Kisoro Land Claim No. 1 of 2008)

NDIMUBANZI YOHANA APPELLANT

VERSUS

1. KABAGAMBE
2. RWAMPABUKA RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, NDIMUBANZI YOHANA, filed this Appeal against the Judgment of **HW KATUSHABE PROSSY**, Magistrate Grade I, delivered in Kabale on 23rd day of July 2012.

The background to this appeal is that the appellant is the younger brother of the 2nd respondent. The 1st respondent is a son of the 2nd respondent. Ndimubanzi filed a claim against the two respondents for land situate in Kisoro town council and Nyakinama Sub County all in Kisoro district.

The appellant's claim is that the land belongs to him as it was left to him by their late father, Rwasangabo. Some pieces were a marriage gift, others were for looking after their father in times of sickness. The appellant's father lived with him as their mother had passed away in 1964. Rwasangabao passed away in 1982. The appellants' case is that the respondents entered upon this land in 2003 and destroyed his kraal, then harvested maize and trees.

Secondly the appellant contends that he has several brothers who are said to have given a power of attorney to the 1st respondent to care take their land. His argument is that these brothers left Kisoro in the 1980s and have never returned. Additionally, that their father had given these brothers their share which they then sold it off.

The respondent's case on the other hand is that the appellant is a brother of the second respondent and an Uncle of the 1st respondent. He was living and staying with their father, Rwasangabo, before he passed away. The respondents contend that they all contributed to caring for their father and therefore the appellant did not do it exclusively. After the death of Rwasangabo, the family land that had not already been given out as marriage gifts remained undistributed as the four younger brothers Kwitonda, Munyaribanje, Ndagijimana and Nyibizi were not given land by their father's death. In these circumstances the land was held by the elder brothers on behalf of the absent younger brothers who used it on a rotational basis with each cultivating it for a year.

With time however the appellant started claiming all the land as his. In 2003 the named younger brothers drew up a power of attorney giving the 1st respondent responsibility to care take their land pending a final determination on the matter. The respondent entered upon the land in that capacity. They deny the appellants claim.

The learned trial Magistrate believed the respondents case and entered judgement in their favour. The appellants being dissatisfied with her finding filed this appeal with 5 grounds namely:

- i. The trial magistrate erred in law and fact when she concluded that the suit property was family property and ordered for the sharing of the same whereas this was not an issue or in contention by any of the parties.
- ii. The trial Magistrate erred in law and fact when she concluded that the plaintiff did not explain how he acquired the suit land.
- iii. The trial magistrate erred in law and fact to conclude that all the four strips of land were family land whereas the only eye witness mentioned one strip only in Nyabirehe – Gishegyera.
- iv. The trial magistrate erred in law and fact to conclude that there was no trespass yet the claim of right was only on one strip of land and the other three on which they trespassed were not claimed by the defendants.
- v. The trial magistrate erred in law and fact for not considering the limitation period and that the land at Nyabirehe-Gishegyera was only being cultivated by the plaintiff alone and not by 3 people.

This is a first appellate court which is enjoined by law to subject the evidence to a fresh scrutiny and, on a balance of probability, come to its own conclusions based on the law and evidence (see **Uganda Breweries Ltd vs. Uganda Railways Corporation SCCA 6/2001[unreported]**).

I shall deal with the ground two first.

Ground ii

The trial Magistrate erred in law and fact when she concluded that the plaintiff did not explain how he acquired the suit land.

The contention of counsel for the appellant is that Ndimubanzi Yohana got the first piece of land from his father as a marriage gift. That the other pieces 3 pieces were given to him by his father in appreciation for taking care of him. It is argued by the appellant that the respondents did not prove their alleged ownership of the land. That at the time the power of attorney was made the elder brothers in custody were not present in order to state ownership of the land.

I have examined the evidence on record. The appellant states that there are four strips of land in dispute. The first consisting of 7 strips in Nyabireme, he acquired when his father was about to die; the second also in Nyabireme consists of 2 strips and was a marriage gift from their father; a third piece in Gishegyera is also a marriage gift; a fourth piece consisting of three pieces was also a marriage gift.

When Rwansangoma (the father and grandfather) died, three brothers were left in charge of the land. They were Rwampabuka Daniel, Rukarangacuro Zephania and Yohana Ndimubanzi. Rwampabuka was a party to the suit as second defendant but passed away before the hearing commenced. Rukarangacuro was DW 2. The testimony of defence witnesses is consistent in stating that the four younger brothers Kwitonda, Munyeribanje, Niyibizi and Ndagijimana were not present at their father's burial prompting the decision to leave the land to the elder brothers to hold and cultivate it on a rotational yearly basis. The plaintiff had on occasion in the past claimed the land as his. The respondents opposed him. He sued them before the Grade II Court but lost.

For the reason that the plaintiff claimed the land as his, three of the four younger brothers made a power of attorney leaving the 1st defendant in charge of it. Rwampabuka and Rukarangacuro were present and consented. The plaintiff was absent. With respect, it is therefore not true as Counsel for the appellant argues that the elder brothers were not present when the Powers of Attorney were concluded.

Rwampabuka who is older than the plaintiff also disputes the contention that the land was a marriage gift or given in appreciation for looking after their father. He

also stated that the younger brothers were shown their land when they came after the fathers burial. He adds that the land is not part of the marriage gifts because they received their marriage gifts when they married.

From this it can be seen that the balance on the evidence shifts towards the defendants as holding the land in trust for the four absent brothers. The plaintiff is claiming ownership over land that he and the other two elder brothers were keeping for the four younger brothers.

This ground of appeal fails.

Ground i and Ground iv

- ii. **The trial magistrate erred in law and fact when she concluded that the suit property was family property and ordered for the sharing of the same whereas this was not an issue or in contention by any of the parties.**
- iii. **The trial magistrate erred in law and fact to conclude that all the four strips of land were family land whereas the only eye witness mentioned one strip only in Nyabirehe - Gishegyera.**

The submission is that the trial Magistrate was wrong to hold that the suitland was family land. The appellant avers that the contention was ownership.

I am in agreement with this submission. The land law as amended defines family land.

S. 38A (4) of the **Land Act** as amended states,

‘In this section –

“family land” means land –

- (a) on which is situated the ordinary residence of a family;
- (b) on which is situated the ordinary residence of the family and from which the family derives sustenance;
- (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or
- (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;’

Clearly the land here does not fall within the parameters of the definition above. What is clear however was that the Court was to determine the ownership of the land. From the Courts holding in Ground ii above the plaintiff is not the owner of the land, it belongs to the four absent brothers.

Regarding the four strips the claimant himself listed four strips in his amended claim for the land. The power of attorney shows that the land given to the four absent brothers are four strips of land claimed by the plaintiff/appellant. With respect therefore it is not correct to state that the respondents only disputed the ownership of one piece of land.

In the result ground ii succeeds in part and ground iii is dismissed/fails.

Ground v

The trial magistrate erred in law and fact for not considering the limitation period and that the land at Nyabirehe-Gishegyera was only being cultivated by the plaintiff alone and not by 3 people.

Regarding Limitation the appellants submitted that the appellant had been in possession since 1961 for some pieces and 1982 for others. PW 2 and PW 3 had seen the appellant in possession for more than 30 years.

It is also the defence evidence that the three elder brothers used the land on a rotational basis. That DW 4 had litigated with the appellant over the same piece of land.

It would therefore appear that there was no adverse possession or the respondents did not envisage any adverse possession and when they did it was challenged. This matter has been litigated before the LC Courts, Grade II and before the Grade I leading to this appeal.

In the result there is no indication that it was caught by limitation or that the respondent s sat on their rights for more than 12 years.

The fifth ground fails.

In the result this appeal is dismissed with costs.

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Michael Elubu

Judge

14.10.2017