

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja**

CIVIL APPEAL NO. 116 OF 2016

**(Arising out of the Chief Magistrates Court of Iganga Holden at
Bugiri Civil Suit No. 011 of 2012)**

1. SARAH KAFUKO

2. KAITA FRED BUYINZA.....APPELLANTS

VERSUS

WERE ROBERT.....RESPONDENT

**JUDGMENT ON APPEAL
BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

- 1] This is an appeal from the decision of His Worship Komakech Kenneth Magistrate GD1 Bugiri delivered on 30/09/2016. The appeal was presented by Esarait, Adikini & Co., Advocates and opposed by M/s Aketch & Co., Advocates. Both counsel filed written submissions as directed.

Background

- 2] The facts admitted by the lower court are that during 1989, Gideon Were the respondent's late father purchased land measuring approximately three acres in Budunyi Village, Bufunda Parish, Buluguyi Sub County, Bugiri District (hereinafter referred to as the suit land) from the

late Zebuloni Odoi and an agreement of purchase was made. Subsequently, Gideon Were gave the land to the respondent his son, and also handed over to him the sale agreement. The respondent took possession and developed the suit land and remained there peacefully until 2012 when the late Balabye Stephen and the appellants encroached on part of it and the 1st appellant built a house on it. The respondent successfully initiated prosecution of the late Balabye in criminal trespass and eventually sued the appellants in civil trespass.

- 3] In defence to the suit, the appellants averred that the suit land was family land that they held under customary tenure.
- 4] In his judgment, the trial magistrate believed the facts presented by the respondent. He held that both appellants were not aware of the transaction between Gideon Were and Zebuloni Odoi. He was convinced that the respondent is the rightful owner of the suit land which borders that of the late Balidawa, husband of the 1st appellant and which the appellants now occupy. He entered judgment for the respondent awarding him vacant possession and a permanent injunction against the appellants restraining them from further trespass. The appellants being

dissatisfied with that decision presented this appeal which is presented on five grounds that:-

- i. The trial Magistrate erred in law and occasioned a substantial miscarriage of justice in holding that the appellants did not have title to the suit land.**
- ii. The trial Magistrate erred in law and occasioned a substantial miscarriage of justice in failing to hold that the 2nd appellant is an administrator of the suit land which belonged to her late husband Balidawa with whom she produced children within the said land and who was buried in the suit land after his demise in 2002.**
- iii. The trial Magistrate erred in law and occasioned a substantial miscarriage of justice in failing to subject the evidence on record to proper scrutiny at the locus in quo by the elders and independent witnesses.**
- iv. The trial Magistrate erred in law and occasioned a substantial miscarriage of justice at locus when the respondent rightly denied the developments on the suit land which belonged to the appellants i.e. houses and plantations on the suit land and by failing to believe this carried a defeat of justice.**
- v. The trial Magistrate erred in law and fact when he believed the forged sale agreement, which sale**

agreement was invalid and that grossly carried a defeat of justice.

Duty of the Court

- 5] My powers and limits as a first appellate Court are well documented. I must reconsider the evidence and evaluate it to the extent that I draw my own conclusions. In doing so, I am not bound necessarily to follow the trial Court's findings of fact if it appears that the court clearly failed in some way to take account of particular circumstances and probabilities. I hasten to add that my conclusions may be limited by the fact that I did not see or hear the witnesses and due allowance shall be made in that regard. See for example **Panyda Vrs R (1957) EA 336** and **Selle & Anor Vrs Associated Motor Boat Company Ltd & Anor (1968) EA 126**.
- 6] I noted that in the first instance, the respondent sued three defendants, Balabye Stephen, Sarah Kafuko and Buyinza Fred. During the proceedings of 20/9/2012, it was reported that Balabye had passed on. On the request of Aketch counsel for the plaintiff (now respondent), Balabye was struck off the record and the matter proceeded against Kafuko and Buyinza only and the plaint was accordingly amended. It was thus wrong for the trial

Magistrate to have written and delivered his judgment as if Balabye was still a party to the proceedings. It was a careless commission, which none the less does not affect the outcome of his decision. Likewise, it was superfluous for the appellants to have re-introduced Balabye Stephen (a deceased person) into the appeal especially when there was already an order striking him off in the lower Court. A deceased person cannot institute or defend a claim or appeal. I accordingly strike Balabye Stephen off the appeal in line with Order 1 rr 10(2) CPR.

- 7] In addition, I note that although the 2nd defendant was at the trial identified as Buyinza Fred yet this appeal was filed by one Kaita Fred. In the proceedings (at page 24) DW2 was referred to “Ilta Fred” alias Buyinza. Before delivery of judgment, counsel Eserait explained that the correct person suing as 2nd appellant is Kaita Fred Buyinza an amendment was accordingly made to the memorandum of appeal.
- 8] Counsel for the appellant chose to argue the grounds of appeal which he rephrased as one. In their response, respondent’s counsel followed the sequence of the grounds as framed in the appeal. I will address the grounds as they

appear in the memorandum but combine those that are related to each other.

Resolution of the grounds of appeal:-

Grounds 1 and 5

- 9] I have carefully perused the judgment and having done so, I am satisfied that the Magistrate exhaustively evaluated the evidence of all parties and their witnesses before coming to the conclusion that that the 1st appellant had no claim to the suit land.
- 10] It appeared not to be in contention that the suit land at some point before 1989 been part of a larger portion owned by the late George Wabwire, the father of the late Balidawa, the 1st appellant's estranged husband. This was a fact attested to by the plaintiff's witnesses and DW1, 2 and 3 alike. On an unspecified date, George Wabwire sold a portion of his land (i.e. three acres which is the suit land) to the late Zebuloni Odoi and the latter then sold his interest to George Were the respondent's father on 21/3/1989. An agreement of sale to that effect was admitted into evidence as **PEX2**.
- 11] Before coming to his decision, the Magistrate recounted the evidence of PW1 the respondent. His testimony is that he received the suit land as a gift from his father Gideon

Were and that at the point he received the gift, Were also handed over to him the agreement of purchase by which he acquired the suit land from Zebuloni Odoi. The Magistrate believed the testimony that at one point the suit land belonged to the late George Wabwire and after Wabwire and Balidawa died, no other family member remained on it. He continued that Balidawa was alive when Odoi sold the land to Were, and that Wabwire the former owner of the suit land and his son Balinda were present and even witnesses to the abovementioned sale agreement.

- 12] The trial Magistrate also believed the respondent's testimony that the late Balidawa owned land adjacent to the suit land and that at the time of filing the suit, it was being used by the defendants/appellants. He explained that at the time he received the suit land as a gift, it was Balidawa using the adjoining land before his death and that Balidawa had never in his lifetime ever raised any issue with him over the same. The trial Magistrate equally believed the testimony that at some point, the 1st appellant separated from Balidawa and moved out of his home. According to the respondent, she migrated to Bugoto where she remarried and even had children. She was to return in 2012, entered and occupied one acre of

the suit land where she built a house and begun cultivating on it. He insisted that the appellants were unable to explain their claim to the suit land which he deemed as trespass.

- 13] Much of that evidence was supported by the respondent's witnesses. PW2 David Were explained in addition that he was present when Gideon Were was purchasing the land and was even a witness to the agreement of purchase. He stated also that Balidawa died in 2000, but that before his demise, the 1st appellant his wife left their home in 1986 and relocated to Bugoto. That she returned in 2012, uprooted the boundary marks on the suit land, constructed a house and settled on it. He further explained that Wabwire and Balidawa had land adjoining that of the respondent upon which Balidawa was buried in the family burial ground. He emphasized that Balidawa and all his family members were not present when Odoi sold the suit land. PW3 offered similar evidence and added that he too was a witness to the agreement of purchase, and his name appears thereon although him and PW2 did not actually sign.
- 14] PW4 Ssemwero Erizephan likewise supported the above evidence. He stated further that the 2nd appellant who was

not born by the time Were purchased the suit land, currently occupies the portion that remained after George Wabwire sold a portion to Odoi and also that the 1st appellant never attended Balidawa's burial. Significantly, he testified that he was the author of the agreement of purchase. He mentioned the seven other people present at the point of sale. On the other hand, PW5 Odongo Alex supported PW1 when he testified that the late Odoi was his son who at some point owned the suit land but had before his demise sold it to Gideon Were, the respondent's father. That after selling the suit land, Odoi shifted to Bugandawere he died and was buried.

- 15] The agreement of sale dated 21/3/1989 was allowed into evidence without contest and marked **PEX2**. It indicates that PW4 drafted it in Luganda and an English translation is available. It mentions that Zebuloni Odoi sold his land in Budunyi Nsango for a sum of Shs. 35,000. Several neighbours are mentioned including Balida S/o and George Wabwire. It indicates that Zebuloni Odoi as vendor appended his signature and PW4 also signed as a witness and as he who drafted the agreement PW2 testified that he saw Odoi append his signature. The witnesses include PW2, 3 and 4. None save for PW4 appended their signatures. It was never raised or proved at the trial that

the sale agreement was a forgery and there was no request by the appellant's counsel to have it investigated. There would be no justification for the Magistrate to make a finding that the agreement was forged, invalid or required investigation.

- 16] I note that the trial Magistrate equally considered the evidence advanced in defence of the claim. The 1st appellant testified that the suit land belonged to Balidawa her late husband who died in 2000 and not 2002 as stated by the respondent and his witnesses. That it was ancestral land that had been inherited and all her grandparents were buried here. She denied knowledge of Odoi or the fact that her father in law had ever sold land to the respondent's father. She admitted ever leaving Balidawa's home and that during her absence, her father in law and husband continued occupying the suit land. On his part, the 2nd appellant stated that the suit land belonged to his father who had likewise inherited it from his grandfather. He admitted to have begun construction thereon in 2011 and he too denied knowledge of Odoi or the respondent's claim to the suit land.

- 17] In my view the appellant's evidence significantly paled against the strong evidence offered by the respondent and

his witnesses. They were both aware that the land at some point belonged to Wabwire, the 1st appellant's father in law but not much else. They indicated no knowledge of Odoi or the fact that he had bought a portion of land from Wabwire, the portion which was later sold to Odoi and then Were, the respondent's father. The appellants also denied the existence of the clear agreement of sale to that effect. There would be no fault by the Magistrate in his finding that the agreement was valid and represented the transfer of interest from Odoi to Were. Nothing was out forward to challenge that agreement.

- 18] As explained by all the respondent's witnesses and even Kafuko herself, at some point the 1st appellant left the home of Balidawa in 1986 and remarried in Bugolo. The 2nd appellant was not yet born in 1989. Both appellants were not present when Wabwire sold part of his interest to Odoi or when Odoi sold to Were. In fact, the evidence also seemed to indicate that Balidawa himself was not present when Wabwire sold a portion of his land to Odoi. I am thus persuaded as the Magistrate was that the appellants would not have known the details of the sale or that only a portion of Wabwire's land remained for his ancestors to claim and occupy.

19] I am also persuaded that when the 1st appellant returned, either under the mistaken belief that the land still belonged to Balidawa or deliberate fraudulent action, she occupied part of what is the suit land taking it for ancestral land belonging to her late husband's family. The 2nd appellant who was not born at the point the suit land was changing hands could not have known much about its history. His testimony is that both him and his late brother Balebye Stephen constructed on the land owned by their father Balidawa one year after his death in 2011. This would be on the undisputed portion that Webwire left and which was adjacent to the suit land.

20] Although the 1st appellant stated that she had no knowledge that criminal proceedings had ever been instituted against the late Balabye, PEX 1 was proof that such proceedings ever existed. The respondent claimed that he sued Balabye in trespass in the Bugiri Chief Magistrate's Court and Balegye conceded to the charge. It is clear in the record of the Bugiri Court in Criminal Case No. 233/2012 that Balabye was the accused who on 9/5/2012 pleaded guilty on a charge for which he was sentenced to community service. That evidence would lend credence to the respondent's testimony that Balabye who returned with the appellants onto the suit land conceded

that he was in trespass thereof. Since Balabye's purported claim to the suit land was similar to that of the 1st appellant, (as a beneficiary of the late Balidawa's estate) then the 1st appellant would equally be in trespass on the suit land.

21] The appellants' witness did not give evidence that would strongly support their testimonies. DW4 Bakuseka was aware Wabwire ever sold part of his land to Alex Adongo and Wakwaka and that when he died, he left his wives and children on the suit land. This was only partly correct since I am persuaded that Wabwire retained only part of his land and sold the rest to Odoi. In fact Bakuseka gave erratic evidence that the 1st appellant remained on the suit land and left it only at very short intervals to do business. Conversely, the 1st appellant did admit that she left the suit land for some years and only returned in 2011 after Balidawa's death.

22] DW4 Okumu Pataleo was also not very helpful. He was not aware when Balidawa's heir was installed or the fact that the 1st appellant had other children other than those she had with Balidawa. He was not even aware that she had at some point relocated from the suit land or that she constructed a house on her return because he stated that

she remained in the house the late Balidawa her husband left her.

23] All the respondent witnesses while testifying in Court mentioned the people owning land immediately surrounding the suit land on the four sides. The identities of those people may have varied but all witnesses were consistent that Balidawa and the appellants owned land directly to the north of the suit land. That evidence was repeated during the locus visit and confirmed by the Magistrate. He drew a sketch plan indicating that the appellants were the neighbors to the north, PW4 Simwero to the East, a swamp to the south, and Bagaga to the West.

24] In his testimony at the locus, the 2nd appellant testified that Balidawa was buried across (from the suit land) because he had a home “across the suit land”. It was thus correct for the Magistrate to find that Balidawa was buried not on the suit land but on his land which borders the suit land to the north, which is land the 2nd appellant currently occupies. His conclusion that the defendants rent out a portion of their land is supported by the evidence of DW5 who admitted that he rented out part of

the land owned by the 1st appellant to grow rice and that he is in his second season of harvest.

25] From the above facts, I would have no reason to fault the Magistrate on his finding that the sale agreement was valid and that the respondent had proved that he is the rightful/lawful owner of the suit land.

26] Accordingly grounds 1 and 5 fail.

Ground 2

27] I agree with respondent's counsel that this was a redundant ground of appeal. The claim at trial was for trespass on land. It never called for a determination of the administration of the late Balidawa's estate. No evidence was adduced that the 1st appellant is an administrator of Balidawa's estate or, that the estate is under administration at all. If at all, evidence of the 1st appellant having powers of administration should have been matters raised in counter claim and none was ever filed. Accordingly, the Magistrate would have no justification to address this issue in the judgment. It can likewise not be raised on appeal and not even as a new matter, for it was a fact not present but unknown to the appellants during the proceedings of the lower court.

28] Ground two accordingly fails as well.

Grounds 3 and 4

29] The submissions by respondent's counsel on the third and fourth ground, are valid. The purpose of visiting and taking evidence at the locus in quo is to check on the evidence given by witnesses called to testify in Court and not to fill any gaps. The Magistrate had no powers to consider evidence by "elders" and "independent witnesses" at the locus. It was a correct position not to consider or include in his judgment such evidence.

30] Further, at the locus, the respondent did admit that the developments and crops on the suit land belonged to the appellants. DW5 himself did admit that he had rented land from the 1st appellant for growing rice and was into the second harvest season. That evidence was confirmation that the 1st appellant was in possession of the suit land, which was adverse possession to the respondent's claim to the same land. Once the Magistrate confirmed and believed that evidence, he was correct in holding that that collectively amounted to acts of trespass rather than proof of ownership by the appellants.

31] Accordingly, grounds three and four fail as well.

32] In summary, the appellants have failed to prove any of the grounds raised. Accordingly, the appeal fails and is dismissed with costs to the respondent.

I so order.

Signed

EVA K. LUSWATA
JUDGE
22/1/2020