

**KAUDA KENNETH**  
**SEGAWA COSMAS ::::::::::::::::::::APPELLANTS**

**VERSUS**

**MUGERWA DAVID ::::::::::::::::::::RESPONDENT**



**Evidence of the parties at trial.**

PW1 testified that he knows the Defendants as his children and that he has sued them for refusing to vacate his commercial house on Kampala-Gulu Highway. That they used to be his tenants and later stopped paying the rent. He reported the matter to the probation officer and they were given 1½ years to vacate his premises which, they refused to do. That he is an elderly who needs some money to sustain him.

In cross examination, he stated that the Probation Officer did not tell the Appellants to stay in the building to look after their siblings. However, he confirmed that they were born in the house and that the land is customary land belonging to his father. He denied that the house was a matrimonial home and instead stated that the matrimonial home was in the village.

PW2 testified that that the Plaintiff brought the Defendants to court because they took over his house which is on Gulu Kampala Highway. That it is the home of the Plaintiff and the Defendants were staying there with their mother and father. That the home belongs to the Plaintiff. In cross examination, he confirmed that they were born in the place and does not know if the Plaintiff was giving aid to the Defendants or not.

PW3 testified that both the house and the land belong to the Plaintiff. In cross examination, he confirmed that the Plaintiff provides for the young ones, that they have been having disputes as a family and cannot confirm the year the house was built. He also confirmed that he could not remember if the mother of the Defendants contributed towards the construction of the house or not. He stated also that the house was residential but it was now a commercial house.

PW4 testified that he is the mother of the Plaintiff and the Defendants are his grandchildren. She stated that the Defendants have refused to leave the home of the Plaintiff in Kigaraga village. That it was their home, her and the husband and when the husband died, the Plaintiff came and started staying there. That when the Plaintiff grew up, he went and built in Kigaragara where the dispute is and that that the Defendants were still young and were staying with their father. That the Plaintiff has not chased the Defendants but he wants to use his house. That the Defendants were given pieces of land to stay by the Plaintiff and the brother.



She further testified that the 1<sup>st</sup> defendant has constructed a house on the portion that was given to him and is staying on it and at the same time using the disputed house. That it is only the two Defendants who are staying on the disputed house which belongs to the Plaintiff. In cross examination, she confirmed that the siblings of the Defendants are not staying in the disputed house and cannot confirm if the Plaintiff is paying fees for the young children or not. She further stated that their grandfather's home is still there and could not confirm if their mother participated in brick laying.

DW1 testified that the Plaintiff is his father having brought him to court for trespassing onto his land upon refusal to pay rent. He testified that they were born on the suit land, and grew up from there. That the Plaintiff left their mother for another woman and built another house. That the land their father is evicting them from is family land. That they are six children and that the Plaintiff is not giving them any support as they are looking after themselves. That in 2005, the Plaintiff came and removed doors from the houses in which, they were staying upon which they reported to police. That after mediation they agreed that they retain part of the house for the tenants and stay on another portion. In cross examination, he stated that family land is where people stay and that they were born on that land.

DW2 stated in his evidence that they were born on the land and that it is their home. That in July 2015, the Plaintiff came and removed doors from the houses and told them that he had sold the house and that they should vacate it. That they reported to police and referred the matter to a probation officer who asked the Plaintiff to let them stay. That the Plaintiff should not lie, that they have never trespassed onto the land and have never been tenants of the Plaintiff. That it was the family that gave them plots and not the Plaintiff which plots they are cultivating and that the 1<sup>st</sup> defendant has rentals. That the Plaintiff does not stay with them since 2007 as he went and married another woman in Kigengere village.

In cross examination, he confirmed that he sells charcoal from the Plaintiff's home and that the Plaintiff did not take him to school. He denied that the Plaintiff has never told them that he wants to renovate since they would have vacated the house.



DW3 stated in her evidence that the Plaintiff is the father of her children and that the Defendants are her children. That they are in court over a plot of land and house. She stated that the Defendants have never been tenants to the Plaintiff and that he chased her from home and went to start a new family.

That in 2015 the children came to her saying their father had chased them from the house and she advised them to go to police upon which, they were referred to the probation officer. That the probation officer advised that they should stay there unless he finds them alternative accommodation.

That they used to stay in grass thatched house and then built a commercial house where the Defendants are staying. That the Plaintiff does not give any assistance to her children in whatever form and that she is the one taking care of them. That the land in question is family land and that is where she left her children. In cross examination, she stated that she was the wife and the children are hers and that the Plaintiff has never given the children a portion to stay.

The trial Magistrate gave judgment in favour of the Plaintiff, ordered for the eviction of the Defendants from the house and ordered the Defendants to relocate to their plots as given to them by their clan members within two months.

Dissatisfied with the judgment of the lower Court, the Appellants lodged this appeal on the following two grounds;

1. That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 002 of 2017 that the suit plot of land belongs to the Plaintiff and not a family property from which the Appellants (Defendants) and their minor siblings were residents.
2. The learned trial Magistrate erred in law and fact when she failed to consider the appellant's evidence of occupation of the suit land since birth as a family holding together with their minor siblings and in the result issued an eviction order against the Respondent's children as trespassers on the suit family residential property.



The Appellants prayed that this appeal be allowed and an order be made declaring that the disputed land in Civil Suit No. 2 of 2017 belongs to the Appellants and their minor siblings as their residential family holding. He also prayed that the costs of this appeal and in the lower court be provided for.

### **Representation**

At the hearing of this appeal, the Appellants were represented by Mr. Simon Kasangaki of Kasangaki and Co. Advocates. M/s Lubega, Babu & Co. Advocates represented the Respondent. Both counsel filed written submissions in support of and against the appeal.

### **Consideration of the Appeal**

#### **Ground one**

On the first ground of the appeal, it was stated that the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 002 of 2017 that the suit plot of land belongs to the Plaintiff and not a family property from which the Appellants (Defendants) and their minor siblings were residents. Counsel for the Appellant, Simon Kasangaki submitted that the trial Magistrate failed to properly evaluate and weigh the evidence on record hence arriving at a wrong conclusion. He argued that the evidence of the Respondent and his witnesses was severely riddled with contradictions and inconsistencies not worthy of any credit and or probative value. That PW1 stated in his evidence that the Appellants were tenants who refused to pay him rent upon which the Probation Officer gave the Appellants only one and a half years to vacate the house. That in cross examination, the Respondent stated that the Appellants were born in the disputed house and later stated that it was not a matrimonial house but a commercial house moreover PW2 and PW3 confirmed that the Defendants were born in that suit house as a matrimonial house.

Counsel for the Appellants further argued that the evidence of the Appellants was generally not rebutted or challenged in cross examination. That it was ably established in evidence that the Appellants and their minor siblings are resident on the suit land as their residential holding. Further that they were born and raised in the suit property as their matrimonial house together with their mother a one Katusabe Grace (DW3). That it was also born out of evidence that the Appellants



have never rented the suit house from their father and that it was also established that the Respondent has never given them any land elsewhere and he does not provide any care or support to his children of whatever kind since he left that family. The Probation and Welfare Officer handled their family dispute and resolved that the Appellants and their minor children stay on the disputed house.

Counsel for the Appellants implored court to take their version on the basis that it is a settled law principle that where a party fails to challenge evidence, that evidence, is acceptable as true. He referred court Justice Karokora, (J.S.C.) decision in **Habre International Co. Ltd vs. Ebrahim Alarakhia Kassim & Others, Civil Appeal No. 4 of 1999 (S.C), (Unreported), at pp. 108-9,** Counsel for the Appellants further submitted that the suit property is a matrimonial house in which all the Appellants stay, were born and raised as children of the Respondent. Later their father separated with their mother a one Katusabe Grace, and went in Kigengere village and married another woman with whom he is staying and that he is aiming at evicting them from the suit house in which they have direct interest.

He further argued that the issue of how court should determine a contributing spouse's share in joint property has come up in several cases before the High Court and the Court of Appeal. In **Kagga vs Kagga, High Court Divorce Cause No. 11 of 2005, (unreported),** for example, Mwangusya, J. observed as follows:

**“Our courts have established a principle which recognise each spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services.....when distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first Respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important that that made be the Respondent.”**

He also referred court to **Julius Rwabinumi v Hope Bahimbisomwe SCCA No. 10 OF 2009.**

Counsel further stated that in the instant case, it was established that the suit house was built during the time the Appellants' mother cohabited with the Plaintiff's as a spouse and hence Katusabe



Grace, is entitled to a share in the house and her children since she made a contribution to the same.

Counsel for the Respondent submitted that the trial Magistrate properly and adequately evaluated the evidence adduced at trial and thus reached the correct decision. That he did not err when he declared the Respondent the rightful owner of the disputed plot/house and that the Appellants are trespassers.

Counsel for the Respondent stated that the Appellants' claim that the plot/house was their family house with their mother is superfluous. That their mother separated with the Respondent and now that the Appellants being of majority age and not dependent children, are not protected by Section 39 (i) and (ii) of the Land Act Cap 227 as amended. That no evidence was adduced at trial by the Appellants to prove that they were dependent children.

He further stated that it was not disputed that the Respondent who is the father of the Appellants does not live on the suit plot/house and neither does the mother of the Appellants as they are all living in separate ways.

Counsel for the Respondent submitted that the appellant's occupation of the land on the homestead of and in the house built by their father as children did not constitute any right of ownership to the Appellants. It is their father who allowed them to stay on his land and when he withdrew his consent for their stay, they continued to occupy and stayed in defiance. That this kind of occupation does not qualify any person to be lawful occupant.

Counsel for the Respondent cited the case of **Runda Coffee Estate Ltd vs Ujagar Singh (1966) EA 564** as cited in the case of **Faraj Maharus Vs J.B Martin Galss Industries & Ors Civil Appeal No. 130 of 2013** where it was held that:

**“it is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed by the licensee as has been well said over 100 years ago, it creates nothing substantial which is assignable”.**

He further that under **Section 29(4) of the Land Act** as amended expressly bars any licensee from making any adverse claim to the land he/she is in possession so as to be considered bonafide or lawful occupant. The Appellants took possession/occupation of the plot/house merely by virtue of being children and they are mere licensees or at worst squatters thereon. That the relationship with their father created a mere personal obligation without conferring any interest in the land for them to benefit.

He further submitted that it is on record that each of the Appellants have separate lands which, they are occupying and utilising by virtue of being sons of the Respondent considering that even one of the Appellants has raised a permanent structure thereon and another is renting his out.

He finally submitted that the Appellants have no legitimate claim to the property of their father. Their claims over their father's property when still living is an act of greed and allowing their claim is to encourage laziness of mature and able children to keep their father in desperate and poverty situations.

#### **Duty of the first appellate court**

The duty of this court as the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. See: **Pandya v R [1957] EA, 336 and Father Narsension Begumisa & others v. Eric Tibekinga, SC Civil Appeal No. 17 of 2002 (unreported)**. It is therefore incumbent on this court to re-evaluate the whole of the evidence adduced and come up with its own decision.

**Section 101(1) of the Evidence Act** places the onus to prove his interest in the suit land on the Appellant. This burden must be discharged on a balance of probabilities.

The Respondent testified that the suit house located on Kampala-Gulu Highway belonged to him. On the other hand, the Appellants claimed that the suit house is a family house where they were born and raised with their mother (DW3) and siblings. The Appellants argued that the disputed



house is a matrimonial house in which, they have direct interest and not a commercial building as claimed by the Respondent.

The question would be whether the disputed house is a matrimonial house since the children grew up in the said house and claim that their mother contributed to the building of the house in question. Matrimonial property was defined in the case of **Julius Rwabinumi and Hope Bahimbisomwe Civil Appeal No. 10 of 2009**. It was stated that;

**“Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contributed to”.**

It should be noted that for property to be termed under matrimonial property, the parties should have contracted a marriage that is legally recognised under the laws of Uganda as a valid marriage. Matrimonial property is for the benefit of the parties to the marriage and to some extent minor children, who are staying with the couple or with one of the parents. In the instant case, it is clear there was no valid marriage as submitted by the Appellants’ counsel between the Respondent and the mother of the Appellants. Counsel for the Appellants submitted that while they were cohabiting, that is when the commercial house was built and hence she cannot claim any interest in the disputed house unless she proves joint ownership of the suit house or her contribution to the construction of the property which she was not able to do in the circumstances of the case.

The Appellants quoted the case of **Kagga vs Kagga, High Court Divorce Cause No. 11 of 2005**, (unreported), for example, Mwangusya, J, as he then was, where the judge recognised the contribution of spouses in the acquisition of family assets to support their claim to the suit property. This case is, however distinguishable from the instant case considering that the Respondent herein was not married to DW3 and cannot be termed as a spouse.



The Respondent relied submitted that the Appellants cannot claim benefit of Section 39 of the **Land Act** as no evidence was adduced at trial to prove that they were dependent children. I agree with the Respondent that the suit property cannot be said to be family property since sufficient evidence has been adduced to prove that neither the Respondent nor the mother of the Appellants is staying in the disputed house but only the Appellants who insist on refusing to vacate the house, even after achieving majority age. The Appellants were given portions of land and considering they are adults, they should be able to fend for themselves. The Appellants claimed that there were minors staying in the disputed house and that the Respondent deserted them however there was no evidence adduced to prove that they actually stayed on the suit land and that the Respondent was not taking care of them.

Section 39 of the Land Act gives a spouse security of occupancy on family property. Family property according to section 39 of the Land Act is defined to mean land on which is situated the ordinary residence of a family and inclusive of where the family derives sustenance.

In the instant case, it cannot be said that the disputed house is a family property as sufficient evidence has been adduced to show that the Respondent built the house which was occupied by the family members which the Respondent later left and that DW3, mother to the Appellants also left the same. This is property solely owned by the Respondent who has the power to deal with it in a way that pleases him and the stay of the Appellants in the suit house did not confer any interest to them.

I would refer the Appellants as mere licencees. In the case of **Musisi Gabriel vs Edco Limited and another Civil Appeal No. 52 of 2010**, the court stated that the cardinal principles of licencees are that a licensee is simply authorised to do a particular act or series of acts upon the other's land without possessing any estate therein. Secondly, it is founded on personal confidence and is generally not assignable or transferable. Thirdly, no proprietary interest passes to the licensee, who is merely not a trespasser; and fourthly, it is revocable at will by the property owner.

In the instant case, the Appellants were allowed to stay in the disputed house by the Respondent and hence they were granted the right to use the disputed house without becoming entitled to



exclusive possession of the same. No personal interest was granted to the Appellants by allowing them to stay in the disputed house as rightly found by the trial magistrate, they became trespassers the moment they refused to vacate the disputed house.

## **Ground 2**

The learned trial Magistrate erred in law and fact when she failed to consider the appellant's evidence of occupation of the suit land since birth as a family holding together with their minor siblings and in the result issued an eviction order against the Respondent' children as trespassers on the suit family residential property.

The issue as raised almost covers what has already been submitted to in the first ground of the appeal however it will be briefly discussed.

Counsel for the Appellants submitted that had the trial Magistrate taken stock of the Appellants' evidence, she would have found that the suit plot is a residential family holding of the Plaintiff, his spouse Katusabe Grace and their children (Defendants and their minor siblings). That she would also not have found them as trespassers thereon and would not have issued an eviction order against the Respondent' children.

He further argued that PW1, PW2, PW3 and PW4, confirmed that the Defendants and their siblings were born and raised in that suit property. That it was in 2005 when the Plaintiff went and removed the doors of the house in which the Appellants were staying claiming he had sold the house which prompted the Appellants to report the matter to police. That it was then that the probation officer advised that the Appellants with their siblings (minors) remain and utilize the suit family residential property.

Counsel for the appellant cited the case of **Lanyero Ketty v Okene Richard & Hellen Abwola Civil Appeal No. 0029 of 2018** where the High court considered facts similar to the instant matter. The wife had separated with the husband and the husband sold property which was occupied by the children to a third party. Court found that it was family property which the husband could not lawfully sale. Relating this precedent to the instant appeal despite the fact that the appellant's



mother separated with the Respondent, the Respondent cannot evict the children from their matrimonial holding. That the learned trial Magistrate erred in law to so hold and prayed the finding of the trial Magistrate be set aside.

Counsel for the Respondent submitted that the Appellants were not trespassers from the beginning since the plot/house was their father's house and that is where they grew up from but trespass came about when the Appellants became of age and were asked to vacate the premises by their father but they refused. From that time, they became trespassers.

It is trite law that when one is declared a trespasser he is stopped from interfering with the property of the person declared the rightful owner.

That it is their prayer that the 1<sup>st</sup> and 2<sup>nd</sup> ground of appeal be found in the negative and that the Honourable court be pleased to dismiss this appeal for lack of merit with costs awarded to the Respondent.

As already discussed, DW3 in the instant case was not legally married under the Laws of Uganda. The Appellants' counsel quoted the case of **Lanyero Ketty v Okene Richard & Hellen Abwola Civil Appeal No. 0029 of 2018**, however, the said case is distinguishable from the instant one in many respects as in the latter case, the parties were married and were never legally separated whereas in the present case the parties were cohabiting and hence not legally married and so cannot fall under section 39 of the Land Act as amended. Besides, the Appellants are not children anymore. They are adults and can only benefit from the property of their parents or father if they choose to give it to them or upon death in accordance with the Succession Act.

The property in question cannot be said to be a residential family holding and the Appellants, who are trespassers, are advised to work towards attaining their own properties. Ground two of the appeal fails.



**Decision**

The appeal is dismissed with costs of appeal to the Respondent and I confirm the decision of the lower court.



Gadenya Paul Wolimbwa

**JUDGE**

06/07/2020

The judgment will be emailed to the parties on 6<sup>th</sup> July 2020.



Gadenya Paul Wolimbwa

**JUDGE**

06/07/2020