THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 59 OF 2023

(Formerly MSD Civil Appeal No.44 of 2019)
(Arising from Chief Magistrate's Court of Hoima at Kagadi, C.S No. 26 Of 2016)

1. TIBAMWENDA FELESTA
2. KATUSABE JANE
3. NYANJURA MARION
4. KABARULI LEONIA
5. BASALIZA ANDREA
6. BOOMERA JOSEPH :: APPELLANTS

VERSUS

1. MWEBAZA GASTAVAS
2. MUGISA WILLIAM :: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and orders of **H/W Niyokwizera Emmanuel** Grade 1 Kagadi, Hoima Chief Magistrate's court dated the **16th of September 2019.**

[2] The facts of the Appeal are that in the court below, the Plaintiffs/Appellants sued the defendants/Respondents vide **Civil Suit No.26 of 2016,** jointly and severally for trespass, vacant possession of unregistered land (kibanja) **situated at Nyamiti along Hoima-Fort Portal Road**, a permanent injunction, general damages and costs of the suit.

[3] It was the Plaintiffs/Appellants' case that they are children and beneficiaries of the estate of their late **Joseph Kaahwa** who owned unregistered land located at Nyamiti village along Hoima-Fort Portal Road, which he, the **late Kaahwa** inherited from his father (their grandfather), a

one **Jabara Yosefu** alias **Tambala.** They averred that before the death of their late grandfather, **Jabara Joseph,** he bequeathed land to his four sons including the plaintiffs' father, **Joseph Kaahwa**. That they were raised on the suit land which they have utilized by building thereon home steads, planting crops, eucalyptus trees, jack fruits and mangoes.

[4] That without any color of right, the defendants who are sons of the late **Bujwera Samuel,** trespassed on the plaintiffs' customary land by claiming ownership so as to be compensated by **Uganda National Roads Authority** (UNRA), under the compensation scheme of the people to be affected by the Hoima-Kyenjojo Road construction. The plaintiffs averred that as a result of the actions of the defendants, they have suffered anguish, mental torture and loss of earnings from failure to utilize the suit land.

[5] On the other hand, the Defendants/Respondents in their amended written statement of Defence and Counter claim denied the Plaintiffs' claim and averred that the disputed kibanja (mailo land) does not form part of the estate of the late **Kaahwa.** That there are clear and known boundaries of the plaintiffs' kibanja that do not include and/or form part of the disputed suit land. The defendant further averred that the suit land belonged to their father **Samuel Bujwera**, who acquired the same in 1985 and bequeathed it to the 1st Defendant/Respondent as the elder son.

[6] The Defendants/Respondents contended that the late **Samuel Bujwera**, paid ground rent in form of **"Nvujo".** That on the 6th day of August 1970, he bought bibanja including the disputed kibanja from a one **Ferdinand Mabanga** an Administrator of the estate of the late **Yowana Nsubuga** and a transfer was duly executed to that effect. That later in 1987, the late **Samuel Bujwera** was entered on the land register in Fort Portal land office as the registered owner.

[7] The trial Magistrate considered the evidence before him and concluded that the suit land belonged to the 1st Defendant/Respondent. The trial court found the plaintiffs/Appellants as trespassers because they had constructed a temporary house thereon. He accordingly dismissed the Plaintiffs/Appellants' case with costs and ordered for the demolition of

their semi-permanent structure on the suit land and that the compensation by UNRA be made to the Defendants/Respondents.

[8] The Plaintiffs/Appellants were dissatisfied with the judgment and orders of the trial Magistrate and appealed to the High Court on the following grounds as contained in their memorandum of appeal.

1. *The learned trial Magistrate erred in law and fact when in evaluation of evidence failed to consider and/or ignored the evidence of the Appellants and thereby came to a wrong conclusion that the Appellants had not proved to the required standard that they owned the suit land.*
2. *The learned trial Magistrate erred in law and fact when in evaluation of evidence found that the Appellants' father planted trees in the land of Bujwera Samuel and did not pay Busuulu for the suit land and thereby came to a wrong conclusion that the suit land did not belong to the Appellants.*
3. *That the learned trial Magistrate erred in law and fact when he failed to find that the Appellants by adverse possession and long use of the suit land had acquired a protectable interest in the suit land as bonafide and/or lawful occupants.*
4. *That the learned trial Magistrate erred in law and fact when he held that the Appellants were trespassers on the suit land.*
5. *That the learned trial Magistrate erred in law and fact when he held that the certificate of title on which the Respondents derive interest was lawfully procured.*
6. *That learned trial Magistrate erred in law and fact when he ignored major inconsistences in the respondents' case but nonetheless found for the Respondents thereby prejudicing the Appellants.*
7. *That the learned trial Magistrate erred in law and fact when he failed to find that the Respondents' counter claim was time barred thereby prejudicing the Appellants.*
8. *That the learned trial Magistrate erred in law and fact when he failed to conduct the locus in quo according to prescribed principles and law thereby occasioning a miscarriage of justice to the Appellants.*

Counsel legal representation

[9] The Appellants was represented by **Counsel Simon Kasangaki** of **M/s Kasangaki & Co. Advocates, Masindi** while the Respondent was represented by **Counsel Stephen Nabigumba** of **M/s P.Wettaka Advocates & Legal Consultants**. Both counsel filed their respective submissions as directed by this court.

Duty of the 1st Appellate court

[10] This being an appeal from the Magistrate Grade 1 as a court of first instance to this court, it is settled law that as a first appellate court, this court is under the duty to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate and make its own conclusion, while bearing in mind the fact that this court never observed the witnesses under cross examination so as to test their veracity; **Sanyu Lwanga Musoke Vs Sam Galiwango, SCCA No.48/1995.**

Consideration of the Appeal

[11] Counsel for the Appellants argued grounds 1,2,3 and 4 consecutively and grounds 5,6,7 and 8 separately. This court shall follow suit while considering and determining this appeal as all the first 4 grounds relate to how the trial Magistrate evaluated the evidence before him.

Grounds 1,2,3 & 4: Evaluation of evidence

[12] Counsel for the Appellants submitted that the Appellants were the children and beneficiaries of the estate of the late **Joseph Kaahwa** and therefore, acquired a protectable interest in the suit land as bonafide/or lawful occupants by adverse possession and/long use of the suit land.

[13] It is the Plaintiffs/Appellants' case as per the testimonies of the Plaintiffs/Appellants, that they were born and found their father, **Yosefu Kaahwa** and grandfather **Jabara** on the suit land. That the Appellants' family have semi-permanent houses, fruit trees (jack fruit, ovacados, mangoes) gardens and eucalyptus trees on the suit land they reside on.

[14] Counsel argued that the Appellants' grandfather **Jabara** bought the suit land in 1937 and started growing thereon cotton, bananas, coffee and mangoes. That the Appellants' father, **Yosefu Kaahwa**, grandfather, **Jabara** and some of their siblings, who include, **Mariam** and **Tereza** were buried on the suit land. He contended that the Respondents do not have any developments on the suit land. That the Respondents' father, the late **Samuel Bujwera** did not own any land in **Nyamiti village** where the suit land is situate. That the said **Samuel Bujwera** instead, had land in **Serusa village** and never claimed the suit land during his lifetime nor was there any dispute on the suit land before his death.

[15] He concluded that the suit land has been in occupation and use by the Appellants until when the Respondents in 1999 trespassed onto their land, destroyed their crops and went ahead to claim compensation from UNRA for that part expropriated for the road construction.

[16] Counsel for the Respondents on the other hand, submitted that the 1st and 2nd Respondents are the children/beneficiaries and co-administrators of the estate of the late **Samuel Bujwera** and counter claimants/defendants in **C.S No.26 of 2016** where they were jointly sued for trespass by the Plaintiffs/Appellants. That their late father **Samuel Bujwera** purchased equitable interests from the Buganda Land Board by then and later purchased legal interest from the administrator of the late **Nsubuga John** called **Mabanga,** which legal interest covered the suit land where the Respondents' father acquired a certificate of title, which covers over one mile of the entire land including the land in dispute and where the Appellants are currently having a homestead. The Respondents provided evidence of all the documentary evidence which included; the purchase agreement, receipts of payments of the "busuulu" and "envujjo" (ground rent), a certificate of title and the WILL of their late father. The said documents were never challenged by the Appellants during the trial. The Appellants had no documentary proof or otherwise to support their case.

[17] Counsel submitted therefore, that there was overwhelming evidence to hold the Appellants as trespassers on the suit property and therefore, justified the trial Magistrate's finding and holding that the 1st defendant/Respondent was the rightful owner of the suit property having acquired the same under the WILL of his late father **Samuel Bujwera.** That one of the Appellants forcefully

constructed a temporary house in the absence of any consent and permission from the Respondents, thus an act of trespass by the Appellants.

[18] The perusal of submissions of both counsel reveal in agreement that the original land lord of the land in dispute was a Muganda by the names of **Nsubuga John (Yowana)** who upon his demise, passed on the estate to **Mabanga Nsubuga** who took over the administration of his estate and was succeeded by **Kizito Mabanga**.

[19] According to **Muhereza Wanamirembe** (PW5) aged 74 years, he knew both parties as children of the late **Yozefu Kaahwa** and **Samuel Bujwera** respectively and though he did not know exactly how the late **Joseph Kaahwa** acquired the suit land, he found him using that land and his children inherited it from him. They have houses, very big mango trees, ovacado trees and other small trees, eucalyptus trees which are nearby the road and a mutoma tree. During cross examination, he explained thus;

> *"The land lord was **Nsubuga.** When he died he passed on the title to **Mabanga** who was the administrator, later on he died... **Kizito Mabanga** is the rightful owner of the land. I do not know whether any rent (busulu) is paid to **Kizito Mabanga**. He is still alive... I know the title is in the names of **Kizito Mabanga.** I knew it. He was left to be the heir."*

The above was the same position of **Tereza Tinkasimire** (PW4), the widow of the late **Joseph Kaahwa** and **Rwakaikara Benezeri** (PW3), aged 101 years, who corroborated each other that the suit land belonged to the Appellants.

[20] On the other hand, **Mwebaza Gastavas** (DW1), brother to the 2nd Defendant/Respondent testified that their late father **Samuel Bujwera** got the suit land from **Nsubuga Yowana** in 1957 and that the said **Samuel Bujwera** used to pay Busuulu (Envujo) to him and later in 1970, purchased it from the land lord's heir **Mabanga.** After buying the land in 1987, that he processed its title as **Plot No.23 Block 50 (**Buyaga-Bunyoro) measuring 48.24 hectares. That the Plaintiffs/Appellants had land thereon as kibanja at the time their father processed the title.

[21] Upon consideration of the evidence of both the parties and law regarding the burden of proof as provided by **S.101 of the Evidence Act,** the trial Magistrate found that both the plaintiffs and the defendants owned a kibanja interest on

the land of **Nsubuga.** However, that their bibanja were separate and distinct from each other and this was arrived at upon visiting locus when he found that though the plaintiffs testified that they buried their relatives on the suit land, the place where their deceased relatives are buried was found separate and distinct from the land in dispute. That therefore, although the Plaintiffs/Appellants' kibanja is on the title of the late **Bujwera,** it is not near the road but rather it stopped on the Mango and eucalyptus trees and the trench below. He established that the disputed portion of land belonged to the 1st Defendant/Respondent.

[22] The paramount issues before court as framed by the trial Magistrate were;

a) Who of the parties own the suit land.

b) Whether there was trespass on the suit land by either party.

c) What remedies are available to the parties.

[23] **S.101 of the Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person. The burden of proof in civil proceedings therefore lies upon the person who alleges to prove his/her allegations. In this case, burden of proof was squarely on the Plaintiffs/Appellants to prove the ownership of the suit land and the alleged trespass and the Defendants/Respondents to prove their counter claim.

[24] In their pleadings, the plaintiffs in **paragraph 4(b)** and **(e)** claimed as follows:

> *"4 (b) The plaintiffs' late father owned an unregistered land (kibanja) by way of customary ownership through acquiring the same land from the plaintiffs' grandfather a one **Jabara Yosefu** at Nyamiti along Hoima-Fort portal road."*
>
> *4 (e) Ever since they were born, the plaintiffs have been utilizing the suit land by planting crops, eucalyptus trees, jack fruits, mangoes and using the same as a homestead. All their belongings are on the suit land."*

[25] In evidence, the Plaintiffs and their witnesses testified that the Plaintiffs have houses/homesteads, tree crops (jack fruits, ovacados, mangoes), eucalyptus trees and graves of their relatives. This is what defined their bibanja holdings on the suit land on which the father of the Defendants the late **Samuel**

Bujwera acquired the certificate of title. It was therefore incumbent on the Plaintiffs during locus visit to demonstrate to the trial Magistrate the above developments on the suit land as proof of their claims. Indeed, at locus, **Basaaliza Andrea** (PW2) told the trial Magistrate that at the mango tree is where the Appellants' father's house, **Kaahwa,** was located and also showed him the eucalyptus trees and their houses. Then he told the trial Magistrate that their father **Yosefu Kaahwa** and grandfather **Jabara** were buried on the suit land. He however never identified to court their graves.

[26] On the other hand, **Mugisa William** (DW2) demonstrated by showing and indicating to the trial Magistrate the boundaries of their portion of land as being from the trench to the mango tree as per his father's WILL, that being the portion that was given to **Mwebaza Gastavas** (DW1). That it started from the mango tree to the eucalyptus trees up to the trench. This is the portion that the trial Magistrate decreed to the 1st defendant, **Mwebaza Gastavas** (DW1).

[27] It is noted however that the trial Magistrate could have adjudicated this suit better at locus by enabling and directing the parties to indicate and point at the boundary marks that demarcated the bibanja holdings of the parties especially the Defendants/Respondents who had conceded that the Plaintiffs/Appellants had a kibanja on their title which they claimed in their WSD that it had clear and known boundaries that did not include the disputed suit land and reflect the same in a sketch map as a demonstration of a just decision.

[28] When I perused the locus notes/proceedings and the sketch map of the suit land as drawn by the trial Magistrate, I found that he did not record any findings of the locus visit that would justify his conclusion decreeing the suit property to 1st Defendant/Appellant, See the guidance of Sir Udo Udoma C.J (as he then was) in **Mukasa Vs Uganda (1964) EA 698 at 700.**

[29] As a result of this omission in the way the trial Magistrate conducted the locus in quo, this court instead of ordering for a retrial which would in essence delay the determination of this appeal further, decided to revisit the locus in quo itself. Upon this court revisiting the locus, again, it was apparent that the Appellants could not locate the graves of their father **Yosefu Kaahwa,**

grandfather **Jabara** or any of their siblings for court to see on the disputed portion of land.

[30] It was instead evident that the disputed portion of land which was found along the Kagadi-muhurro Tarmac Road had a permanent house of a one **Amulinda Godfrey** which was purchased from a one **Ketty Tibaijuka** (A retired police officer) who in turn had purchased it from **Bujwera,** the father of the defendants. This court is of the view that the fact that this house of **Amulinda,** being in the belt of the disputed portion of land, then, that is sufficient evidence that the portion of the land belonged to the defendants.

[31] The graves therefore must have been on another portion of land but not the one in dispute as rightly found by the trial Magistrate. It follows therefore, despite the deficiencies at locus, the trial Magistrate was able and rightly in my view, to discern the Plaintiffs/Appellants' kibanja holding from that of the Defendants/Respondents and concluded that the Plaintiffs/Appellants' claim did not extend to the portion occupied by the Defendants/Respondents. The Plaintiffs/Appellants did not therefore prove their claim and the trial Magistrate rightly dismissed it.

[32] The Appellants' conduct of forceful occupation of the suit land by entry and building of houses without the consent of the Defendants/Respondents amounted to trespass within the meaning of **Justine Lutaaya Vs Stirling Civil Engineering, SCCA No.11/2002.** The Plaintiffs/Appellants' claim of adverse possession appear to hold no water. For possession to be adverse, it must be proved to be continuous, **Nambulu Kintu Vs Ephraim Kamuntu (1975) HCB 221.** In this case, the Appellants did not adduce such evidence of continuous possession of the suit portion of land.

[33] As a result of the foregoing, I find that the trial Magistrate properly evaluated the evidence before him and arrived at a correct position that the suit portion of land belonged to the defendants. Grounds 1,2,3 and 4 are in the premises found to be devoid of any merit. They accordingly fail.

Grounds 5: The learned trial Magistrate erred in law and fact when he held that the certificate of title on which the Respondents derive interest was lawfully procured.

[34] The burden was on the Appellants to prove that the certificate of title on which the defendants/Respondents derive interest was unlawfully procured since the general principle of the law is that "he who alleges must prove", **Ss.101-103 of the Evidence Act.**

[35] In this case, it appears an agreed position between the parties that the Appellants have a kibanja on the Respondents' father's land. In their pleadings, the Appellants/plaintiffs never pleaded either that the certificate of title held by the Respondents' father was unlawfully acquired or adduce any evidence at trial to prove such a claim. Certificate of title is conclusive evidence of ownership save for fraud, **S.59 of the RTA.** In the present case, in the absence of any pleading and evidence that the title was obtained by fraud or with illegality, I find this ground of appeal devoid of any merit and it accordingly fails.

Ground 6: That the learned trial Magistrate erred in law and fact when he failed to find that the Respondents' counter claim was time barred thereby prejudicing the Appellants.

[36] In the counter claim, the Respondents/Counter claimants pleaded as follows:

> *"Para.17: In 2001, the named plaintiffs led by the 5th plaintiff started trespassing on the disputed kibanja wherein the defendants' father asked them to leave the kibanja in vain.*
>
> *Para.18: Recently, in 2010, there was a contemplated government scheme to construct the Hoima-Kyenjojo Road...*
>
> *Para.19: When your counter claim respondents learnt of the said compensation in the year 2015, Nyanjura Marion, the 3rd plaintiff built a semi-permanent house in the middle of the formerly disputed eucalyptus trees of 1964 while in anticipation of compensation."*

[37] As can be seen from the above, it is clear that the Respondents/Counter claimants' cause of action accrued around 2001-2015 with the Appellants/Counter Respondents' acts of trespass, to wit, occupation of the disputed portion of land and construction of a semi-permanent house thereon without the Respondents/Counter claimants' consent. In this case, the suit was filed in 2019. So, even if one was to compute time on the grounds that the action was for recovery of land as counsel for the Appellant put it, the Respondents/Counter claimants would still be in time since the time fixed by **S.5 of the Limitation Act** is 12 years from the date on which the right of action accrued.

[38] Going by trespass of which I find this case to be, in **Eridad Otabong Waima Vs A.G, SCCA No.6/1990 [1992] V KALR** at **p.4**, it was held:

> *"Where a period of limitation is imposed it begins to run from the date on which the cause of action accrues. When, therefore there is for instance a trespass, libel, unlawful arrest, false imprisonment... time begins to run from the act itself, or if there be several acts in respect of each act from the date of its commission."*

Trespass as a continuing tort, the cause of action continues until the wrong ceases.

[39] In the instant case, the Appellants' claims that the Respondents' counter claim is time barred because both **Tibamwenda** (PW1) and **Basaaliza** (PW2) stated in their evidence that trespass began in 1999 does not make their claim of trespass time barred since trespass is a continuing tort. Besides, as **PW1** explained, the tort of trespass of 1999 was in regard to the entire land and not that particular portion of land in dispute in the instant case.

[40] In the premises, I find this ground of appeal devoid of any merit and it accordingly fails.

Ground 7: That the learned trial Magistrate erred in law and fact when he ignored major inconsistences in the Respondents' case but nonetheless found for the Respondents thereby prejudicing the Appellants.

[41] Counsel for the Appellants in his submissions did not identify for this court the inconsistences and the contradictions referred to in this ground of appeal. Indeed, upon perusal of the Respondents' evidence, I have not been able to find any inconsistences or contradictions warranting court's attention for purposes of ensuring that justice is done to the parties.

[42] As a result of the above, I find this ground of appeal devoid of any merit and it also accordingly fails.

Ground 8: That the learned trial Magistrate erred in law and fact when he failed to conduct the locus in quo according to the prescribed principles thereby leading to a miscarriage of justice to the Appellants.

[43] This court having found that there were omissions by the trial Magistrate as regards the record of the locus in quo proceedings, including a clear sketch map depicting the dispute, this court re-visited the locus in quo.

[44] It is my view that by this court re-visiting the locus in quo cured any errors, omissions and or deficiencies that may have been occasioned by the trial Magistrate. In the premises, I find this ground without merit and it accordingly fails.

[45] All in all, the entire appeal is found lacking merit and it is in the premises dismissed with costs.

Dated at Hoima this **3rd** day of **November, 2023.**

Byaruhanga Jesse Rugyema
JUDGE.