

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MUBENDE  
CIVIL APPEAL NO.35 OF 2023  
(ARISING FROM CIVIL SUIT NO. 081 OF 2020)**

**KIGOZI EXPERITO**

**APPELLANT**

**VERSUS**

**1. ADIDA KIGUNDU  
2. SAIT KISEGERWA**

**RESPONDENTS**

**BEFORE: HON. JUSTICE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

This Appeal arose from the Judgment of a Magistrate Grade 1 of Mityana delivered on June 13, 2023. The Appellant sought a declaration that he is the owner of the suit Kibanja located at Ddanya LC1, Busimbi Division, Mityana Municipality District (hereinafter referred to as “**the suit land**”), that the Respondents are trespassers on the suit land, an eviction order, a permanent injunction and costs of the suit.

**Background**

The Appellant claimed to have acquired the suit land on 13<sup>th</sup> March 1999 from Mpaka John and started utilising it immediately without any interference. That to his dismay, in the year 2020 the Respondents occupied the suit land which prompted him to try to stop them, but they instead threatened him with violence.

He further averred that upon reporting to the relevant authorities, the Respondents were charged with threatening violence but due to the Respondents continued unlawful interference with his possession, he sought the intervention of Court through the suit.

On the other hand, the Respondents through their joint written statement of defence denied trespass and put up a defence of claim of right in the suit land having obtained ownership from their father Muhammed Musoke Lukwago.





They averred that the Appellant acquired a piece of land adjacent to theirs. That the Appellant has never occupied the suit land but rather it is the Respondents who have a home on the suit land and it has clear boundary demarcations with the land the Appellant acquired from Mpaka John. They prayed for dismissal of the suit with costs.

### **Procedural history**

The trial Court framed the following issues for determination;-

1. Who is the rightful owner of the suit land
2. What remedies are available

The Appellant **PW1** brought Kbanda Enoch **PW2**, Kigozi Margaret **PW3** as his witnesses while the Respondents Saiti Kiegerwa and KIGUNDU Adadi testified as **DW1** and **DW2** respectively but also brought Naama John as **DW2**, Ssebagala John as **PW4** and Sserunkuma Rodgers as their Witnesses.

Court relied on the testimonies of witnesses and the late Mpaka John's agreement was admitted as PI D1. Court also made locus visit which formed a fact finding of what was on ground and contrasted it with the testimonies of the witnesses.

Upon hearing the evidence and visiting locus, the trial Magistrate found that the Appellant had planted new boundary marks while the boundary marks mentioned by the Respondents were in tandem with their testimonies. As such, the Appellant was found to have failed to prove his case.

As a result, of the above findings, the trial Magistrate made the following orders in favour of the Respondents;-

1. The Defendants are the rightful owners of the suit land
2. The Plaintiff is declared a trespasser on the suit land
3. The Plaintiff was further ordered to remove the new boundary marks that he planted after the purchase of the suit land





4. A permanent injunction was issued restraining the Plaintiff, his servants, agents, employees and any other person from any further trespass and interference with the Defendant's occupation of the suit land

5. Costs were awarded to the Defendants.

### **Grounds of Appeal**

The Appellant was aggrieved with the decision and Appealed to this Court. The memorandum of Appeal was filed on **10<sup>th</sup> July 2023** with the following grounds;-

1. The learned trial Magistrate erred in law and fact by failing to evaluate all the evidence before Court.
2. The learned trial Magistrate erred in law when she conducted the locus visit in an irregular manner.

The Appellant prayed for orders that:

1. The Appeal be allowed
2. The Judgment of the lower Court be set aside
3. The costs of this Appeal and the lower Court be awarded to the Appellant.

### **Representation**

MS Tebusweke, Mayinja, Okello & Co. Advocates represented the Appellant while Kangaho & Co. Advocates represented the Respondents. Both Counsel filed written submissions with supporting authorities which have been considered but not reproduced.

### **Preliminary Objection.**

This Court has a duty to dispose of any preliminary objections raised by any party to the appeal, at the earliest opportunity as the preliminary objections, if upheld by the Court have the effect of disposing of the whole suit.

**Mukisa Biscuit Manufacturing Ltd V. West End Distributors Ltd (1969)**  
**E.A 696**



The preliminary objection by the Respondents is in respect to the 1<sup>st</sup> ground of appeal, which they objected to for being general and not precise contrary to **Order 43 rules 1 and 2 CPR**.

They prayed that since the Appellant should have clearly and state the kind of evidence that was not considered by the trial Court. They prayed that the ground be struck out for being too broad.

In reply, the Appellant's Counsel argued that in light of the duty of this Court to evaluate the evidence in its entirety, the objection should be overruled and the appeal be determined on its merits.

### **Decision on the preliminary objection**

The 1<sup>st</sup> ground of Appeal is not well framed. It flouts the provisions of Order 43 rule 1 (2) CPR which requires a memorandum of Appeal to be concise setting forth under distinct heads the grounds of objection to the decree appealed from.

In the circumstances, a badly framed ground of Appeal may only be ignored in the interest of doing substantive justice.

**Katumba Byaruhanga V. Edward Kyewalabye Musoke, C.A.C.A No.2 of 1998**

However, in the interest of substantive justice, I over rule the objection since this Court is enjoined to re-evaluate the entire record.

### **Duty of the Court**

It is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusions while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity.

**Sanyu Lwanga Musoke V. Sam Galiwanga SCCA No. 48 of 1995**

I will accordingly bear in mind the duty and legal obligation of the first Appellate Court while resolving this Appeal





## **Consideration by Court**

### **Grounds 1**

The learned trial Magistrate erred in law and fact by failing to evaluate all the evidence before Court.

The trial Magistrate made her decision based on evidence from both sides. Both sides adduced evidence oral evidence and the testimonies of the witnesses were compared with the findings of the locus visit before the trial magistrate made a decision.

It is trite that there is no set format to which evaluation should conform. While the length of analysis may be indicative of a comprehensive evaluation of evidence, the test of adequacy remains a question of substance.

**Francis Sembuya V. Alport Services LTD SCCA No.6 of 1999, Ephraim Orgoru Odongo & Another V. Francis Benega Bonge SCCA No. 10 of 1987.**

In the instant case the Appellant claimed that the Respondents had trespassed on the suit land while the Respondent set up a defence of claim of right which if proved is a total defence to a tort of trespass to land.

Trespass occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land.

**Justine E.M Lutaaya V. Sterling Civil Engineering Ltd, Civil Appeal No.11 of 2002.**

A finding that any of the parties to the suit is a trespasser would render the other the owner of the suit land and therefore answer the first issue in the positive for the latter. The cause of the dispute is the boundary marks which the Respondents allege to have been shifted and replaced with the new and young boundary marks which extended into their father's land. The Appellant lays a claim of ownership of the suit land beyond the old boundaries to the new one.



In order to bring the legal burden home, the Appellant testified that he knows the Respondents as sons of the late Musoke Muhammed Lukwago who trespassed on the suit land he acquired from Mpaka John on 13/11/1999 at a consideration of UGX.200,000/=.

That the witnesses to the agreement included Margaret Kigozi, Lukwago Muhammed and Festo Kasumba.

He testified that the boundaries were included in the sale agreement on the right Musoke Muhammed, Magaret Nalwanda on the upper side Mugenyi on the left and Kasolo but they did not mention the neighbour on the lower side. That the disagreement is with on the side neighbouring Musoke Muhamed's land.

He further testified that the dispute arose when he planted the boundaries two years before. That the Respondents removed the boundaries that were planted with their father and trespassed on half ( $\frac{1}{2}$ ) an acre by planting maize and trees which incident the Appellant reported to police.

In cross examination, the Appellant testified that the new boundary marks added him some land as the old boundaries had completed the boundary. That he planted the new boundaries with the Respondent's father three years before. That he did not complete marking the boundary in the first place because of **scarcity of the items to be used**.

In re-examination, the Appellant testified that he had no disagreement with the Respondent's father.

PW2 testified that the Appellant and the Respondents are neighbours. That between 2003-2004 the Respondent's father hired him land and that the said land shares boundaries with the Appellant's. That at the time of testifying in Court, there were young boundary marks. That PW1 saw him using the land and he does not have any dispute with him.

That a month to the hearing, PW2 went back but the boundary marks had been removed and the 1<sup>st</sup> Respondent was in occupation and he added himself the portion belonging to the Appellant. That PW2 was using the suit land before the demise of the Respondent's father.



PW2 further testified that the 1<sup>st</sup> Respondent cut the boundary marks after the demise of his father. That he did not know whether the Appellant was the owner of the suit land.

PW3 also a wife to the Appellant testified and corroborated the evidence of PW1 regarding the acquisition of the suit land. That at the time of testifying, the 1<sup>st</sup> Respondent had slashed the fence and extended the boundaries.

In cross examination, PW3 testified that the late Musoke bought his land before PW1. That there were no boundary marks and that they planted a fence when Musoke was still alive.

On the other hand, in order for the Respondents to discharge their legal burden, the 2<sup>nd</sup> Respondent (DW1) testified that he knows the Appellant and that their father died in 2015.

That when he started to divide their late father's land by demarcating the boundaries, the Appellant reported them to the LC2 Chairperson of Nakaseta Parish and the decision of the LC 2 was in their favour.

DW1 testified that he saw his late father Musoke utilise the suit land which is about 1 acre.

When cross examined, DW1 testified that there was already an old fence with a barbed wire as boundary marks. That their father had a disagreement with the Appellant on the boundaries between 2013 and 2014 and that their father was murdered in cold blood and the suit land may be the reason for the murder.

That when they cut the bush to make proper demarcations, they discovered that the Appellant had extended the boundaries through the bush and at the time of testifying the Appellant had rented out the suit land.

The 1<sup>st</sup> Respondent (DW2) testified that he knows the Appellant as a neighbour and that he got misunderstandings with the Appellant over the boundaries of the land. That when they slashed near the boundary with the Appellant he claimed that they encroached on his land whereas not because they knew the land and boundaries very well having grown on the suit land.



He further testified that the Appellant reported them to the LC1 and LC2 which Councils resolved the dispute in their favour. That the Appellant reported to Police which closed the file for lack of evidence. He prayed for a locus visit by Court.

In cross-examination, DW2 emphasised the LC 1 and LC2 as the authorities where the Appellant first reported and later at Police where the Appellant reported a case of Criminal trespass and removal of boundaries. He testified that the suit land is part of his fathers Kibanja. He testified that it was Mpaka John who had planted the barbed wire fence for the boundary and that his late father had a path just near the fence.

DW3 testified that he knows the boundaries of the land in issue and that he is among the people who signed of the sale agreement as a witness when Mpaka John was selling land to the Appellant. That when the Appellant reported the Respondents, he noticed that the boundary marks were young yet when the Plaintiff was purchasing the land there was a fence with thorns and they did not plant a new fence since the one in existence was enough.

When cross examined, DW3 testified that there was a fence between the Appellant's land and that of the Respondent's father at the time the Appellant acquired his land. That he last went to the suit land in 2020 and the cattle path is still their just like at the time when the Appellant purchase his land.

DW4 corroborated the evidence of DW2 and DW3 in regard to the existence of a cattle path, new boundary marks (fence) and a disagreement over the suit land between the Appellant and the late Musoke.

He also testified that he participated in putting up the new boundary marks on the instructions of the Appellant upon the Appellant informing him that the late Musoke had given him the suit land.

During cross-examination, DW4 testified that no one was using the suit land at the time when they plated the new fence, that he used to hire the suit land where the Appellant wanted to put the new fence.



That he did not ask the late Musoke whether he had permitted the Appellant to use the suit land.

DW5 corroborated the evidence of DW1 and DW2 that the Appellant reported a case at the LC2 accusing the Respondents of trespass. That when he visited locus in 2020 he saw two boundary marks of Majirikit that were very old and another of Nkoni fence that was still young which the Appellant claimed to know.

That the LC2 concluded in a written judgment that the proper boundary was the old one. That the Appellant was not happy with the decision of LC2 and reported to police. DW5 also corroborated the evidence of DW3 when he testified that the Kibanja had a cattle path next to the old fence.

It should be noted that the Appellants evidence proves that he acquired land from the late Mpaka John however, it is short of proving that the land he acquired goes beyond the old boundaries as observed by the learned trial Magistrate.

The argument that the Appellant did not plant boundaries in 1999 on the land bordering with the Respondent's father because he did not have enough items for purposes of demarcation is far fetched. It is also not possible that the boundary marking items only became available upon the demise of the original owner who had a dispute over the suit land with the Appellant.

It is more believable than not that the Appellant planted the new boundary marks and encroached on the Respondent's late father's land. This can be deduced from the testimony of DW3 who was present in 1999 when the Appellant was acquiring his land and who later participated in the planting on the new boundary marks when he was informed that the Respondent's father had given the Appellant the suit land whereas not.

I therefore do not find any reason to fault the trial magistrate's finding that the suit land belongs to the Respondents who are the sons of the former owner and therefore the Appellant is a trespasser.



The trial Magistrate's evaluation of evidence led her to the right decision and therefore, ground 1 of the Appeal fails.

## **Ground 2**

The learned trial Magistrate erred in law when she conducted the locus visit in an irregular manner.

Irregular means "*not in accordance to law, method or usage; not regular*".

**Blacks laws Dictionary, Bryan A. Garner 11<sup>th</sup> Edition page 993**

Counsel for the Appellant desires this Court to find that the locus visit was not conducted in accordance to law, method or usage and in trying to prove so, he submitted that only DW5 was recalled to testify instead of calling all the witnesses.

Locus in-quo proceedings are intended to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence.

**Mukasa V. Uganda (1964) EA 698 at page 700**

Both Counsel for the Appellant and the Respondents in their submissions stated that court visited locus. The list of attendance shows that all parties attended. The proceedings of what transpired at locus are also on record and a sketch map attached which to me is in tandem with the evidence already given.

It should be noted that the purpose of visiting locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross examined.

**Badru Kabalega V. Sepriano Mugangu (1992) KALR 265**



I find that there is no evidence on record to prove the Appellant's allegation. If there was a mistrial at locus then the parties and their advocates ought to have addressed the same to the trial Magistrate. This ground therefore also fails.

It should be noted that the adjudication and final decision of the suit should be made on the basis of evidence taken in Court and the locus visit must be limited to an inspection of the specific aspects of the case as canvassed during oral testimony in Court and the testing of the evidence on those point.

I do find that the sketch map of the trial magistrate clearly depicts the testimonies of the parties and harnessed the physical aspects of the evidence on record.

Therefore, and in view of what has been outlined, I am unable to fault the trial Magistrate on the conclusions reached. Accordingly, I find no merit in the Appeal and I order as follows:-

- a) This Appeal is dismissed
- b) The judgment and orders of the trial Court are hereby upheld
- c) The costs of this Court and the Court below are awarded to the Respondents.

  
**Moses Kazibwe Kawumi**  
Judge

**21<sup>st</sup> December 2023**