

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

**HCT-16-LD-CA-0006-2023**  
*(Formerly MSD-HCT-12-LD-CA-0042 of 2016)*  
*(Arising from KIB-HMA-0002 of 2014)*

**1. TIBALEKA YOWANA**  
**2. KABONESA SESIRIA**

} ..... **APPELLANTS**

**VERSUS**

**SEKONGE KAROLI ..... RESPONDENT**

*(Appeal against the verdict of Grade One Magistrate H/W Gimugu K K, a Grade One Magistrate sitting at Kibaale Magistrate's Court in Land Civil Suit No. HMA-0020 of 2014 delivered on the 8<sup>th</sup> day of September, 2016)*

**JUDGMENT**

- [1] This is an Appeal from the Judgment and Decree of the Magistrate Grade one of Kibaale Magistrate's Court, Hoima Chief Magistrate dated 8<sup>th</sup> September, 2016.

**Facts of the Appeal**

- [2] The Respondent/Plaintiff sued the Appellants for *inter alia*, a declaration that he is the lawful owner of the suit Kibanja situate at **Kigaza LC I, Bwamiramira Sub county in Kibaale District**, that the Appellants/Defendants are trespassers thereon and an order of eviction against the Appellants/defendants, their agents, workers, assignees or any person claiming ownership from the Appellants from the suit land/Kibanja.
- [3] It was the Respondent/Plaintiff's case that he purchased the suit Kibanja measuring approximately **4 acres** sometime back on the 10<sup>th</sup> day of May, 2013 at sum of **UGX. 2,500,000=** as per the Sale

Agreement that was duly endorsed by the Local Council Officials from **Mikairi Mukibi Bahemuka** who in turn had bought it in 1963 from a one **Biretwa Mali**.

- [4] The Respondent/Plaintiff averred that in 2013, the Appellants without any colour of right trespassed on the suit land by cultivation and hiring a big portion of the Kibanja to other people without his knowledge and consent.
- [5] In their joint statement of Defence, the Appellants who are mother (2<sup>nd</sup> Appellant) and son (1<sup>st</sup> Appellant) denied the Respondent/Plaintiff's allegations and contended that they inherited the suit land/Kibanja from the late mother of the 2<sup>nd</sup> Appellant/Defendant a one **Bigwire** and that they have been using the suit land/Kibanja since the 1950. That they have 2 semi permanent houses, banana plantations, fruit trees (avocados, jack fruit, and mangoes) and coffee plantations as their developments thereon.
- [6] The Appellants in particular contended that the Respondent/Plaintiff has never bought the suit Kibanja from **Mikairi Mukibi Bahemuka**, that the purported agreement of purchase is a forgery made in **Lunyolya LC I in Luwero District** with intent to defeat their interests as the Kibanja is situate in **Kagazi LCI, Kibaale District**.
- [7] The trial Magistrate evaluated the evidence before him and found that the Appellants fronted **Bigwire** (the late mother of the 2<sup>nd</sup> Appellant/Defendant) as the person from whom the land was inherited but that the Respondent/Plaintiff on the other hand proved that **Bigwire** was only invited on the land by his son

**Bahemuka Mikairi** who later sold the land to the Plaintiff. That the Appellants did not show how **Bigwire** obtained the suit land. In the result, the trial Magistrate found that the Plaintiff proved on balance of probabilities that he is the rightful owner of the suit land having lawfully bought it from **Bahemuka Mikairi**. Judgment was accordingly entered in favour of the Respondent/Plaintiff.

[8] The Appellants/Defendants were dissatisfied with the Judgment and Decree of the trial Magistrate. They lodged the present Appeal on the following grounds of Appeal.

1. The learned trial Magistrate erred in law and fact when he ignored the 1<sup>st</sup> Appellant's beneficial interest in the suit property and held that he was a trespasser thereby occasioning miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he, against the weight of evidence, held that Respondent was the rightful owner of the suit property thereby occasioning miscarriage of justice.
3. The trial Magistrate erred in law and fact when he failed to pronounce himself on the status of the 2<sup>nd</sup> Appellant and the nature of the interest she so held in the suit property so as to be allowed to utilize an acre of the suit property until her demise.
4. The learned trial Magistrate erred in law and fact when he heavily relied on the Respondent's purchase agreement without having it tendered in Court as an exhibit.

5. The learned trial Magistrate erred in law and fact when he declared a one Nakachwa Maria a trespasser when she was never sued in her individual capacity by the Respondent.
  6. The learned trial Magistrate erred in law and fact when he utterly disregarded the Appellants' evidence on record thereby occasioning a miscarriage of justice.
  7. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching at a wrong decision.
  8. The trial Magistrate erred in law and fact when he condemned the 1<sup>st</sup> Appellant to meet the costs of the suit.
- [9] The Appellants were represented by **Mr. Wosamwa Emmanuel** who filed his respective written submission as directed by Court while the Respondent did not do so. He was self represented. The 1<sup>st</sup> Appellant was reported to have died before the conclusion of this Appeal.

### **Duty of the first Appellate Court**

- [10] As guided by Mulenga JSC in **Fr. Narsensio Begumisa & 3 Ors Vs. Eric Tibebaga S.C.C.A. No. 17 of 2002.**

*"The legal obligation on a first appellate Court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its own decision on issues of facts as well as*

*of law. Although in a case of conflicting evidence the appeal Court has to make due allowances for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions”.*

[11] In the instant case, bearing the above in mind, this Court is to rehear the case and consider the materials before the trial Magistrate and consider whether or not, the trial Court’s decision should stand.

[12] As argued by Counsel for the Appellants in his submission, this Court shall also consider **Grounds 1,2,6 & 7** together because they resolve around how the trial Magistrate evaluated the evidence before him and **Grounds 3,4,5 & 8** separately.

### **Grounds 1,2,6 and 7: Evaluation of evidence**

[13] Counsel for the Appellants submitted that the Appellants’ evidence of inheritance of the suit property was never challenged in cross examination. That they proved a valid interest in the suit property by showing the developments they had on the land, having lived and constructed on the land all their lives and indicating that the 1<sup>st</sup> Appellant buried his son on the property. Secondly, that the Respondent’s purported purchase agreement of the suit property which was never produced in evidence was said to had been executed in Luwero.

- [14] Lastly, that the Appellants' beneficial interest inherently emanated from consanguinity/lineal relationship and was not created or could not be extinguished for mere lack of letters of administration pursuant to **S.191 of the Succession Act** as the trial Magistrate erroneously found.
- [15] In his bid to prove his case, the Respondent/Plaintiff testified that the suit land belonged to his brother **Mikairi Mukibi Bahemuka** who sold it to him at **UGX. 2,500,000=** for 4 acres and the purchase agreement was executed on 10<sup>th</sup> May, 2013 where he had relocated. That the said **Mikairi Bahemuka** had left the Respondent's mother, a one **Bigwire** and her son, the 2<sup>nd</sup> Appellant on the suit land and that he informed them of his side of the suit land to the Respondent.
- [16] Lastly, that the vendor, **Mikairi Bahemuka** came to confirm that he sold the suit land to the Respondent when the Appellants disrupted him from utilizing the land. His evidence was supported and confirmed by **Tinkamanyire Mathius** (Pw4) Chairman LC I who testified that the seller was staying Luwero District but died after selling the land to the Respondent. **Kiiza Agnes** (Pw5), the widow of the vendor, **Mikairi Bahemuka** also confirmed the sale of the suit land to the Respondent. The banana plantation and the many fruit trees as well as the grass thatched house were left on the land by the vendor, her late husband **Mikairi Bahemuka**.
- [17] On the other hand, the 1<sup>st</sup> Appellant (Dw1) a nephew to the Respondent, testified that the suit land was left to his mother, the 2<sup>nd</sup> Appellant, by her mother, the late **Modester Bigwire**. The

other witnesses of the Appellants **Dw3-Dw4** all testified that the suit land was for the late **Modester Bigwire**, but none adduced any evidence as to how the said **Modester Bigwire**, mother of the 2<sup>nd</sup> Appellant came to acquire the land.

[18] Indeed, this is what the trial Magistrate questioned when he stated at p.4 of the Judgment thus:

*"The Plaintiff's evidence displaced the defence evidence that the land originally belonged to **Bigwire** and proved that **Bigwire** was only invited there by his son **Bahemuka**. Having stated that the land originally belonged to **Bigwire**, the evidential burden of proof was on the Defendant to show how **Bigwire** obtained it and they didn't do it while the Plaintiff proved how **Bahemuka** got and allowed **Bigwire** to use it"*

[19] I approve the above statement by the trial Magistrate as a correct position of the law, **Ss 101 & 103 of the Evidence Act**. See also **Kamu Enterprises Ltd Vs. Krystalline Salt Ltd S.C.C.A. No. 08 of 2018** where it was held, as per Mwendha JSC, that:

*"Evidential burden of proof is the burden of adducing evidence to prove a fact in one's favour. While the evidential burden keeps shifting, the legal burden never shifts. (see Phipson law of Evidence, 14<sup>th</sup> Edition)".*

[20] In the instant case, the alleged actual possession of the property before the purchase by the Respondent was with the consent of



the original owner, **Mikairi Bahemuka** who permitted his mother **Bigwire** on the land and was eventually buried thereon. This however, in my view, did not confer the Appellants who joined her on the land any rights over it. The original owner **Mikairi Bahemuka** retained his rights over land and therefore could sell it to any one and indeed, he sold it to his brother, the Respondent. The developments i.e. banana plantation and fruit trees on the land claimed to belong to the Appellants, the uncontroverted evidence of **Kiiza Agnes** (Pw5), widow to the late **Bahemuka Mikairi** clearly disclosed that the said developments had been left thereon by her late husband. Such developments cannot therefore be taken as evidence that the property belonged to the Appellants.

[21] As a result of the foregoing, I find that the trial Magistrate properly evaluated/weighted the foregoing evidence on record in favour of the Respondent. Grounds 1,2,6 and 7 are found to be devoid of any merit. They accordingly fail.

**Ground 3: The learned trial Magistrate erred in law and fact when he failed to pronounce himself on the status of the 2<sup>nd</sup> Appellant's nature of interest she holds in the suit property so as to be allowed to utilize one acre of the suit property until her demise**

[22] The trial Magistrate having found that the Respondent/Plaintiff was the rightful owner of the suit land having lawful bought it from **Mikairi Bahemuka** as this Court has also found, it follows that both the Appellants have no vested interest in the suit land and therefore, both of them are trespassers thereon. The trial



Magistrate erred in fact and law when he failed to declare the 2<sup>nd</sup> Appellant a trespasser on the suit land.

**Ground 4: The learned trial Magistrate erred in law and fact when heavily relied on the Respondent's purchase agreement without having it tendered in Court as an exhibit**

[23] It is true that in evidence, there is a mention of an agreement dated 10<sup>th</sup> May, 2013 executed in Luwero District between the Respondent and his brother **Mikairi Bahemuka** for the purchase of the suit Kibanja by the Respondent and it was never tendered in evidence. It is however not true and correct that the trial Magistrate heavily relied on the purchase agreement to find in favour of the Respondent.

[24] The trial Magistrate in the first instance observed that it was one of the undisputed facts that:

*"In May, 2013, the Plaintiff executed a land purchase agreement in respect of the suit land in Luwero between himself and the late Mikairi Bahemuka"*

[25] In their joint Witness Statement of Defence on record, the Appellants/Defendants pleaded that the agreement paraded by the Respondent/Plaintiff was a forgery made by the Respondent/Plaintiff with intent to defeat the Appellants/Defendants. However, during scheduling, one of the points of agreement was that the Respondents/Plaintiff executed a purchase of land in dispute from Luwero District and not in Kibaale District. The foregoing clearly shows that the purchase

agreement of the suit land by the Respondent existed but according to the Appellants, it was a forged one. The burden was on the Appellants to prove that it was a forgery. They did not adduce any evidence to that effect. They therefore failed to discharge the onus. The vendor **Mikairi Bahimuka** came to **Kigaza village** where the suit land was situated to confirm his sale to the Respondent, something he did before the LCs of the area. This piece of evidence was not challenged by the Appellant.

[26] It follows therefore that the failure by the Respondent to tender in the purchase agreement which appear to had been under the delusion that it was not contested, was not fatal to the Respondent's claim since there is other overwhelming evidence that the vendor **Mikairi Bahemuka** came and confirmed the sale and this was again confirmed by his widow, **Agnes Kiiza** (Pw5) in her unchallenged evidence on record.

[27] In the premises, I find that the trial Magistrate had basis upon which he made the finding that the Respondent purchased the suit land hence the 4<sup>th</sup> ground of appeal also accordingly fails.

**Ground 8: The leaned trial Magistrate erred in law and fact when he condemned the 1<sup>st</sup> Appellant to meet the costs of the suit.**

[28] It is trite law that costs follow the event and the successful party is entitled to costs. This is established law by S.27(2) CPA which provides thus:

*"Provided that the costs of any action, cause or other matter shall follow the event unless the*

*Court or the Judge shall for good reason or otherwise order".*

- [29] It is evident on the lower Court record that by the closure of the Appellant's/defendant's case the 1<sup>st</sup> Appellant was alive and participated in the entire trial of the suit. No proof was adduced both in the lower Court and on appeal regarding when the 1<sup>st</sup> Appellant allegedly passed on. The Respondent/Plaintiff being the Successful party was entitled to the costs of the suit which the trial Magistrate in his discretion accordingly granted to the Respondent/Plaintiff. There was no good reason to order otherwise.
- [30] For the above reasons, I find no grounds to fault the trial Magistrate's orders as regards costs. This ground of appeal also accordingly fails.
- [31] In conclusion, I find that the entire appeal is devoid of any merit and it is accordingly dismissed with costs against the Appellants to the Respondent, the death of the 1<sup>st</sup> Appellant notwithstanding since his estate survives him.

Dated this 8<sup>th</sup> day of December, 2023.



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**Byaruhanga Jesse Rugyema**  
**Judge**