THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CIVIL APPEAL NO. 0028 OF 2021

(Arising from Civil Suit No. 0170 of 2015)

BYARUHANGA ANDREW==========APPELLANT

VERSUS

TUSHEMEREIRWE JANE==========RESPONDENT

BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGMENT

This Appeal arises from the Judgment delivered by His Worship Rukundo Isaac Magistrate Grade One sitting at Kabale Chief Magistrates Court in Civil Suit No. 0170 of 2015 wherein he found in favour of the Respondent.

The brief background of the Appeal is that the Respondent sued the Appellant for the following orders:

i) A declaration that the Suit land belongs to the said Plaintiff.

ii) Eviction orders against the Defendant.

iii) Special and general damages.

iv) Costs of the Suit.

It was the allegation of the Plaintiff that she was the daughter of the late Sarapio Kayari and acquired the Suit Property from her said late father in 2006 the same having been family land and in possession of the late Kayari from the time known to the Plaintiff till 2000 when it was given to the Plaintiff.

The Plaintiff further alleges that she took possession and control of the Suit properties unchallenged until 2011 when Kayari died and the Defendant took advantage to grab her land in 2011 and that the Defendant who owns land below the Suit land removed the pertinent boundary marks save a big stone which is still there, cut down three big trees on the Suit property and converted them.

The Defendant on the other hand contends that the Suit property originally belonged to the Plaintiff's father who sold the same to one Dominic Bariyanga in 1996 who in turn sold the Suit property to the Defendant in 1999 and that the Defendant has utilized the Suit property todate.

The trial Magistrate on 20/05/2022 delivered his Judgment in favour of the Plaintiff declaring her to be the lawful owner of the Suit property above the stone which is the boundary and issued an eviction order against the Defendant with costs to the Plaintiff.

The Appellant being dissatisfied with the finding appealed to this Court on the following grounds:

1. **The learned trial Magistrate erred in law and fact when he failed to properly evaluate evidence or record at locus.**
2. **The learned trial Magistrate erred in law and fact when he said that there was contradiction in identifying boundaries by the Defendant and his witnesses whereas not.**
3. **The learned trial Magistrate did not consider the agreements of the Plaintiff on which she was given the land she claimed.**

Representation

At the hearing of this Appeal Rev. Bikangiso Ezrah appeared for the Appellant while Mr. Beitwenda Dann represented the Respondent. Both Counsel filed written submissions in this matter.

The mandate of this court

The duty of this Court is to re appraise the evidence on record and come up with its own conclusions bearing in mind the fact that it did not have the opportunity to observe the demeanor of witnesses.

See: Active Automobile Spares Ltd versus Crane Bank and another SCCA No. 0021 of 2001.

Ground one.

The learned trial Magistrate erred in law and facts when he failed to properly evaluate evidence or record at locus.

Summary of submissions

Rev. Bikangiso for the Appellant submits that it is not in dispute that the Plaintiff's father had land above that of the Defendant and that the Plaintiff acquired her land from her father Sarapio Kayari while that of the Defendant was acquired from Dominic Bariyanga who had also acquired it from Sarapio Kayari the father of the Plaintiff.

It is the contention of Counsel that the locus proceedings do not show which land is in dispute. The trial Magistrate just drew the sketch map for the land of the

Plaintiff and that of the Defendant only yet in his Judgment he declares the land above the stone to belong to the Plaintiff.

Mr. Beitwenda Dann in his submissions in reply contends that PW1 Ndinawe Ambrose a biological brother to the Respondent testified without any material challenge that the Suit land belongs to the Respondent having acquired the same from their father Sarapio in 2006 and that he signed in the agreement to this effect as No.3 while PW2 the Respondent herself testified that the Suit land is her sole property having obtained the same in the presence of PW1 and several others from her father Sarapio Kayari on 18/09/2006 and that the Respondent herself signed as No.10, while her late father signed as No. 17. The said agreement was admitted as P. Exhibit No.1 Counsel further submits that PW2 also testified in Court concerning the boundary between her and that of the Plaintiff there by corroborating the evidence of PW1 that there was a big stone in the boundary, In the middle and it separated the Suit land and that of the Appellant.

It is Counsel's argument that even on the locus inquo it was established that the Appellant bordered the Suit land at the bottom, Respondent/Plaintiff at the top, Rwenduru on the right and left sides.

Further that the Respondent at locus showed clearly the big stone which she had testified in Court to be the boundary of the Appellant and Respondent.

According to Counsel for the Respondent what was of interest was the ridge as testified to by the Appellant and his witnesses or the big stone which the Respondent and her witnesses testified to be the boundary mark. Counsel credits the trial Magistrate for finding that it was the big stone in the middle which is the

boundary of the Suit land as evidenced by the sketch maps drawn while at the locus inquo and submits that the trial Magistrate correctly evaluated the evidence on the Court record as well as evidence at the locus inquo.

My finding

I have carefully studied the entire record of the trial Court. I have also given due consideration to the submissions of both Counsel.

The trial Magistrate in his Judgment properly lays out the evidence as presented by the parties before carrying out an analysis of the same.

The trial Magistrate finds the evidence of the Plaintiff (PW2) and that of her brother in PW1 to be more believable than that of the Defendant. The trial Magistrate also accepts as proof P. Exhibit 1 that the Suit property was given to the Plaintiff by her late father and accepts her evidence that she was in occupation of the Suit property from 2006 – 2011 when she was evicted by the Defendant after the death of her father and poses a rhetorical question as to why the same occurred only after the death of her father and not before then.

The Trial Magistrate in analyzing the defence case observed that the sale agreements tendered to the Court by the Defendant did not clearly stipulate the boundaries of the land being sold nor were they witnessed by the late Sarapio father to the Plaintiff and the original seller and neighbor at the time of purchase by the defendant from the late Dominic.

The trial Magistrate while at locus took a recording of the same indicating the evidence of the Plaintiff and drawing a sketch map of the Suit property and that of the defendant as well.

This Court must observe that the real issue before the trial Court contrary to what was pleaded in the Plaint as "Declaration that the Suit land belongs to the said Plaintiff" was more an issue of encroachment or trespass, for that matter. The Plaintiffs claim as per the evidence she led and the record at the locus was that the defendant had exceeded the boundary of a big stone and had cut down her tress and now owns a garden on her part of the Suit property. This explains the orders of the Court that "**the Plaintiff is hereby declared the lawful owner of the Suit land above the stone which is the boundary to that extent".**

The Court in Yeseri Waibi Vs Edisa Lusi Byandala [1982] HCB 28 Held that:

"The trial Magistrate should make a note of what takes place at the locus inquo,,,,"

The Chief Justice in his directives to Judicial Officers on locus visits found in **Practice Direction No.0001 of 2007** under paragraph 3(d) and (e) provides as follows:

"During the hearing of land disputes the Court should take interest in visiting the locus inquo and while there

(d) Record on the proceedings at the locus inquo.

(e) Record any observation, view, opinion, or conclusion of the Court, including drawing as sketch plan if necessary"

I would disagree with the Appellant's Counsel that the locus proceedings do not show which land is in dispute and that yet the trial Magistrate in his Judgment declares the land above the stone to belong to the Plaintiff.

The trial Magistrate in his record and to his credit draws a sketch map of the Suit property as following the description of the Plaintiff and labels a stone with the record stating:

"**Alleges that the Defendant stopes (Sic) at this stone from the stream but the Defendant has gone beyond the stone and encroached on the Plaintiff's land**"

The trial Magistrate also above the stone mark records as follows:

"Sweet potatoes garden belonging to the Defendant"

I am sufficiently satisfied that the trial Magistrate properly recorded the proceedings at the locus and complied with the requirements as laid out in **Practice Direction No.1 of 2007**.

It is also my finding that the Trial Magistrate properly evaluated the evidence on record.

Ground 1 has therefore not been proved and fails.

Ground 2:

The learned trial Magistrate erred in how and fact when he held that there was contradiction in identifying boundaries by the Defendant and his witnesses:

Summary of submissions

It is the submission of Counsel for the Appellant that the major issue to be established at the locus was whether there was a ridge and stumps of alleged trees

in existence and whether they were in the same line. The failure of the Magistrate to verify this fact was a big error according to the Appellants Counsel and that therefore the trial Magistrate had no basis to say that the witnesses contradicted themselves because it is possible to have a ridge as a boundary and on this ridge there are tress.

Counsel for the Appellant further submits that the Respondent/Plaintiff did not challenge the Appellant/Defendants evidence that there was a ridge separating her land from that of the Defendant. Counsel was also critical of the trial Magistrate for faulting of the Defendant in not inviting the late Sarapio Kayari as he purchased the Suit property arguing that the late Sarapio in turn did not invite the Defendant as a neighbor as he gave his land to the Plaintiff.

The Respondents Counsel on the other hand submitted that the Respondent/ Plaintiff and her witnesses testified without any material challenge that the boundary of the land of the Plaintiff and the Defendant was a big stone which Court even noted at the locus inquo.

According to the Respondent's Counsel DW1 testified that the ridge is the boundary between his land and that of the Plaintiff and under cross-examination confirmed indeed that the tress did not form part of the boundary and that he further contradicted himself and testified that the boundary marks were "Migorora" plants while DW2 testified that the boundary between the Plaintiff and defendant's land were tress which tress belonged to the Plaintiff's father.

My finding

I will for clarity reproduce below the findings of the trial Magistrate that is in issue:

"**DW2, the wife to Dominic the seller to the Defendant testified that there was a big stone on the Suit land but it was not the boundary but rather the boundary was trees which belonged to the late Kayari: DW1 on the other hand testified that the boundary was a ridge. DW3 also gave a similar piece of evidence that a boundary was a ridge. Accordingly I find this contradicting evidence of the defence not convincing as to what they knew as the boundary. There is a disparity as to the actuary what the boundary is".**

I have perused the record and find that DW2 Christine Tibeyama whose late husband Bariyanga Dominic sold the land to the Appellant/Defendant describes the boundary as being trees that belonged to Kayari. The Appellant (DW1) and his spouse (DW3) describes the boundary as being a ridge.

The Appellant under cross-examination admits to cutting trees on the Suit property but that these trees did not form part of the boundary. The Appellant is also on record testifying that there were "**Migorora**" acting as boundary marks.

The trial Magistrate in his Judgment describes the findings of the Court at the locus visit in the following words;

"Court visited locus on the 22nd August, 2020 on which proceedings were conducted. At locus Court found that there was a big stone in the middle which is the boundary of the Suit land and that the Defendant does not stretch to the top of the entire land"

It would appear that an evaluation of the above evidence on record coupled by the visit to the locus inquo conducted by the trial Magistrate was the basis for the conclusions that the evidence of the Appellant/Defendant was contradicting in identification of the boundary between the parties.

The argument of the Appellant's Counsel that it is possible to have a ridge as a boundary with trees growing on the ridge unfortunately is not backed up by evidence on the Court record.

The criticism of the Appellant's Counsel that that the trial Magistrate faulted the Defendant for not inviting the late Sarapio Kayari as a neighbor when he was making a purchase in my view was more of an observation that clearly did not form the basis of his final decision besides the benefit of involving neighbours when making a purchase of customary land was well laid down in **Nyakahara Margaret and 02 other versus Tumuhirwe HCCA No. 0002 of 2010**.

This Court after careful appraisal of the evidence on record would not fault the trial Magistrate in finding that there was a contradiction in identifying boundaries by the Defendant and his witnesses.

The 2nd ground therefore fails.

Ground Three:

The learned trial Magistrate did not consider the agreements of the Plaintiff on which she was given the land she claimed.

Summary of submissions

It is the submission of Counsel for the Appellant that the Plaintiff's/Respondent witnesses testified that they witnessed the agreement giving land to the Plaintiff but they never visited the land before writing the agreement and that the same was written at home and that as a result the witnesses did not see the boundaries of the Suit land.

Counsel further submits that the alleged agreement dated 18/09/2006 was not written by Sarapio Kayari as alleged first and that in cross-examination the Plaintiff said her father died in 2002 and yet the agreement was written in 2006.

It is also the contention of Counsel that the 2006 agreement does not mention the neighbours of the Suit land and that the alleged agreement was just a family meeting and the late Sarapio Kayari signed amongst the attendees but not as a person giving land with the document indicating that there will be another meeting on the 10/12/2000 which Counsel finds to be contradicting since the said meeting was taking place on in 2006.

It is therefore Counsel's submission that there is no agreement on which the trial Magistrate could rely to enter Judgment for the Plaintiff.

Counsel for the Respondent in reply submits that the question of whether the Suit property was given to the Plaintiff is answered by Exhibit No.1 as correctly opined by the trial Magistrate who relied on the decision in **Sog Mukobe versus Willy Wambuwu HCCA No. 0055 of 2005** in which Court held that Mukisa the donor intended to give the Suit land which was un registered as a gift to the Appellant because it was reduced in writing.

It is the contention of the Respondent's Counsel that the late Sarapio Kayari signed as No.17 on Exhibit No. 1 and the reference to another meeting was dated 16/12/2006 not 10/12/2000 as alleged by the Appellant's Counsel.

The Court in **FL schuler AG versus Wickman machine Tools sale Limited [1973) and Aller 39** held that;

"The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties intentions must be ascertained on legal principles of construction from the words they have used"

My finding

This Court has carefully studied P. Exhibit No.1 both the original in Runyankore Rukiga and the English translation of the same.

The title to P. Exhibit 1 is "**meeting for the good of the family**". It would appear that the same was as a result of a family meeting as submitted by Counsel for the Appellant.

Indeed the Plaintiff at Paragraph 5(i) of her Plaint avers that:

"The late Kayari held a family meeting at which he gave 5 pieces of land including Suit land located at Maresu village to the Plaintiff. This was reduced in writing"

The Respondent/Plaintiff, PW1 and later the trial Magistrate all refer to P. Exhibit 1 as an agreement.

This Court takes no issue with the reference or title given to P. Exhibit 1 on the basis that the intention or minds of the persons involved in drafting this document is the more important consideration.

The submission by the Appellant's Counsel that the witnesses to P. Exhibit 1 did not visit the land in issue is not supported by the evidence on record because it was never put to the Respondent/Plaintiff or her witness in PW1 by the Appellant during cross-examination. In any case there is no rule that transactions involving land must always be carried out at the location of the property and not residences such as in the instant case.

On the issue of when Sarapio Kayari passed on the evidence on record clearly states the same as being 2011 with the properties as contained in P. Exhibit 1 being given to the Respondent in 2006. The submission by the Appellants Counsel that the Respondent stated that her father died in 2006 is misplaced.

A perusal of P. Exhibit 1 indicates that it lists 5 pieces of land in different locations as belonging to the late Mzee Kayari with the Respondent/Plaintiff expressly mentioned as the sole beneficiary of these properties which include the Suit property.

The absence of boundaries in my considered opinion does not invalidate the gift made to the Respondent/Plaintiff. It is more a question of form than substance.

The signature of Kayari as No.17 in P. Exhibit 1 is clear and was not contested by the Appellant/Defendant at trial. I find the intention expressed by the father of the Respondent/Plaintiff in Exhibit 1 to be clear and unambiguous and that was to gift his properties including the Suit property to the Respondent.

The argument by the Appellant's Counsel that P. Exhibit 1 indicates the next meeting as taking place on 10/12/2000 when the same document bares the date of 18/09/2006 as its origin is a valid argument when one bases the same on the translated document of P. Exhibit. The original however in Runyankore-Rukiga indicates the date of the next meeting as **16/12/2006**. It would appear that the curve to **"6"** confused the translator in appearing like "O" it is a simple typo that this Court need not labour over.

The trial Magistrate did correctly consider the agreements of the Respondent/Plaintiff on which she was given the land she claimed.

The third ground therefore fails.

In the final result this Court finds no merit in the Appeal and the same is hereby dismissed.

The costs of the Appeal and of the trial shall be met by the Appellant.

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SAMUEL EMOKOR
JUDGE
28/02/2023