THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. 0021 OF 2015

(ARISING FROM MASINDI CHIEF MAGISTRATES COURT CIVIL SUIT NO. 0012 OF 2014 AT BULIISA)

MBABAZI SAM S/o YOSIYA :: APPELLANT

VERSUS

HARRIET MBABAZI :: RESPONDENT

(Appeal from the judgment of His Worship Okongo Japyem delivered on the 19th day of March, 2015)

BEFORE: Hon. Justice Isah Serunkuma

JUDGEMENT

Introduction

The respondent sued the appellant in the Chief Magistrates court of Masindi at Buliisa for a declaration that she is the rightful owner of a kibanja situate at Kisomero village, Nile village, Ngwendo subcounty Buliisa district for a permanent injunction restraining the appellant from interfering with the rights of the respondent, general damages, mesne profits, eviction order, demolition order and costs of the suit.

Issues of Contention

1. Who is the rightful owner of the suit land?
2. What are the available to the parties?

Findings of the trial court

1. The trial court found that plaintiff is the rightful owner of the suit land.
2. That the defendant, his agents and relatives are trespassers to the suit land.
3. A permanent injunction against the defendant restraining him from the suit land.
4. A demolition order issued against the defendant's house effective within

six months if he fails to demolish the same.

5. Costs to the plaintiff.

The appellant being dissatisfied with the decision of the trial court appealed to this court on the following grounds;

1. *That the trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 0012 of 2014 that the suit land belongs to Mujumbi Kasyetuka who was succeeded by the respondent.*
2. *That the trial magistrate erred in law and fact when he totally disregarded the appellant's evidence of ownership of the suit land thereby arriving at a wrong decision that the suit land belongs to the respondent.*
3. *That the trial magistrate erred in law and fact when he failed to address himself as to the correct procedure to be followed at locus in - quo thereby occasioning a miscarriage of justice to the appellant.*

Further the appellant made the following prayers;

a) The appeal be allowed.
b) A declaration that disputed land in Civil Suit No. 0012 of 2014 belongs to the appellant.
c) An order awarding the costs of appeal and in the lower court to the appellant.
d) An order for a fresh locus in quo or trial de novo.

Representation

Mr. Kato Paul Senego appeared for the appellant while Mr. Lubega Willy appeared for the respondent.

Submissions

Counsel for the appellant urged grounds one and two together.

Counsel submitted about the law relating to appeals as was enunciated in ***Stewards of Gospel Talent vs Nelson Onyango; HCT-00-CV-CA-0014 -2008, National Insurance Corporation Vs Mugenyi [1987]HCB 28; Father Narisensio Begumisa & Ors versus Eric Tibekiga; SCCA No. 0017 of 2002 (unreported).***

Counsel cited *section 101 of the Evidence Act* which is to the effect that one who alleges facts has the burden to prove the same.

It was counsel's assertion that trial magistrate failed to properly evaluate the evidence on record and totally disregarded the appellant's evidence of ownership of land. That the appellant's witnesses adduced evidence showing that the land is communally owned by the Bateera clan members and each one of them has customary rights. He cited the case of ***Atuya Valiryano Vs Okeny Delphino; HCCA No. 0051 of 2017*** wherein the high court held the suit property to be clan communal property and that the respondent could not privately or individually hold the same.

In conclusion counsel submitted that appellant is occupying and utilizing the suit land that his father and grandfather used and that the trial magistrate ignored consideration of that evidence.

In response, counsel for the respondent submitted that the trial magistrate properly subjected the evidence on record to proper scrutiny and reached a correct conclusion that the respondent was the rightful owner of the suit land having inherited the same from her father the late Mujumbi Kasyetuka.

Counsel submitted that during the visit on locus in quo the trial court observed that the respondent had built her hut and that the appellant constructed a house in the compound of the respondent a further sign that the respondent was in possession of the land and the appellant trespassed on the same.

In conclusion it was counsel for the respondent's submission that the trial magistrate based on the evidence as a whole given by both the appellant and respondent hence coming to a conclusion that the suit land belongs to the respondent.

On ground three counsel for the appellant submitted that the trial magistrate failed to address himself as to the correct procedure to be followed at the locus in quo visit there by occasioning a

miscarriage of justice. That court's observation and findings at locus in quo were not noted and that the appellant and his witnesses were not given an opportunity to show court or explain how the Bateera clan came to acquire the suit land. That some alien people who neither gave any evidence in court nor were even neighbors to the suit land were allowed to give evidence at locus which falls short of the recognized locus visit procedures.

Counsel concluded by making a prayer that this Honorable court finds that the trial magistrate erred in law by not addressing himself to the proper procedure of locus visit thereby reaching an erroneous decision that the suit land belonged to the respondent.

Counsel for the respondent recognized and agreed with the law and procedure to be followed while conducting locus in quo visits as submitted by counsel for the appellant. In retaliation counsel submitted that all requirements as stipulated by law were followed by the trial magistrate. That it is clear that the parties who testified at locus were still under oath and that the proceedings were recorded. Counsel referred court to pages 13-16 of the record of proceeding for ease of reference.

Court's Analysis.

The duty of this court as an appellate court of first instance is to re-valuate the evidence, subjecting it to fresh scrutiny. The court has to be conscious of the fact that it did not have a chance to observe the witnesses, nor listen to them. The law is well stipulated in various cases. (See; ***Uganda Revenue Authority versus Rwakasaija Azarious & 2 Ors; CACA 8/2007).***

I have duly examined the pleadings, the evidence on record, submissions by counsel both in the trial court and at appeal and the findings of the trial court. I now do find the following in resolution to the grounds raised at appeal;

Ground one.

I will resolve the grounds as handled by counsel in their submissions.

Grounds 1 & 2.

1. That the trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 0012 of 2014 that the suit land belongs to Mujumbi Kasyetuka who was succeeded by the respondent.

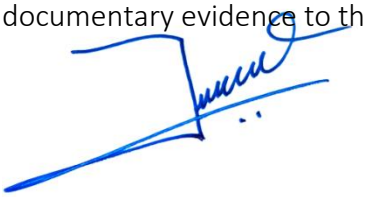
2. That the trial magistrate erred in law and fact when he totally disregarded the appellant's evidence of ownership of the suit land thereby arriving at a wrong decision that the suit land belongs to the respondent.

In assessing evidence the court has a duty to consider all evidence on record as a whole without isolation of even the smallest piece of evidence brought before it. The burden of proof is always on one who asserts a fact, though the plaintiff has an overall burden to prove the case on a balance of probabilities. (*Sections; 101,102 &103 of the Evidence Act).*

The judgment by the trial magistrate is being challenged for failing to give the evidence on record a proper scrutiny and that he disregarded the evidence of the appellant thus coming to a wrong decision.

According to the record the appellant adduced evidence to show that the land was communal land belonging to the Bateera clan while the respondent adduced evidence to show that the land belonged to her late father. From the evidence adduced what I find common is that both the respondent and appellant are of the same clan. The appellant asserts that the land was of his grandfather who acquired the same for the whole clan while the respondent asserts that as well the land belonged to her father who bought the same from Bunyoro-Kitara kingdom. However, the respondent didn't not produce any evidence or document showing that her father had bought the land with a claim that the documents were lost during the war. Be it as it may even if the documents are lost but the author of the same is still in existence.

The burden of proof of any fact is cast on to the person who wishes court to believe in its existence. The respondent wishes court to believe that she is the owner of the suit land having inherited the same from her late father on premises that the land was bought but does not bring to court any documentary evidence to that effect.



In the alternative, the appellant who asserts that the land belongs to the whole clan led evidence as per the witnesses on record to show that indeed the land is clan land and not individually owned. Both the appellant and respondent belong to the same clan and as such the appellant's assertion that the suit land is part of the land belonging to the Bateera clan to which both the litigants belong to is more convincing and believable. I therefore, find that the suit land is part of the land that belongs to the Bateera clan.

As such I find that the trial magistrate failed to scrutinize the evidence on record properly thus coming to a conclusion that the respondent is the owner of the suit land and that the appellant and his neighbours and relatives are trespassers on the same.

Grounds one and two therefore succeed.

Ground 3.

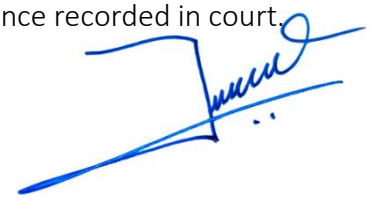
That the trial magistrate erred in law and fact when he failed to address himself as to the correct procedure to be followed at locus in - quo thereby occasioning a miscarriage of justice to the appellant.

The law with regard to visiting of locus in quo is now settled and there are a lot of authorities on what happens at locus in quo.

The guide lines set down in ***Practice Direction No. 1 of 2007*** require that all parties, their witnesses and advocates be present, parties and their witnesses are allowed to adduce evidence and be cross examined, all proceedings are recorded including a sketch plan if necessary.

All procedures must be followed. Witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross examination by the parties or their advocates.

All evidence and proceedings at the locus in quo must be recorded and form part of the court record. It is also important to note that evidence at locus cannot be considered in isolation from the existing evidence recorded in court.



The purpose of locus in quo is to help both parties to clearly indicate to court what their claim is. In matters where the claim is based on boundaries and location parties are given the opportunity to show court the boundaries or location as claimed. In the case of ***John Siwa Bonin Vs John Arap Kissa (HCCS No. 0058 of 2007*** where the decision in ***De-Souza vs Uganda (1967) E.A 78***, was re-echoed, court observed that the purpose of visiting locus in quo is to check on evidence given by the witnesses in court, not to fill in gaps to bolster the party's case. Evidence from the independent witnesses was never part of the evidence given in open court.

In the instant case there was fresh evidence taken from four other witnesses who never testified in court which is a violation of the rules of practice under the Practice Directions. At page 2 of the judgment, the trial magistrate makes reference to four independent witnesses who did not give evidence in court during the hearing of the matter.

Section166 of the Evidence Act is to the effect that improper admission or rejection of evidence is not to be ground of itself for a new trial or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision. Further under ***Section 70 of the Civil Procedure Act***, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or jurisdiction of the court.

In the case of Kaggwa Vs Olal & 6 Ors (Civil Appeal No.0010 of *2017) [2018] Unreported* it was held *that before court sets aside a judgment it must be demonstrated that the evidence taken or rejected in error will occasion a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favorable to the party appealing must have been reached in the absence of the error.*

In the circumstance the key evidence needed to make this court believe that the respondent is the owner of the suit land is the documentary evidence part of which was not acquired at the locus in quo visit or adduced by the independent witnesses.

It was, therefore, an error for the trial magistrate to allow new witnesses give evidence at locus visit and further relied on their evidence in making his decision which is contrary to the law and

practice. However, that alone does not make this court order for rehearing of the suit. As such I will disregard the evidence of the witnesses referred to as independent witnesses on the record and consider the rest of the evidence as adduced.

According to the evidence on record the appellant and his neighbours including the respondent are collective rightful owners of the suit land and as a result cannot be referred to as trespassers.

In my considered view, the respondent failed to bring to court documentary proof of how her father acquired the land thus her claim to ownership of the land cannot be sustained on mere assertions. As such I find that the trial court wrongly evicted and issued permanent injunction upon the appellant and his neighbours.

In the result, I find that the suit land belongs to the Bateera clan as a whole and the appellant and his neighbours being part of the clan thus cannot be regarded as trespassers to the same. The appeal is allowed with costs to the appellant.

I so order.

Dated and delivered on this 27th day of October 2023.

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Isah Serunkuma
JUDGE