THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA
CIVIL APPEAL NO. 064 OF 2023
(Arising from Civil Suit No. 13 of 2010)

1. EYIIRE SILIVE
2. AKANI CHARLES
3. KAKAIRE WILSON
4. LUBANGA MUGABI ========== APPELLANTS

VERSUS

HAJJI KAGUBIRU SHABAN ========== RESPONDENT

BEFORE: HON. MR. JUSTICE BATEMA N.D.A, JUDGE

This is an appeal from the decision of **HER WORSHIP JESSICA CHEMERI,** the Chief Magistrate of Iganga as she then was, delivered on 10th November 2020.

Background

The Appellants claim that the suit land located at Busano village, Namungalwe sub-county, Iganga District formerly belonged to their late grandfather, a one Silve Taire who had allegedly obtained the same from a one Mulani Bagulaine, his father-in-law. It was alleged by the Appellants that the late Silve Taire had first married Mulani Bagulaine's daughter but later developed misunderstandings and divorced her and then married Esther Babirye who died in 2009

The Appellants further claim that they inherited the suit land through a Will supposedly written by their grandfather, Silve Taire in 1974, wherein he purportedly bequeathed the suit land to the Appellants as grandchildren. Although, the late Silve Taire never had issues with Esther Babirye, it was alleged by the 1st Appellant, Akani Charles that the Appellants were direct grand children of the late Silve Taire's brother, a one Lasto Magala.

The Appellants finally argue that they only occupy about six (6) acres and do not know of the 30 or 25 acres talked about by the Respondent.

In rebuttal, the Respondent, Hajji Kagubiru Shaban who was the Plaintiff at the lower court claims that the suit land formerly belonged to his late father, a one Asuman Kagubiru who in 1954 purportedly allowed Eserezi Babirye (now deceased), the Respondent's maternal auntie to occupy, cultivate and hold the same in trust for his son (Respondent) who was a minor then.

The Respondent further claims that on 10/8/1999, the late Eserezi Babirye allegedly handed over the suit land to the Respondent and as such he is the lawful owner. The Respondent maintains that there was no time when the late Eserezi Bairye or her supposed cohabitee, Silve Taire owned any part of this suit land and that in fact the late Silve Taire only came on the suit land by virtue of cohabiting with Eserezi Babirye. The Respondent contends that when Silve Taire died, he allowed that he gets burried on the suit land because his people rejected to take his body since he had been cohabiting which was viewed as a social taboo in their culture.

The Respondent finally argues that he instituted the suit in 2010 for trespass after the Appellants supposedly destroyed his mivule trees, orange, coffee and jack fruit trees and started ferrying bricks onto the suit land without any claim of right.

In her Judgment, the learned trial Chief Magistrate (as she then was) found for the Respondent, Hajji Kagubiru Shaban, having believed his testimony and that of his witnesses on account of being truthful and consistent. She declared the Appellants trespassers and ordered for their eviction. The Appellants being aggrieved and dissatisfied with that decision appealed to this court.

Grounds of Appeal

1. That the learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate evidence on record thereby arriving at a wrong decision.
2. That the learned trial Chief Magistrate erred in law and fact when she found that the Appellants are trespassers on the suit land.

3. That the learned trial Chief Magistrate erred in law and fact when she failed to accept/ exhibit the Will relied on by the Appellants.

In addition to the grounds of Appeal, the Appellants also raised a Preliminary Objection to effect that the Respondent had failed to describe the suit land in terms of size and boundaries and the extent of trespass allegedly committed.

Duty of the court

This being a first appeal, it is the duty of this court to re-evaluate the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.**See Icomai Edward v. Vance Omome, H.C.C.A No. 037 of 2018 [2023] at Soroti High Court Circuit.**

Determination of grounds of Appeal

Before I delve into the determination of grounds of Appeal as framed by Counsel for the Appellants. It's imperative that I first address the Preliminary objection raised by the Appellants' counsel.

The Appellants' counsel contends that the Respondent, Hajji Kagubiru Shaban who claims ownership of the suit land failed to describe its size and its boundaries and therefore his plaint filed in the lower court offended **Order 7 rule 3 of the Civil Proceedure Rules S1-71** to the extent that the subject matter therein was incapable of sufficient identification.

In rebuttal, Counsel for the Respondent argued that the Appellants having failed to raise this supposed defect in pleadings at the lower court, they are estopped from challenging the same at this stage of appeal on account of being without effect and having been over taken by events. Counsel relied on the authority of **Nanyonga Teopista & 3 ors v. Nanyombi Margaret [H.C.C.A No. 141 of 2019].**

This Court is alive to the fact that the Appellants were unrepresented at the lower court and therefore could not have in the circumstances raised Preliminary Objections on account of lack of legal and procedural knowledge.

I am also well aware that the defect alluded to by Counsel for the Appellants was so glaring to the extent that the Respondent was never sure of the size of the land he owned and how much of it was being trespassed and/ or encroached on by the Appellants at the time of filing his suit in the lower Court.

However, I take the firm view that non-measurement or the uncertainty of the exact measurement of the size of the land does not per se render a suit incompetent and bad in law more so when court is dealing with land outside the torrens system or unregistered land and has taken the initiative to conduct a locus in quo before delivering judgment.

The old judicial practice of Judicial Officers visiting locus in quo was intended for each party to indicate at the locus, what he or she is claiming. Court must verify and test the evidence adduced at the trial and confirm if the features at the locus tally with the evidence on record. Lastly, the practice of visiting locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence.

Therefore to the extent that the learned trial Chief Magistrate sufficiently identified the land as that which the Respondent/ Plaintiff had referred to in his Pleadings and testified upon during trial when she conducted the locus in quo on 1st February 2019 and even generated a sketch map which is on court record, I find no reason to uphold this preliminary objection. **See Bwiire John Guloba v. Wanyama Manasi & Oweri Joel H.C.C.A No. 92 of 2008.**

In any case, I wish to agree with Counsel for the Respondent to the extent that preliminary objections not raised in the lower court should not be raised on appeal more so when re-trial of the case because of the successful preliminary objection would not result in a different out come. **See Nanyonga Teopista & 3 ors v. Nanyombi Margaret [H.C.C.A No. 141 of 2019].**

In the premises, I find this preliminary objection redundant and is hereby overruled.

I now turn to the grounds of Appeal.

Ground 3

That the learned trial Chief Magistrate erred in law and fact when she failed to accept/ exhibit the Will relied on by the Appellants.

Counsel for the Appellants submitted that to the extent that the learned trial Chief Magistrate disregarded the Will dated 10/11/1974 as documentary evidence in proof of the Appellants' ownership of the suit land, she arrived at a wrong decision and occasioned a miscarriage of justice.

The Appellants' Counsel further submitted that as unrepresented litigants, the Appellants ought to have been guided on the procedure of exhibiting a Will. They relied on the case of **Nabanja v. Nabukalu (Taxation Appeal No. 04 of 2018) at High Court Family Division.**

In rebuttal, the Respondent argued that contrary to the Appellants submissions, the 2nd Appellant, Akani Charles testified on the contents of the said Will albeit nothing suggested that this was a Will or that their names as beneficiaries of this suit land were mentioned at the very least.

The Respondent further argued that the authority of **Nabanja v. Nabukalu (Taxation Appeal No. 04 of 2018)** cited by the Appellants' Counsel was cited in error and of no relevance to the matter at hand. The said case never made mention of the need for guidance and direction to unrepresented litigants by a trial Magistrate.

I have revisited the evidence on record and have come to the conclusion that the learned trial Chief Magistrate properly directed her self by rejecting and disregarding the evidence of the so-called Will.

It is trite law, that a Will is proved before Court by at least one attesting witness who must attest to its execution, authenticity, custody and contents therein.**See Section 67 and 68 of the Evidence Act Cap 6.**

In the lower court, no single witness adduced evidence to prove the execution of the impugned Will not withstanding that the same was

never translated in English, the official language of Court. In short, the Will was never proved and is inadmissible.

Turning to the concern that unrepresented litigants ought to be guided on the procedure for exhibiting a Will, I would like to note that once a litigant elects to be self represented, they must do so bearing in mind the vagaries and consequences of proceeding without counsel. Court does not owe them any special consideration and/ or exceptional treatment than those ably represented save for guidance on areas of procedure.

In this particular case, the fact that there was no single attesting witness brought by the Appellants before Court, inevitably there was no witness to be guided on procedure. Even more disturbing is the fact that DW3, Kakaire Wilson during cross examination in the lower court, testified that he had never seen the Will of Silve Taire and only came to know of the same in Court.

In the premises, I uphold the findings of the trial Chief Magistrate on this issue. This ground of Appeal fails.

Ground 1 and 2

1. ***That the learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate evidence on record thereby arriving at a wrong decision.***

2. ***That the learned trial Chief Magistrate erred in law and fact when she found that the Appellants are trespassers on the suit land.***

Counsel for the Appellants argued grounds 1 and 2 jointly. The Appellants submitted that the learned trial Chief Magistrate failed to see through the various contradictions of the Respondent's case. One such controversy was the testimony of Erisa Wagonyena Kaserere, PW4 who contradicted the Respondent's case by testifying that the Respondent had lent the land to Eserezi Mutesi Babirye whereas not.

The other contradiction was that if it were to be believed that indeed Babirye Eserezi handed over the land to the Respondent in 1999 as

Hajji Shaban Kagubiru, PW1 claimed, how come she continued occupying the same until her demise in 2009.

The 2nd Appellant, Akani Charles, DW1 on the 2nd ground of Appeal testified that the fact that both Babirye Eserezi and Silve Taire lived and upon death were both buried on the suit land is evidence enough in proving that the latter owned the same.

In rebuttal, the Respondent submitted that to the contrary, it was the Appellants' case that was bedeviled with contradictions. The Respondent's counsel submitted that in their pleadings, the Appellants claimed that their grand father, the late Silve Taire had bought the suit land but later in their oral testimonies, Akani Charles, DW1 and Eyiire Silve, DW2 contradicted themselves by stating that the suit land was inherited by Silve Taire from his father-in-law, Mulani Bagulaine.

On the 2nd ground of Appeal, the Respondent, Hajji Shaban Kagubiru, PW1, submitted that mere occupation of the suit land by Silve Taire and Eserezi Babirye did not amount to acquiring any proprietary interest in the same but rather licensee status and therefore there was no legal interest to transmit to the Appellants upon the death of Silve Taire.

I have revisited the evidence on record and come to the conclusion that the learned trial Chief Magistrate properly and carefully evaluated the evidence on record and occasioned no injustice.

I wish to note that among the salient canons of evidence court employs while evaluating and analyzing evidence is the exclusionary rule. This *interalia* entails the hearsay rule and the rule against prior consistent statements. **See Section 59 of the Evidence Act Cap 6.**

If the evidence of the Appellants were to be considered as a whole, bearing in mind that this Court had no opportunity to assess the demeanor of the witnesses in lower court, I would find that the story of the Respondent is consistent with the truth and believable because Part of the evidence that the Respondent relied on was the hand over letter **PEX1** dated 10/09/1999, wherein Eserezi Babirye handed over

the suit land to the Respondent. **PEX1** was admitted without objection and there is nothing on record contradicting it.

On the other hand, the narrative of the Appellants is highly suspicious, full of conjecture and speculation and riddled with inconsistencies incapable of any evidential support, save for the fact that some of their relatives were buried on the suit land.One such grave inconsistency with the Appellants' case, is the question of acquisition of this suit land. In Paragraph 4 (I) of their Written Statement of Defence. The Appellants state that their grand father, Silve Taire bought the suit land from Asuman Kagubiru, the Respondent's father but later contradict themselves by stating that Silve Taire got the same from his father-in-law, a one Mulani Bagulaine.

Worse still is the fact that the evidence on record indicates, that save for the 2nd Appellant Akani Charles, the rest of the Appellants do not know how their grandfather, the late Silve Taire acquired the land.

The Appellants simply took advantage of the death of Eserezi Babirye in 2009 and the hitherto good will and kindness of the Respondent to assert their so-called user rights on land they very well knew did not belong to them.

The Appellants are trespassers without any claim of right and therefore must be evicted from the suit land which includes the burial grounds.

In the final result, I hereby uphold the judgment and orders of the learned trial Chief Magistrate and accordingly dismiss this appeal.

The costs of this appeal and in the lower court are awarded to the Respondent.

I so Order.

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BATEMA N.D.A

JUDGE

28/03/2024