

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA

CIVIL APPEAL NO: 40 OF 2021

(Arising from Civil Suit No: 001 of 2019)

NAMUDDU GRACE.....APPELLANT

VERSUS

MATOVU JAMES.....RESPONDENT

JUDGMENT

(Appeal against the Judgment & Orders of His Worship Owino Paul Abdonson a Magistrate Grade One, then at the Chief Magistrates Court of Masaka at Kalangala)

BACKGROUND

The Respondent instituted Civil Suit No. 001 of 2018 in the Chief Magistrates court of Masaka at Masaka against the Appellant for a claim that the latter trespassed on his Kibanja/land.

The Respondent pleaded that his parents gave him the suit Kibanja as a gift *intervivos* and that the Appellant had encroached on it over the years. That he got to know of the Appellant's trespass on the land in 2016.

The Respondent also pleaded that he reported cases of trespass against the Appellant to the local authorities but that they were never resolved.

In her written statement of defence, the Appellant denied the Respondents claims. She pleaded that the suit Kibanja was given to her by her father, now the Late Luzzi Edward, when it was still occupied by a forest in 1992. A gift deed *intervivos* to that effect was admitted as part of her evidence at the hearing.

The Appellant further stated that upon taking possession of the suit land/kibanja, she constructed a grass thatched house on it in 1993 and enjoyed peaceful possession of the same until 2018 when the Appellant came claiming ownership of the same.

The Appellant further pleaded that the Respondent reported her over allegations of trespass to the sub county land committee which returned a verdict in her favour, holding that she was the lawful owner of the Kibanja/land.

The Appellant prayed that the suit be dismissed with costs.

The Learned Trial Chief Magistrate heard and determined the suit in favour of the Respondent. The Appellant was dissatisfied with the decision thus the instant Appeal.

Representation

The Appellant was represented by **M/s Luzige, Lubega, Kavuma & Co. Advocates**

The Respondent was represented by **M/s Jawass Associated Advocates**

The Appellant raised four grounds of appeal in her memorandum of appeal to wit;

1. *The learned trial Magistrate erred in law and fact when he did not evaluate the evidence on record and arrived at a wrong decision.*
2. *The learned trial Magistrate erred in law and fact when he did not consider the Judgment of the Lc3 Area Land committee and arrived at a wrong conclusion.*
3. *The learned trial Magistrate erred in law and fact when he failed to consider the Appellant's interest as confirmed by the landlord, Nabisinja Benaleta.*
4. *The learned trial Magistrate erred in law and fact when he failed to consider the period of time spent on the Kibanja and arrived at a wrong conclusion.*

The duty of this Court as a first Appellate

The duty of a first Appellate Court is to re-appraise or re-evaluate evidence as a whole and come to its own conclusion bearing in mind that it has neither seen nor heard the witness and should make due allowance in that regard.

The Supreme Court has re-echoed the above principles in a number of cases like **Uganda Revenue Authority versus Rwakasanje Azariu & 2 Ors; CACA No. 8/2007; Fr. Narsensio Begumisa and 3 Ors versus Eric Kibebaga; SCCA No. 17 of 2002 and Banco Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1998.**

I therefore have the duty to re-appraise the evidence and reach my own conclusions thereon subject to the caution that I did not see, hear, or observe the witness.

Decided cases have also established that “where the trial court has erred, the Appellate Court will only interfere where the error has occasioned a miscarriage of justice. The Appellate Court has a duty to re -evaluate the evidence of the trial court while considering facts, evidence and the law. The court can interfere with the findings of the trial court, if the court misapplied or failed to apply the principles applicable to the offence charged,” in this civil case, the issues that were raised before court for determination.

APPELLANT’S SUBMISSIONS

On grounds 1 and 2;

The Appellant submitted that her occupation of the suit land was confirmed by a one Bernadette Nabisinja in a deed dated 13th March 2013 which she also exhibited in Court at the trial.

The Appellant also submitted that key among her witnesses were the Respondent’s very relatives, to wit; Dw3, Grigolio Lubega, the Respondent’s elder brother and Pw4, an 80-year-old relative of the Respondent and both testified in the trial court that the suit kibanja is hers.

The Appellant further submitted that the Respondent first complained in 2017 over a boundary dispute in the LC1 court which he lost. That later he lodged another complaint over the kibanja in the LC3 court which he also lost. That the findings of the said courts were exhibited in the trial court but that the learned trial Magistrate ignored them.

On grounds 3 and 4;

The Appellant submitted that the learned trial Magistrate erred when he determined the suit before him basing on the 1983 earlier case that was brought by Luzzi Edward (deceased), her father, against a one Grigolio Lubega. She argued that the suit was in respect to another part of land that Grigolio Lubega (the Appellant’s brother) had trespassed upon.

The Appellant further argued that the learned trial Magistrate further erred in his findings because the said Grigolio Lubega who was the Defendant in the impugned proceedings that were never concluded testified in her favor, that the suit Kibanja is hers.

In addition to the above, the Appellant submitted that the learned trial magistrate's conduct amounted to a conjecture because he ignored the evidence before him and relied on another matter that was not before him to make a binding decision against the parties.

In conclusion, the Appellant prayed that the appeal be allowed and the Judgment and Orders of the learned trial Magistrate be set aside.

RESPONDENT'S SUBMISSIONS

Preliminary Objection:

The Respondent raised an objection that grounds one and three offend the provisions of Order 43 rule 2 of the Civil Procedure Rules. The rule provides that the memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decree appealed against.

The Respondent cited the authority of *Attorney General versus Florence Baliraine Civil Appeal No. 79 of 2003, in which a ground raised in objection to the learned trial Judicial officer's findings, alleged failure to evaluate evidence. This alleged failure to evaluate evidence was held not to be a ground of appeal but a fishing expedition.*

The Respondent argued that both grounds one and three are narrative and argumentative and prayed that this Honourable Court be pleased to strike them out.

Arguments on the merits:

Ground one;

The Respondent supported the findings of the learned trial Magistrate and submitted that the trial officer, rightly evaluated the evidence on record and correctly reached a conclusion that he is the owner of the suit Kibanja.

The Respondent supported the learned trial Magistrate's findings that the Appellant's father had earlier on been prohibited from taking possession of the suit land until the final determination of Civil Suit No. 9 of 1983 by issuing an injunction in the matter.

The Respondent submitted that all the Appellant's evidence on acquisition of the suit Kibanja including that which was given by his biological brother, Grigolio Lubega, as Dw3, was all hearsay and thus inadmissible as per Sections 58 and 59 of the Evidence Act Cap. 6. He asserted that the said witnesses were not present when the said gift of land was allegedly given to the Appellant and that as such the same was rightly rejected by the trial court.

On ground two;

The Respondent submitted that the ground is absurd and an abuse of court process because court could not have relied on alleged findings of local council courts which were never proved by documentary evidence.

The Respondent further argued that the LC3 authority has never been a court of first instance in land matters. He supported his argument with the authority of *Isoto Angella versus Atai Elizabeth HCMA No. 140 of 2022 in which it was upheld that Local council three courts are not courts with original jurisdiction. They are appellate courts to which appeals from local council two lie.*

In conclusion on this ground, the Appellant argued that for the above reasons, the learned trial Magistrate cannot be faulted for having ignored a Judgment of the LC3 Area Land Committee.

Ground three;

The Respondent submitted that he testified that the Appellant trespassed on the suit land in the year 2018. He also submitted that this court should consider the fact that he testified that he was sick for a very long time and that the disputes over the land between Edward Luzzi and Bernadette Nabisinga, prevented him from occupying his land.

Ground four;

The Respondent also submitted that although the Appellant contends that she has been in possession since 1992, her possession has not been peaceful but rivaled with several lawful impediments like injunctions, complaints, challenges or interruptions that defeat her claim of being an adverse possessor.

Furthermore, the Respondent submitted that the Appellant's claims that she is also a lawful or *bonafide* occupant are unfounded because the same were never a part of her pleadings in the trial Court. The Respondent also argued that the Appellant did not raise the objection of limitation against the suit in the trial court and that the trial Magistrate cannot be criticized for not upholding an objection that was never raised in the first place.

In conclusion, the Respondent prayed that this Honourable Court be pleased to dismiss the entire appeal with costs to the Respondent.

DETERMINATION OF COURT.

I have carefully examined the submissions of the parties and the record of the trial court but before delving into the merits of the appeal I will deal with the preliminary objection raised by the Respondent.

The objection that was raised by the Respondent is that grounds 1 and 3 offend Order 43 rule 2 of the Civil Procedure Rules. Below are the two grounds, sought to be struck out by the Respondent.

Ground one: The learned trial Magistrate erred in law and fact when he did not evaluate the evidence on record and arrived at a wrong decision

Ground three: The learned trial Magistrate erred in law and fact when he failed to consider the Appellant's interest as confirmed by the landlord Nabisinja Benaleta.

The above rule in Order 43, requires that a memorandum of appeal should set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decree

appealed from. The Respondent buttressed his argument with a plethora of authorities, key among them being *Attorney General versus Florence Baliraine Court of Appeal Civil Appeal No. 79 of 2003 in which a ground criticizing the trial Judicial officer's failure to evaluate evidence was held to be a mere fishing expedition.*

In like manner, the Respondent contends that the two impugned grounds of appeal offend the above rule and should be struck out by this Honourable Court.

In my consideration I agree with the Respondent that indeed, ground one offends the rule but ground three was drafted concisely and it is neither argumentative nor a fishing expedition.

In agreement with the Respondent, I will strikeout ground one as prayed, but retain ground three.

Ground two; The learned trial Magistrate erred in law and fact when he did not consider the Judgment of the LC3 area land committee and arrived at a wrong conclusion.

Ground three: The learned trial Magistrate erred in law and fact when he failed to consider the Appellant's interest as confirmed by the landlord Nabisinja Benaleta.

I will resolve these two grounds jointly.

In his pleadings, the Respondent stated in paragraph 4(f) of his plaint filed on 12/02/2019, that he first took the matter to the LC1 chairman and later to the sub county and that the matter was not resolved.

In his evidence in chief, the Respondent testified on oath that he took the dispute to the Lc3 – Bujumba court and that they ruled that, Namuddu Grace was the rightful owner of the suit land in 2017. During cross examination, the Respondent testified that he learnt of the Appellant's occupation of the suit kibanja in 2018.

Whereas, this Court has ruled on several occasions that the Local Council Courts have no authority to try land matters, the fact that these suits were initiated in these courts by the Respondent and he lost is a relevant fact. This fact shows that the Respondent subjected himself to the Jurisdiction of these courts. He is now estopped from claiming that they were not vested with jurisdiction to try the land disputes that he referred to them. This fact also, demonstrates that the Respondent is guilty of forum shopping. He subjected himself to the jurisdictions of these courts, lost and still initiated a suit in the Magistrates' court.

It is also imperative to note that whereas the Respondent pleaded in paragraph 4(a) of his plaint that he acquired the suit land as a gift *intervivos* from his parents in 1965, in his evidence on court record, he stated that his father did not give him the suit land in writing. The Respondent instead, testified in direct departure from his pleadings, that he inherited the suit land from his parents.

In Jani Properties Ltd vs. Dores- Salaam City Council [1966] EA 281; and Struggle Ltd vs. Pan African Insurance Ltd [1990] which were followed by the Hon. Mr. Justice Henry I. Kaweesa in High Court Civil Appeal No. 020 of 2021 Kitaka Peter & 12 Ors vs. Mohamood Thobani it was held that a party is bound by his/her pleadings and cannot depart from them. That departure from pleadings is good ground for rejection of the evidence.

It is the finding of this court, therefore, that the learned trial Magistrate Grade one ought to have rejected the Respondent's evidence for being a complete departure from his pleadings.

In contrast to the Respondent, the then unrepresented Appellant maintained her case as pleaded in her Written Statement of Defence. She testified in the trial court that she acquired the suit Kibanja from her father Luzzi Edward (deceased). She even stated that she has a written deed that was given to her by her father when he gave her the suit land.

The Respondent's elder biological brother, Grigolio Lubega also testified for the Appellant as Dw3. He testified that he knew both the Appellant and the Respondent. He informed court that the Appellant is his neighbor and that the suit land belongs to her, having acquired it from her now deceased father, the Late Luzzi Edward who was the registered proprietor of the suit land at some point in time.

Whereas the Respondent attempted to have Grigolio Lubega's evidence expunged from the record by alleging that he was a person of unsound mind without proof, the learned trial Magistrate examined the witness, and satisfied himself that he was capable of giving evidence. He thus admitted and maintained his evidence on the record of this court.

Grigolio Lubega was a party to the suit in which the Appellant's father was allegedly stopped from making changes to the land by way of an injunction. The fact that Grigolio Lubega testified for the Appellant, stating that she is the owner of the suit land, lends credence to the Appellant's

claim that the land on which an injunction was issued against the Late Edward Luzzi (the Appellant's father), is different from the suit land.

In addition to the above, the Appellant testified that prior to the death of the current registered proprietor to the suit land, the Late Nabisinja Bernadette, she paid her a visit to regularize her occupancy. She further testified that the deceased even made for her a written deed in recognition of her occupancy dated 13/03/2013. It is only unfortunate that the learned trial Magistrate did not guide the unrepresented Appellant to admit this document as an exhibit or for Identification. Nevertheless, the record shows that the learned trial Magistrate had a look at this document.

The Appellant also testified that the Late Nabisinja Bernadette never challenged her occupancy at any one time. In the absence of any evidence contrary to this claim, this means that the now deceased registered proprietor acquiesced with the Appellant's occupation of the suit land.

With respect to the learned trial Magistrate, I disagree with the fact that he relied on an uncertified record of proceedings to determine a very important issue on ownership of the suit kibanja. The learned trial Magistrate held that Edward Luzzi could not have lawfully gifted the suit land when a temporary injunction stopping him from dealing in it was still in force. In the absence of certified true copy of the record, I find that this holding was unjustifiable.

In addition, I have already found that, the fact that Grigolio Lubega, who was a party to the impugned earlier proceedings as a defendant, having testified that the suit land belongs to the Appellant, this fact confirms or lends credence to the Appellant's claim that the suit land is different from the one which was the subject of the previous proceedings from which the injunction arose.

Accordingly, the learned trial Magistrate's finding that the Late Edward Luzzi could not have given the suit kibanja to the Appellant because of a temporary injunction in an earlier suit of 1983, was unfounded.

In the premises, I hereby answer grounds 2 and 3 in the affirmative.

I also find that the affirmative resolution of the above two grounds of appeal suffices to determine the instant appeal. I thus do not find it necessary to delve into the fourth ground of appeal.

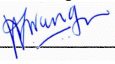
In conclusion, the appeal hereby succeeds and costs of the same are awarded to the Appellant.

I so order.

Dated this 23rd day of January, 2024.

Orders:

1. The Appeal is allowed.
2. The Judgment and Orders of the trial Court are hereby set aside.
3. Civil Suit No. 001 of 2019 is dismissed.
4. The Costs of this appeal are awarded to the Appellant.

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VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE