

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

Civil Appeal No. 092 of 2022

(Formerly MSD-CA-001 of 2022)

1. ALBERTINA RACHIU
2. OKUMU CHARLES
3. OZELE ALFRED
4. OKECHA GODFREY
5. APENJO JOYCE

..... APPELLANTS

VERSUS

1. MUGISA JELOUSY
2. MULIMBA ROBINAH

..... RESPONDENTS

(Appeal from the Judgment and Decree of H/W Komakech Kenneth, Magistrate Grade 1 of the Chief Magistrate's Court of Masindi at Buliisa in C.S. No. 001 of 2010 dated 11th January, 2022)

Judgment

Background:

- [1] The Respondents as Plaintiffs filed a suit against the Appellants/Defendants for inter alia, a declaration that the Respondents were the rightful owners of the suit land measuring **14 acres** situated at **Kisomoro LC1, Ngwendo Sub county, Buliisa District**, that the Appellants are trespassers thereon, general damages, a permanent injunction and costs of the suit.
- [2] It was the Respondent's/Plaintiff's case that they are children of the late **Mulaya Mulimba John** who acquired the disputed land by way of 1st occupation in **1987**, utilized it for agriculture and built a semi-permanent house thereon. That it was until on or about

2017, when the Appellants/Defendants together with their workmates started claiming and utilizing the disputed land by planting thereon seasonal crops without any colour of right or consent from the Respondents/Plaintiffs.

- [3] On the other hand, the Appellants denied the Respondents' allegations and contended that the suit land which is different from where the Respondents constructed their house, was acquired by the 1st appellant's husband a one **Othembi Ethien** in **1965** by way of 1st occupation. The 2nd - 5th Appellants are all children of the 1st Appellant.
- [4] The trial Magistrate found that upon locus visit to the suit land, the Respondents occupied and utilized the suit land which previously belonged to their late father a one **Mulimba John**, before and after his demise, for cultivation of seasonal crops and that their father constructed a semi-permanent house thereon. That Court observed houses constructed and belonging to the Appellants were all newly grass thatched, built in various corners of the suit land while others were still under construction.
- [5] The trial Magistrate concluded that the Appellants forcefully entered into or upon the suit land and therefore, he decided in favour of the Respondents, that the suit land belonged to the Respondents.
- [6] The Appellants were dissatisfied with the Judgment of the trial Magistrate and lodged this appeal on 3 grounds as contained in their amended Memorandum of Appeal:

1. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate evidence on record, thereby coming to a wrong conclusion that the Plaintiffs had proved to be the customary owners of the suit land.
2. The learned trial Magistrate erred in law when he based his decision on ownership of customary land on conflicting claims of possessionary rights, rather than on the requirement to prove established customary practices.
3. The learned trial Magistrate erred in law and fact when he awarded general damages of Ugx. 8,000,000= without proof, basis or evidence in support of the award.

Counsel legal representation

- [7] The Appellants were represented by **Mr. Omara Daniel of Amani Law Chambers & Co. Advocates, Hoima** while the Respondents were represented by **Mr. Abaasa Nicholas of LDC Legal Aid Clinic, Kampala**. Both Counsel filed written submissions as permitted by this Court for consideration in the determination of this Appeal.

Duty of the 1st Appellate Court

- [8] It is a well settled principle on a 1st appeal as the instant case that the parties are entitled to obtain from the appeal Court its own decision on issues of facts as well as law. In conflicting evidence, the appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses. The discretion of the trial

Court should not be interfered with by the Appellate Court unless it is found that the trial Court is exercising its discretion has misdirected itself in some matter, see **Steward of Gospel Talents Vs. Nelson Onyango H.C.C.A. No. 14 of 2008** and **N.I.C. Vs. Mugenyi [1987] HCB 28**. In this Appeal, this Court shall be guided by the above principles.

- [9] In this Appeal, **Grounds 1 and 2** of appeal relate to how the trial Magistrate evaluated the evidence as adduced before him and therefore, shall be dealt with together while ground 3 shall be dealt with separately.

Grounds 1 and 2: Evaluation of evidence

- [10] Counsel for the Appellant submitted that whereas the trial Magistrate was alive to the law on proving customary ownership of land as claimed by the Respondents, he erred in law when he departed from this known position of the law and misdirected himself, when he went ahead and based his decision that the Respondents were the owners of the suit land on conflicting claims of possessionary rights over sizeable track of land which each party claims as a private property.
- [11] Counsel submitted that in this case, there was no evidence adduced by the Respondents or any of their witnesses during trial to show or demonstrate that they acquired the suit land through inheritance under custom or on any established customary rules.
- [12] Lastly, Counsel submitted that the Appellants derived their interest in the suit land from the 1st Appellant's late husband **Ethien Othembi**, father to the 2nd - 5th Appellants. That the

Respondents occupied and utilized the former land of a one **Gilbert Dengo** where the Respondents' father **Mulimba John** built a house, the portion of land that is not in dispute. That the trial Magistrate therefore ignored this piece of evidence in his evaluation of evidence and instead evaluated the Respondent's evidence in isolation of that of the Appellants.

- [13] Counsel for the Respondents on the other hand submitted that the suit land belonged to the Respondents' father, **Mulimba John** who acquired it as vacant land, utilized it by cultivation of food crops and construction thereon of a semi-permanent house.
- [14] Under **Sections 101 -103 of the Evidence Act** he or she who asserts must prove. The burden lies on the Plaintiff to prove his or her case on the balance of probabilities, see also **Nsubuga Vs. Kavuma [1978] HCB 307**. In the instant case, the Respondents as Plaintiffs had the burden to prove their case that the suit land belonged to them and that the Appellants were trespassers thereon.
- [15] It was the finding of the trial Magistrate as it was the evidence of the Respondents that they occupied and utilized the suit land which previously belonged to their father the late **Mulimba John** who before and after his demise, utilized the land for cultivation of seasonal crops, and that their late father constructed a semi-permanent house thereon. That upon the trial Magistrate's visit at locus in quo, he confirmed the presence of the semi-permanent house on the suit land which still existed.
- [16] I think this was a misdirection by the trial Magistrate. Both in their pleadings and evidence adduced in Court, the

Appellants/Defendants contended and averred that the location where the Respondents have the semi-permanent house does not form part of the disputed area. According to the Appellants, that portion of the land is on a one **Dengo's** land who offered it to the Respondents' father, **Mulimba John**.

- [17] Indeed, as per **the cross examination of Mugisa Jelousy (Pw1) by D4**, the Respondents/Plaintiffs have no home/house on the suit land. As per **the cross examination of Robinah Mulimba (Pw2) by D1**, their father had several wives who were staying in their respective homes outside the suit land. The suit land was just for cultivation. **Pw2** explained in her evidence that their father used to take them to the gardens for work on the suit land. The foregoing evidence was also confirmed by **Bamuturaki William (Pw3)** who during **cross examination by D2** stated that the suit land was just for cultivation and there was no graves there on at the time.
- [18] The sum effect of the Respondents' evidence is that of possession of the suit land by way of cultivation of seasonal crops. The Respondents came from their homes which are not located on the disputed land for cultivation. The alluded to semi permanent house of the 1st Respondent was therefore not on the suit land.
- [19] On the part of the Appellants, it is not in dispute that they are both in possession of the suit land by way of cultivation of food crops and occupation. During **cross examination of Pw1 by D3**, he conceded that the Appellants had buried their people on the suit land though he did not know how they came to bury them thereon. The 1st Respondent as Pw1 stated in evidence that they

had utilized the suit land for over 50 years. It is surprising however that despite his claim that they had utilized the suit land for over 50 years and therefore from his childhood, the 1st Respondent/Plaintiff did not know the neighbors.

- [20] The Respondents as further proof that they were owners of the suit land testified that their father sold a portion of the suit land measuring about 10 acres to a one **George Mukoma** as per **P.Exh.1**. The Respondents however did not adduce credible evidence that the portion of the land sold to the said **George Mukoma** formed part of the suit land in dispute. The said **George Mukoma** did not appear to testify in Court as either a claimant of any portion of the suit land or a witness of the Respondents.
- [21] In the premises, it appears apparent to me that the Appellants who are in both possession and occupation of the suit land have a better title than the Respondents who came to claim possession of the suit land by way of cultivation of food crops under the protests of the Appellants, **Atunya Vs. Okeny, H.C.C.A. No. 51 of 2017 [2018] UGCLD 69**.
- [22] As a result of the above, I find that the trial Magistrate considered the evidence of the Respondent and without any reason or justification ignored and failed to take into consideration the evidence of the Appellants regarding how the father of the Respondent came onto **Dengo's** land where he built a house and stayed. Had the trial Magistrate properly evaluated the above evidence, he would have come to a conclusion that the Respondents/Plaintiffs had failed to prove that they were customary owners of the suit land through occupation as he

wrongly found, and that it is the Appellants who were in both possession and occupation that were the owners of the suit land. The Respondents/Plaintiffs did not prove their case on the balance of probabilities that they were the owners of the suit land.

- [23] Grounds 1 and 2 are in the premises found to have merit and they accordingly succeed.

Ground 3: The learned trial Magistrate erred in law and in fact when he awarded general damages of Ugx. 8,000,000= without proof, basis or evidence to support the award

- [24] I do agree that damages are the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done; **Contract, Hall Brothers SS Co. Ltd Vs. Young [1939] 1 KB 748 at 756. In Stroms Vs. Hutchison (1905) AC 515,** general damages are such as the law will presume to be the direct natural or probable consequence of the act complained of.

- [25] In the instant case, the case is for trespass. The purpose of general damages is that the Plaintiff is put in a position that he was in had the injury or infringement complained of not occurred. In the premises, the Plaintiff would be entitled to damages for the injury suffered or loss suffered as a result of the trespass. In this case however, no trespass has been proved. The Appellants could not be found trespassers on the suit land they possessed and occupied of a long time. The Respondents appear to had been attracted by the potential of oil compensation to make the instant claims for the suit land.

[26] I find this ground of appeal having merit and it also accordingly succeeds.

[27] In conclusion, I find the entire appeal having merit. It is accordingly allowed with orders that the Judgment and decree of the trial Magistrate is set aside and substituted with an order that the widow of **Othembi Ethien**, 1st Appellant and her children (2nd – 5th Appellants) are the lawful owners of the suit land which they possess and occupy and where the 1st Appellant has buried her children measuring 14 acres of land situate at **Kisomoro village, Ngwendo Sub county, Buliisa District**.

The Appellant is also awarded costs of the appeal and in the lower Court.

Dated at Hoima this 1st day of February, 2024.


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Byaruhanga Jesse Ruggyema
Judge