

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

Civil Appeal No. 028 of 2023

(Formerly MSD-CA-045 of 2019)

1. BARONGO FONIFACE
2. BARONGO BOSCO

} APPELLANTS

VERSUS

NDOLERIIRE PASCAL RESPONDENTS

(An Appeal from the Judgment and Decree of the Chief Magistrate's Court of Hoima at Hoima before H/W Kagoda S.M. Ntende Esq. Chief Magistrate dated 12th day of September, 2019)

Judgment

Background:

- [1] The Respondent herein sued the Appellants inter alia for, a declaration that the suit land located at Kabaale-Kisweka L.C, Mparo Division, Hoima Municipality, Hoima District (suit land) belongs to the Respondent as a customary holding and that the Appellants are trespassers thereon.
- [2] It was the Respondent's case that he is the customary owner of the suit land having acquired the same from his father **John Kwebiiha** in 1979 and has been in its possession using it for cultivation of crops and grazing of animals.

- [3] That in 1997, the 1st Appellant trespassed on part of the land by crossing the boundary and cutting the barbed wire fence that separated it from that of his neighbor, a one the late **Difan Mugenyi**. That the Respondent replaced upon the intervention of the LC Chairman of the area but in and around 2006, the 1st Appellant once again, removed the barbed wire fence, crossed into deep into the Respondent's land and planted thereon trees such as Jack and Mangoes.
- [4] That in 2010, the 2nd Appellant also came and trespassed on the suit land by way of slashing and cultivation and both the Appellants extended their acts of trespass to the suit land by way of construction of a permanent house thereon.
- [5] In their joint written statement of Defence, the Appellants denied the Respondent's allegations and contended that they were utilizing the land that the 1st Appellant acquired way back in 1984 by way of first possession and that the said **John Kwebiha** had never owned the suit land and so could not have passed on the same to the Respondent. This may had been utilizing the land since 1984 without any interference until 1998 when the Respondent began laying unfounded claims in the same.
- [6] The trial Magistrate upon the evaluation of the evidence that was adduced before him by the parties found the Appellants' evidence riddled with contradictions regarding how they came to acquire the land while that of the Respondent was found coherent. He gave Judgment in favour of the Respondent with the following orders.

(a) That the suit land belongs to the Respondent

- (b) That the Appellants are trespassers thereon*
- (c) A permanent injunction restricting the Appellants, their agents, legal and personal representatives or anyone claiming from them from trespassing or in any way interfering with the suit land.*
- (d) Eviction order, general damages of UGX. 10,000,000= and costs of the suit.*

[7] Being dissatisfied with the Judgment and orders of the trial Magistrate, the Appellants lodged the present Appeal to this Court on the following grounds:

1. That the learned trial Magistrate erred in law and fact when in evaluation of evidence failed to consider and/or ignored the evidence of the Appellants and thereby came to a wrong conclusion that the Respondent had proved to the required standard that he owned the suit land.
2. That the learned trial Magistrate erred in law and fact when in evaluation of evidence found that the Appellants' witnesses Dw2 and Dw3 majorly contradicted the evidence of Dw1 and thereby came to a wrong conclusion that the suit land did not belong to the Appellants.
3. That the learned trial Magistrate erred in law and fact when he rejected the Appellants' Exh.D.1, a letter from the LC I Executive Committee signed by the Respondent as LC I Chairperson and elders dated 14th April, 1998 as contradictory of the Appellants' claim of settlement on the suit land since 1984.

4. That the learned trial Magistrate erred in law and fact when he failed to find that the Appellants by adverse possession and long use of the suit land had acquired a protectable interest in the suit land as Bona fide occupants.
5. That the learned trial Magistrate erred in law and fact when he held that the Appellants were trespassers on the suit land.
6. That the learned trial Magistrate erred in law and fact when he ignored major inconsistencies in the Respondent's case but none the less found for the Respondent thereby prejudicing the Appellants.
7. That the learned trial Magistrate erred in law and fact when he failed to conduct the locus in quo according to the prescribed principles and wrongly evaluated the evidence at the locus in quo thereby leading to a miscarriage of justice to the Appellants.

Counsel legal representation

- [8] The Appellants were represented by **Mr. Simon Kasangaki** of **Ms. Kasangaki & Co. Advocates, Masindi** while the Respondent was represented by **Mr. Aaron Baryabanza** of **Ms. Baryabanza & Co. Advocates, Hoima**. Both Counsel filed their respective submissions for consideration in the determination of this Appeal.
- [9] The law governing first Appeals as the instant one is well settled. The first Appellate Court is to review the record of evidence i.e.

for itself in order to determine whether the decision of the trial Court should stand. In so doing Court must bear in mind that an appellate Court should not interfere with the discretion of a trial Court unless it is satisfied that the trial Court in exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of discretion and that as a result there has been a miscarriage of justice, **Stewards of Gospel Talents Ltd Vs. Nelson Onyango H.C.C.A. No. 14 of 2008.**

- [10] This Court shall therefore reconsider all the evidence that was adduced before the trial Court by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence the decision of the trial Court should stand.
- [11] Grounds of Appeal 1-6 appear to revolve around how the trial Magistrate evaluated the evidence before him. As a result, they shall be dealt with together while ground No. 7 shall be dealt with separately.

Grounds 1-6: Evaluation of evidence

- [12] Counsel for the Appellants submitted that all the Appellants/Defendant's witnesses corroborated each other and attested to the fact that the suit land belongs to the 1st Appellant, having acquired the same by first occupation as public land in 1984 and has never vacated the same up to date. That the Appellants' witnesses (Dw1 and Dw2) did not whatsoever

contradict themselves but rather corroborated each other confirming and proving that the disputed land belongs to the 1st Appellant, having acquired the same by first occupation in 1984 and has never vacated the same.

- [13] That the Respondent as the then the village LC I Chairperson witnessed the confirmation of his boundaries by the neighbours and elders in the village by signing and stamping **D.Exh.1** dated 14th April, 1998, thus he confirmed the 1st Appellant as the owner of the suit land.
- [14] Counsel concluded that the trial Court erroneously overlooked the core fact of the evidence that **Exh.D.1**, documentary evidence which is always the best evidence under **S.58 of the Evidence Act**, written by the LC Committee of the village that confirmed the 1st Appellant's ownership of the suit land. That the Respondent, being the Area LC I Chairperson who among others confirmed his ownership of land could not therefore later turn around and claim ownership of the same land in 1998.
- [15] Counsel for the Respondent on the other hand submitted that the trial Magistrate in his Judgment clearly analysed the evidence of the Appellants but rejected it on the ground that the 1st Appellant was claiming to have acquired the suit land in 1984 yet he was relying on the document of 1998. Secondly, that according to the 1st Appellant, he acquired the suit land by first occupation in 1984 yet **Nyansio Karubanga** (Dw2) told Court that the suit land was given to the 1st Appellant by a village elder (**Omukuru Womugongo**) called **Augustine Kasangaki** upon which he gave the bataka "**Kita**" in form of money. Counsel concluded that it

was on the basis of the above unexplained inconsistencies in the Appellant's evidence that let the trial Magistrate to reject the Appellants' evidence and come to the conclusion that the suit land belonged to the Respondent.

[16] Counsel concluded that it was on the basis of the above unexplained inconsistencies in the Appellants' evidence that led the trial Magistrate to reject the Appellants' evidence and come to the conclusion that the suit land belonged to the Respondent.

[17] It is trite law that the burden of proof is on her who alleges and the applicable standard of proof is that on a balance of probabilities; **Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 130.**

[18] At the trial in the lower Court, three issues which were agreed upon by the parties are as follows:

(a) **Whether the suit land belonged to the Respondent/Plaintiff.**

(b) **Whether the Appellants/Defendants were trespassers on the suit land.**

(c) **What remedies were available to the parties.**

The trial Court found the issues in the affirmative, in favour of the Plaintiff/Respondent.

[19] In his bid to prove his case, the Respondent/Plaintiff adduced evidence to the effect that he acquired the suit land from his late father, **John Kwebiiha** in 1979 in the presence of his neighbor, the late **Difani Mugenyi** and his son a one **Okwir** among others. That the 1st Appellant/Defendant trespassed on the suit land in

1997 by cutting a barbed wire fence boundary and the 2nd Appellant/Defendant entered on the land in 2020. Both Appellants who are father and son thereafter carried out cultivation and growing of fruit trees and then constructed a house thereon.

[20] The Respondent's evidence was supported by that of his uncle, **Balaam Kibura** (Pw2), the Area LC I Chairperson, **Basigara Patrick** (Pw3), and **Mugenyi Fred** (Pw4) who is the son of the late **Difani Mugenye**, the original neighbor to the suit land. They all testified that the suit land initially belonged to the Respondent's father, the late **John Kwebiiha** and that the Appellants who were residents of **Ngogoma village** came and grabbed the land from the Respondent in 1998/9 but the matter was reported before the LC I Court and it was resolved in favour of the Respondent where upon the Appellants vacated the land. That however, after some time, the appellants came back and trespassed again on the suit land and the matter was reported before the LC II Court where upon once again, the Appellants lost and left the suit land. It was until 2010 when the Appellants finally returned and again trespassed on the suit land by cultivation of crops and construction of a house thereon hence the institution of this suit.

[21] The 1st Appellant on the other hand adduced evidence that he is the owner of the suit land having acquired it by way of first possession in 1984. That in April, 1988, the Respondent who was the then LC I Chairperson confirmed him as resident on the suit land as per **D.Exh.1**. His evidence was also supported and

corroborated by that of **Karubanga Nyansio** (Dw2) and **Kyamanywa Francis** (Dw3).

[22] The document that was relied on by Appellants as confirming them as residents on the suit land is dated 14th April, 1998 (D.Exh.1). It is a **Kabaale LC I** Executive Committee document indicating boundaries of the residents of **Kaburaisoke/Kyawairima**. Attached to it is the mapping of the area.

[23] In his submissions, Counsel for the Respondent protested the admission of **D.Exh.1** and its consideration in the evaluation of evidence on the grounds that when the Respondent testified in Court as Pw1, the said document was not put to him during cross examination to confirm or deny it. That the attached sketch map was drawn in 1984 before the document was authored and lastly, that as per the record of proceedings, the suit land is in **Kinogozi West LC I**, formerly **Kabaale LC I** whereas the document locate the land in **Kaburaisoke/Kyawairima**.

[24] In my view, the Counsel for the Respondent's protests against **D.Exh.1** were and are not justified. The document was never an ambush to the Respondent at all because it was sufficiently pleaded under the "list of Documents" as

*"1. A letter by the LC I dated 14th April, 1998
illustrating boundaries of each resident"*

The attachment which is a sketch map was listed as the 2nd document.

[25] The Respondent was the LC I Chairperson at the time the document was authored. Since the document was listed as the Appellants' document that would be relied on, that was sufficient alert to require the Respondent either seek for its production under further and better particulars (**O.6 r 3 CPR**), that is, if he was not aware of it and or then deny it in subsequent pleadings in reply under **O.8 r 18 (1) CPR** depending on whatever status he considered the document to have. The Respondent did not take any of the above options. As a result of the Respondent's omission to take any of the above referred to action, the document (**D.Exh.1**) and the evidence adduced along with it was left unchallenged. The Respondent failed to rebut the Appellant's evidence that he himself in his capacity as the LC I Chairperson of the area, on 14th April, 1998 confirmed the 1st Appellant as a resident on the suit land. He could not therefore later, claim it as his without any evidence rebutting **D.Exh.1** which confirmed his boundaries of the land.

[26] As regards the present location of the suit land, the 1st Appellant claimed that it is situated in **Kinogozi West**, formerly **Kabaale LCI**. As per **D.Exh I**, **Kaburaisoke/Kyawairima** were both shown to be areas in **Kabaale LC I**. I find that the location of the suit land is in the same area despite the changes in the names brought about by the new political demarcations. It cannot therefore be said that **D.Exh.1** refer to a different piece of land and not the suit land. The burden was on the Respondent/Plaintiff to show that **D.Exh.1** of which he was a signatory as the area LC I Chairman referred to a different piece of land rather than the suit land, which burden he did not discharge. The Respondent in any case

did not either deny the signature on **D.Exh.1** or claim/allege that it was forgery.

- [27] As regards the claim that there were previous LC decisions over the suit land decreeing it to the Respondent/Plaintiff, none of these Judgments were proved and tendered in evidence. There was no explanation from the area LC Chairman **Basigara Patrick** (Pw3) as regards the none availability of these decisions.
- [28] The Appellants claim and evidence that the 1st Appellant acquired the suit land by way of 1st occupation does not appear in any way, in my view, contradicting **Nyansio Karubanga's** (Dw2) evidence which is to the effect that the 1st Appellant got the suit land in 1984 from the village elder (**Omukuru womugongo**) **Augustine Kasangaki** as Counsel for the Respondent want this Court to conceive it. Acquisition of land by first occupation as it were had to be backed by elders or local chiefs of the area. In this case, it is explained by the fact that the 1st Appellant had to give them "**Ekita**", which I may regard to had been a form of appreciation.
- [29] In the premises I find that the Appellant's evidence proved their acquisition of the suit land, which they have long occupied with developments thereon and therefore, acquired a protectable interest in land. The Respondent's case was devoid of any credible evidence regarding how, in the first instance, the Respondent's father **Kwebiiha** came to own the land in question for him to later on pass it to the Respondent and in the second instance, that they had been cultivating or carrying out grazing of animals thereon.

[30] In conclusion, I find that the trial Magistrate erred in law and fact when in evaluation of evidence failed to consider and/or ignored the Appellants' unchallenged evidence of acquisition of the suit land confirmed by **D.Exh.1** of which the Respondent was a signatory that affirmed the 1st Appellant's boundaries of the suit land and rather concluded that the Appellants' evidence was contradictory.

[31] As a result of the above, the Appellants could not be found trespasser on the suit land they legally acquired and were in long occupation of. Grounds 1-6 are in the premises found meritorious and they accordingly succeed.

Ground 7: That the learned trial Magistrate erred in law and fact when he failed to conduct the locus in quo according to the prescribed principles and wrongly evaluated the evidence at the locus in quo thereby leading to a miscarriage of justice to the Appellants

[32] In this case, Counsel for the Respondent conceded that 2 witnesses, **Sande Godfrey** (for the Respondent/Plaintiff) and **Wandera Jackson** (for the Appellants/Defendants) who testified at locus were allowed to do so irregularly for this was contrary to the prescribed principles for locus visit as guided in the **Practice Direction No. 1 of 2007** and explained in **David Acar Vs. Alfred Aliro [1982] HCB 60** where Court observed as follows:

".....locus in quo, it is not a public making where public opinion is sought but it is an opportunity for the witnesses to clarify on what they stated in Court and they must do so on oath".

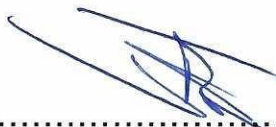
[33] In this case, the 2 locus witnesses; **Sande Godfrey**, and **Wandera Jackson** were never the parties' witnesses in the pleadings and during trial. There is no where it is indicated as to how they came to give evidence at locus. However, as rightly submitted by Counsel for the Respondent, the Appellant has not shown in this appeal where the trial Magistrate wrongly evaluated the evidence at the locus in quo thereby leading to a miscarriage of justice to the Appellants.

[34] I find that the trial Magistrate in his judgment never relied on the evidence of the two witnesses at locus to decide the case against the Appellants. One of the witnesses' evidence was expunged. The evidence at locus did not in this case in any way therefore prejudice the Appellants. This ground accordingly fails.

[35] On the whole, as per the findings of this Court, this appeal generally succeeds with the following orders:

- (a) The Judgment and the decree of the trial Court are set aside and substituted with an order declaring the Appellants as the lawful owners of the suit portion of land measuring about 6 acres.
- (b) Costs of this appeal and in the trial Court are awarded to the Appellants.

Dated at Hoima this 25th day of January, 2024.



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Byaruhanga Jesse Rugyema
Judge