

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT HOIMA
CIVIL APPEAL NO. 91 OF 2022
(Formerly MSD Civil Appeal No.40 of 2019)
(Arising from Buliisa C.S No.5 of 2019)

DAVID BAHIKYA APPELLANT

VERSUS

1. AMIS RWAMUKAGA

2. RASHID NTAMARA RESPONDENTS

(Appeal from Judgment and orders of H/W Komakech Kenneth, Magistrate Grade 1 Buliisa dated 30th June, 2022)

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

Background

- [1] The Appellant/plaintiff and his deceased brother **Rugonza Robert** filed **C.S No.5/2019** against the Respondents/Defendants for inter alia, a declaration for ownership of the suit land situated at Kirama Village, Kigwera Sub county, Buliisa District measuring **approximately 4 acres**, that the Respondents/Defendants are land grabbers, general damages and costs of the suit.
- [2] The Appellant/Plaintiff's case is that he acquired the suit land through inheritance from his late grandfather a one **Mugwambya Kasoro** who acquired the same from his late father, the late **Kasoro Mbali** who in turn had acquired it by way of first occupation and had stayed on the suit land with his family without any interference until in 2019, when Uganda National Road Authority (UNRA) came up with the programme of paying

compensation for the suit land due to compulsory acquisition for road construction, that the Respondents/Defendants started laying claims of ownership of the same.

- [3] The Respondents/Defendants on the other hand denied the Appellant's allegations and contended that they acquired the suit land through inheritance from their late father, **Busulwa Ramadhan** who in turn had acquired it by way of first occupation in 1949. The Respondents claim that they were therefore born on the suit land where they have been carrying out cultivation of cash and food crops. Further, that their beloved demised family members were buried on the suit land as further proof of its ownership.
- [4] At trial, the issues for determination were;
- a) **Who owns the suit land.**
 - b) **Whether or not the defendants are trespassers on the suit land.**
 - c) **What remedies are available to the parties.**
- [5] The trial Magistrate found that the **Mugwambya** family (from whom the Appellant/Plaintiff derive interest) was near the primary school (Kigwera/Kirama) as the Respondents/Defendants settled on the opposite side as confirmed during the locus in quo visit. That a one **Salim Wandera**, brother to the Respondents/Defendants lived on the suit land where **Mugwambya's** family had taken over. As a result, he found the suit in favour of the Respondents/Defendants and dismissed the Appellant/Plaintiff's suit with costs.
- [6] Dissatisfied with the judgment of the trial Magistrate, the Appellant lodged the present appeal against the judgment on the following grounds;
1. *The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No.5 of 2019 that the suit land belongs to the Respondents.*
 2. *The learned trial Magistrate erred in law and fact when he totally disregarded the Appellant's evidence of possession and customary ownership of the suit land thereby arriving at a wrong decision in Civil Suit No.5 of 2019 that the suit land belongs to the Respondents.*

3. *The learned trial Magistrate erred in law and fact when he failed to find that the Appellant's family land is separated from the Respondents' family land by a path (Wanseko - paraa road) which has existed since time immemorial.*
4. *The learned trial Magistrate erred in law and fact when he found that the suit land occupied by both parties when none of the Respondents' family was settled nor utilising the suit land at all thereby reaching a wrong decision in Civil Suit No.5 of 2019 that the suit land belongs to the Respondents.*
5. *The learned trial Magistrate erred in law and fact when he failed to find that the suit land was acquired by way of first occupation by the late Mugwabya and the late Karozi Kasoro bordering the land of Mulega Basaliza in the South, Mwijakubi Charles in the West, Kirama Primary School in the East and a path (Wasenko - Paraa Road) in the North.*

Duty of the 1st Appellate court

- [7] It is the duty of this court as the 1st Appellate court to re-examine and re-evaluate evidence on record and make its own inference of facts 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 **Fr. Narsensio Begumisa Vs Eric Tibebaga, SCCA No.17/2000 [2004] KALR 236 and Pandya Vs R [1957] E.A 336.**
- [7] I note that all the grounds of appeal revolve around how the trial Magistrate evaluated the evidence before him to find in favour of the Respondents/Defendants save for the 1st ground of appeal which I find to be too general and vague. It does not state which type of evidence the trial Magistrate failed to properly evaluate hence it violates **O.43 rr.1& 2 CPR**. The memorandum of appeal is required to set forth concisely the grounds of objection appealed against pointing out or specifying points in the judgment which are alleged to have been wrongly decided which is not the case here in ground 1 of the appeal, **Ranchodbai Patel Ltd & Anor Vs Henry Wambuga & Anor, SCCA No.06 of 2017**. Such ground of appeal which offends **O.43 r.1 CPR** is liable for being struck out. I do accordingly

strike it out for being offensive, See also **Okot & Ors Vs Lamoo, HCCA No.26/2018 [2020] UGHC 174.**

Grounds 2 – 5: Evaluation of Evidence

- [8] Counsel for the Appellant **Mr. Simon Kasangaki** submitted that the Appellant has been and is still on the suit land and well known by the neighbours from all the borders of the land. That the Appellant has crops and a homestead and has buried his relatives on the suit land over time. That on the other hand, the Respondents do not stay on the suit land and neither do they have any developments thereon to prove that they own the suit land as alleged. That the Respondents did not lead credible evidence that they owned the suit land in possession of the Appellant. The graves the Respondents alleged were on the suit land were not shown to court at the locus in quo.
- [9] Counsel for the Respondents **Mr. Lubega Willy** on the other hand, submitted that it is not true that the Appellant was in possession of the suit land as a customary owner. The Appellant's own witness **Basaliza Mulega Charles** (PW3) testified that the Appellant and his family are currently residing on a portion of the suit land which was previously owned and occupied by a one **Salim**, a brother to the Respondents. Counsel therefore concluded that the land which was occupied by the Respondents including their brother **Salim** was occupied by the Appellant's family and this forms part of the suit land hence, that this is evidence that the Respondents were in possession of the suit land.
- [10] It is the law of evidence under **S.101 of the Evidence Act** that the burden of proof lies on the person alleging a set of facts and the applicable standard of proof is on a balance of probabilities. The burden of proof was therefore on the Appellant/Plaintiff to prove his case on the balance of probabilities; **Sebuliba Vs Co-operative Bank Ltd [1982] HCB 130.**
- [11] In this case, the Appellant/Plaintiff testified as **PW1** that he lived with the Respondents/Defendants on the suit land for very many years until 1985 when they left for their side of the land leaving the Appellant behind. The

demarcation was a path. In cross examination, the Appellant explained that he had known the Respondents since 1948 implying that he had lived with the Respondents since then up to 1985 when they left to their own place. That the Respondents' burial ground is not on the suit land but on their own land which is not the subject matter of this suit.

[12] The Respondents/Defendants on the other hand testified thus; **Amis Rwamukaga** (DW1) stated that his late father **Ramadhan Bisula** got the suit land from a one **Mugema Wandera** who had already acquired the land next to the suit land. He testified further that his father, his brother's wife and his brother and sister were all buried on the suit land. He concluded that if court goes to the suit land, it will find the above mentioned graves on the suit land. He however conceded that currently, the Appellant is in occupation of the suit land since 17/1/2012, none of the Respondents have lived on the suit land. He however explained that when his father died, they were so crowded and therefore, they decided to shift to other vacant areas.

[13] According to **Rashid Ntamara** (DW2), brother to the Respondents testified that their father **Ramadhan Bisula** acquired the suit land by way of first occupation through **Mugema Wandera** and that by the time they came on the suit land, **Mugwambya** (from whom the Appellant derive interest) was already settled but that their boundaries were clearly demarcated. In cross examination, he however revealed that by 1992, they had migrated and settled elsewhere.

[14] Whereas **DW2** conceded during cross examination that the Appellant's brother and father were all buried on the suit land that is located near the primary school, at locus, the Respondents did not prove by way of locating the graves of their father, brother's wife and brother and sister whom they claimed were buried on the suit land and show them to court as they intimated and promised to do in court. Counsel for the Respondents and the trial Magistrate instead relied heavily on the fact that **Salim Wandera**, brother to the Respondents had a house on the suit land and had grown thereon flowers. Again during locus visit, there is no evidence that was shown to court that on a certain spot on the suit land, there existed

- evidence of the said **Salim's** house and that the said flowers were ever on the suit land. The said **Salim** was not called as a witness.
- [15] It is apparently clear from the evidence of both parties that the Respondents' family joined the Appellant's family sometime back in the late 1940's and later, the Respondents' family migrated and settled elsewhere, at their current area of occupation. As to whether they left behind their vested interests in the suit land, there is no evidence in support of such a contention. The claim that the Respondents left behind their brother **Salim** occupying the suit land is not supported by any evidence. As **Salim** himself did not testify, there is no evidence as regards why or how he left the suit land, if at all he had been left behind.
- [16] In conclusion, I find that the trial Magistrate erred in law and fact when he totally disregarded the Appellant's conceded evidence of possession and found that the suit land was occupied by both parties when none of the Respondents' family was settled or utilising the suit land and thereby reached a wrong conclusion that the suit land belongs to the Respondents.
- [17] In the instant case, no credible evidence was adduced by the Respondents that the Appellant and his family occupied a portion of the suit land previously occupied by the brother of the Respondents, **Salim**. The Appellant's possession and occupation of the suit land that was conceded to is proof of ownership of the suit land in the absence of the Respondents' presentation of a better title than that of possession by the Appellant/Plaintiff; **Atunya Vs Okeny, HCCCA No.51/2017 [2018] UGCLD 69.**
- [18] As a result, for the reasons given above, I find that the Appellant/Plaintiff proved ownership of the suit land and therefore **grounds 2-5** are found to have merit, they accordingly succeed. The judgment and orders of the trial court are set aside and substituted with an order decreeing the suit land to the Appellant. Costs of this Appeal and in the lower court are accordingly awarded to the Appellant.

Dated this 25th day of January, 2024.

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Byaruhanga Jesse Rugyema
JUDGE.