THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

Civil Appeal No. 029 of 2022

(Formerly MSD-CA-008 of 2019)

KAAHWA JULIUS :::::::::::::::::::::::::::: APPELLANT

VERSUS

ELVANIS NYAKATO :::::::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgment and orders of H/W Aisu Nicholas, the Magistrate Grade I of Hoima at Hoima dated 23/01/2019)

Judgment

Background:

[1] The Respondent filed **C.S. No. 34 of 2017** against the Appellant in the Chief Magistrate's Court of Hoima at Hoima for trespass to land, vacant possession of the suit land, Permanent injunction against the Appellant, damages for trespass and costs of the suit.

[2] It was the Respondent's/Plaintiff's case that she acquired the suit land measuring 10 acres located at **Kisojo-Marongo LC I, Bugambe Sub county, Kikuube** (formerly Hoima) District. That the Respondent/Plaintiff acquired the suit land on 5th March, 1985 by way of purchase from a one **Zaverio Wathum** and a sale agreement was accordingly executed to that effect. That thereafter, she took possession and started utilizing the said land by way of cultivation. That it was during the time she had left for

marriage in Jinja District where she also fell sick and got involved in an accident in 2016 that the Appellant/Defendant came and trespassed on the suit land by way of cultivation and claiming ownership.

[3] That when the Respondent tried to stop the Appellant's activities on the land and demanded to know how the Appellant acquired the suit land, she was threatened with violence and the Appellant has therefore been in forceful use of the land amid her protests.

[4] The Appellant/Defendant on the other hand denied the Respondent/Plaintiff's allegations and contended that he is the rightful/customary owner of the suit land having also acquired it by way of purchase from the late **Zaverio Wathum** in 1983. That he took physical possession of the same in 1984, staying and utilizing the same by way of cultivation of crops, grazing and setting up a homestead without any interference whatsoever for over 33 years.

[5] The trial Magistrate on his part evaluated the evidence as adduced by the parties before him and found that the suit land is not surveyed hence its exact size is not known and that both parties claim to have bought the land from the same person, the late **Zaverio Wathum** as per their respective purchase agreements. He concluded that there was evidence that the Appellant moved with the Respondent when she was looking for the land to purchase and therefore knew that the suit land was for the Respondent. He therefore wondered why the Appellant who had allegedly earlier bought the suit land allowed the Respondent to purchase the same land he had allegedly earlier bought in 1983. He found the

Appellant's purchase agreement suspect for no original copy was presented for examination and therefore, on the strength of the Respondent's purchase Agreement, he found that the Respondent was the rightful owner of the suit land and the Appellant as a trespasser. Judgment was accordingly entered in favour of the Respondent/the Plaintiff.

[6] The Appellant was dissatisfied with the decision of the trial Magistrate and lodged the instant appeal on the following grounds:

1. **The learned trial Magistrate erred in law and fact when he based his decision solely on the testimonies of the Respondent without putting in consideration the documentary evidence adduced by the Appellant thereby arriving at a wrong decision.**
2. **The learned trial Magistrate erred in law and fact when he failed to consider properly and adequately scrutinize and evaluate the evidence of the Appellant and in so failing thereby came to a wrong conclusion.**
3. **The learned trial Magistrate erred in law and fact when he failed to address his mind on contradictions and inconsistencies by the Defendant's witnesses thereby arriving at a wrong conclusion.**
4. **The learned trial Magistrate erred in fact and in law when he failed to properly evaluate the evidence adduced by both parties and therefore coming to a wrong conclusion.**

Duty of the 1st Appellate Court

[7] The duty of this Court as a first Appellate Court is to re-examine, re-appraise and re-evaluate the evidence on record and come to its own decision. In so doing it is to subject the evidence on record to a fresh and exhaustive scrutiny, see **Bank Arabe Espanol Vs. B.O.U, S.C.C.A. No. 8 of 2001.**

Counsel legal representation

[8] The Appellants were represented by **Mr. Aaron Baryabanza** of **Ms. Baryabanza & Co. Advocates, Hoima** while the Respondent was represented **Ms. Iren Twesiime** of **Ms. Legal Aid Project** of the **Uganda Law Society, Masindi**. Both Counsel filed their respective submissions as directed by Court for consideration in the determination of this Appeal.

[9] Both Counsel argued all the 4 grounds of appeal together for the grounds are relate to how the trial Magistrate evaluated the evidence on record. I shall also deal with all the 4 grounds of appeal together because the grounds revolve generally around the evaluation of evidence before the trial Court.

Grounds 1,2,3,4: Evaluation of evidence

[10] Counsel for the Appellant submitted that the Appellant purchased the suit land from a one **Zaverio Wathun** in 1983 and immediately took possession of the same by using it for cultivation of crops and setting up houses till 2016 when the Respondent came and started claiming the land. That the purchase agreement was admitted as **DIDI.**

[11] However, the perusal of the record clearly shows that upon the attempt by the Appellant to tender in evidence the purchase agreement, Counsel for the Respondent objected to its admission on the grounds that it was a photocopy. As a result, Court admitted it for identification **(DIDI)** purposely pending production of its original. The Appellant closed his case without production of the original purchase agreement as directed by Court. The document therefore remained on record for merely identification purposes but not an exhibit. It is therefore not correct that the Applicant's purchase agreement was admitted in evidence as an exhibit marked **DIDI.**

[12] As a general role, under **S.63 of the Evidence Act**, documents adduced in Court are to be proved through primary evidence. Primary evidence means the document itself is produced for inspection by Court (**S.61 of the Evidence Act**). However, **S.64** (Supra) provides for secondary evidence as an exception to the general rule under for example these scenarios; when the original is shown or appear to be in the possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to the process of the Court; when the original has been destroyed or lost or in the possession or power of any person not legally bound to produce it, and or when the original is public document within the meaning of **S.73** etc, see also **Kigoye Francis Vs. Uganda Crim. Appeal No. 31 of 2019 (SC).**

[13] In this case, the Appellant produced in Court a photocopy of the alleged purchase agreement for the suit land which was never exhibited. There was no explanation given regarding the where abouts of the original agreement so as to have it admitted under the exception provisions of **S.64 of the Evidence Act**. As a result, I would find that the Appellant did not tender in Court any document to prove purchase of the land and as a result, this left the Appellant completely without any documentary proof that he ever purchased the suit land from **Zaverio Wathun** as he alleged.

[14] On the other hand, the Respondent adduced evidence that she is the owner of the suit land having bought it in 1985 from **Zaverio Wathum** at **Ugx. 10,000=** and tendered in evidence the purchase agreement to that effect which was admitted as **P.Exh.1.**

[15] The Respondent as **Pw1,** she further adduced evidence that upon purchase of the land she took possession of the land and utilized it for a short while before she left for Gulu, leaving the land under the care of **Zaverio Wathum**, the seller. That she then went to Jinja, from where she fell sick and on her return in 2016, to her consternation, the Appellant had trespassed on the land and built houses thereon. It is the Appellant, as per **Yosani Rwakaikara's** (Pw3) evidence, who had accompanied her to look for the land in question to purchase and she purchased it.

[16] The claim that the Appellant did not witness the purchase agreement does not render **Pw3's** evidence unreliable because the fact that the Appellant moved with the Respondent as they looked for the land does not necessarily mean that at the time of the execution of the agreement, he had to be present. The Appellant

did no expressly deny accompanying the Respondent when she was looking for the land in question to buy.

[17] As regards the inconsistencies and contradictions regarding the neighbours of the suit land, **Yosani Rwakaikara** (Pw3) named the neighbour to the suit land at the time of the signing of the agreement in 1985 as **Okello Julius, John Oza, Sunday Arafa** and **Wathum Zaverio.** Indeed, these were as reflected on the agreement **(P.exh.1).** The rest of the witnesses named neighbours of the suit land as at different periods and as explained by **Pw3** during cross examination, some neghbours shifted, others like **Lozio** died and others are still there. The neighbourhood of the suit land did not remain static. I have therefore not been able to appreciate any of the alleged contradictions and inconsistences referred to by Counsel for the Appellant.

[18] As regards the alleged contradictions in the Respondent's case as to the acreage of the suit land, it is an agreed fact that the suit land un surveyed. The Respondent in her pleadings estimated it be **10 acres,** brother to the vendor, **Oza John** (Pw2), estimated it to be **15 acres,** while **Lunjunziro Augustine** (Pw4), the area LC I Chairman estimated it to be **18-20 acres** in size. During scheduling, as an agreed fact, the suit land was estimated to be **15 acres** in size. In view of the above, it cannot be said there are variances in estimation of the size of the suit land by **Pw2** and **Pw4** that amounted to a grave contradiction. Even the Appellant and his witness **Opendo Felix** (Dw2) could not give a similar estimation. I find that the trial Magistrate rightly ignored the alleged inconsistencies. The parties and witnesses were only

giving the estimated acreage and not the precise acreage of the suit land.

[19] As regards whether the Respondent's suit was for recovery of land and therefore time barred under **S.7 of the Limitation Act.** It is apparent that as per the pleadings and the evidence as adduced by the Respondent, trespass upon her land occurred during 2006-2016 when she was away in **Gulu** and sick in **Jinja.** She discovered the trespass in **2016** and filed this suit in **2017.** Therefore, whether this suit is classified as a proper case of trespass or a case for recovery of land, by any stretch, it is not barred by **S.5 of the Limitation Act** which limits the instituting of such suits within 12 years from when the cause of action occurred. Besides this was not an issue that was canvassed by the trial Magistrate and therefore cannot form the basis of this appeal.

[20] In conclusion, I find that the trial Magistrate properly evaluated the evidence on record, and thereby reached a right conclusion that the suit land belongs to the Respondent. It is not correct that the trial Magistrate failed to consider the documentary evidence adduced by the Appellant. The Appellant did not adduce any documentary evidence in support of his contentions that he purchased the suit land. As a result, his claim that he had utilized the suit land for over **33 years** without any interference is a fallacy.

[21] All the 4 grounds of appeal are found devoid of any merit and they accordingly fail. The trial Magistrate Judgment and orders are

upheld. The appeal is therefore in the premises dismissed with costs to the Respondent.

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

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Byaruhanga Jesse Rugyema
Judge