

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT HOIMA
LAND CIVIL APPEAL NO. 107 OF 2022

[ARISING FROM LAND CIVIL SUIT NO.029 OF 2013]

*[Appeal from the judgment and decree of the Chief Magistrate of
Hoima, H/W Kagoda S.M. Ntende delivered on 8th day of December,
2022 at Hoima]*

1. SUNDAY LAWRENCE
2. WABYONA VICENT
3. ABITEGEKA JULIUS
4. KAITWEBE PAUL
5. MWESIGWA ALFRED
6. ALITUHA ALEX

.....APPELLANTS

VERSUS

AYESIGA MOSES.....RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

BACKGROUND:

- [1] The Respondent/Plaintiff filed **Civil Suit No. 029 of 2013** against the Appellants/Defendants for inter alia, a declaration that the suit land belongs to the Estate of his late father **Byembandwa John** and that as a beneficiary to the said estate he is entitled to protect the same, and that the Appellants are trespassers on the suit land.
- [2] It was the Respondent/Plaintiff's case that the suit land originally belonged to the late **Erasto Kahigwa** who bequeathed it to the Respondent's father **Byembandwa John** as his share. That the family

of late Byembandwa utilized the land until **5.3.2013** when the Respondents trespassed on the suit land by extending from their own land, a small plot of land with clear boundary marks which share boundaries with the suit land acquired from the Respondent's grandfather, **Erasto Kahigwa**. That the Appellants in trespass put a boundary line covering the suit land measuring about 5 acres.

- [3] In their joint Written Statement of Defence, Appellants denied the Respondent's claims and contended that they have always resided on the suit land of their father, the late **Paul Kato** who acquired it from his good friend, the late **Erasto Kahigwa**, the grandfather of the Respondent in 1972. That immediately thereafter, the family of the late **Paul Kato** settled onto the dispute land, utilizing it until when the father of the Respondent, **John Byembandwa** encroached onto the Appellants' land. That the matter was reported to the Resistance Council of the village which emphasized the exact boundaries which were earlier marked by the Respondent's grandfather in 1987. That otherwise, they intend to fence off the land given to them by the late **Erasto Kahigwa** by constructing barbed wires so as to stop encroachers from erasing the boundaries of 1987.
- [4] During trial before the trial Magistrate, the issues for determination were:
- (1) Whether the suit land forms part of the estate of the late John Byembandwa.
 - (2) Whether the defendants were trespassers on the suit land.
 - (3) What remedies are available to the parties.
- [5] The trial Magistrate resolved the above issues in favor of the Respondent/Plaintiff on the ground that there was overwhelming evidence at locus that the family of the late **Byembandwa**, father to the Respondent cultivated **and** possessed the suit land as evidenced by the remains of the homestead of the Respondent's brother a one **Busobozi Godfrey**. The Appellants' homesteads were found outside the suit land and in conclusion, the trial Magistrate found that the Respondent proved a balance of probabilities that the suit land forms part of the estate of the late **John Byembandwa**, the father of the Respondent and therefore, the

Appellants had trespassed on the suit land with the following orders among others:

1. The suit land belonged to the estate of the plaintiff's father to which the Plaintiff (Respondent) had interest.
2. The Defendants (Appellants) were trespassers on the suit land.
3. A permanent injunction order restricting the Defendants/Appellants from any act of trespass on the Plaintiff's/Respondent's land.

[6] The Appellants were dissatisfied with the judgment and orders of the trial Magistrate, lodged the present appeal with the following grounds of appeal as contained in their Amended Memorandum of Appeal:

1. *The trial Chief Magistrate erred in law and fact when he held that the suit land belonged to the estate of the late **John** Byembandwa hence occasioning a miscarriage of justice.*
2. *The trial Chief Magistrate erred in law and fact when he held that the defence exhibits and documents are a forgery hence occasioning a miscarriage of justice.*
3. *The trial Chief Magistrate erred in law and fact when he held that the defence evidence of DW2 and DW3 given in court amounted to hearsay evidence leading to miscarriage of justice.*
4. *The trial Chief Magistrate erred in law and fact when he held that the Defendants are trespassers on the suit land hence occasioning miscarriage of justice.*
5. *The trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and awarded general damages of UGX. 6,000,000/= and costs to the Plaintiff which hence occasioned miscarriage of justice.*

Counsel Legal representation:

[7] The Appellants were represented by **Mr. Kennedy Muyambi** of the **LDC Legal Aid Clinic, Kampala – Masindi**, while the Respondent was represented by **Mr. Aaron Baryabanza** of **Ms. Baryabanza & Co.**

Advocates, Hoima. Both counsel filed their respective submissions for consideration of this court in the determination of this appeal.

Duty of the 1st Appellant Court:

- [8] This being an appeal from the Chief Magistrate as a Court of first instance to this court, it is settled law that this court as a first appellate court, it is under duty to subject the entire evidence on record to in exhaustive scrutiny, re-evaluate it and make its own conclusion, while bearing in mind the fact that this court never observed the witnesses under cross-examination so as to test their veracity; **Sanyu Lwanga Musoke Vs Sam Galiwango, S.C.C.A No. 48 of 1995.**

Consideration of the Appeal:

- [9] **Grounds 1, 2, 4 & 5** revolve around how the trial magistrate evaluated the evidence as presented before him. These grounds of appeal shall be dealt with together and grounds 2 and 3 separately.

Grounds 1, 2, 4 and 5: Evaluation of Evidence:

- [10] Counsel for the Appellants submitted that the Respondent made several contradictions regarding as to who was the original owner of the suit land; **Philimon Kaheru or Erasto Kahigwa and John Byembandwa.**
- [11] Further, that there was evidence that **Paul Kato** had a toilet on the suit land hence evidence that the suit land belonged to the Appellants as their father **Paul Kato** was in possession but the trial magistrate held that **Paul Kato** was merely given a chance to put a pit latrine outside the land given to him.
- [12] Lastly, that during locus visit, the court focused on whether **Busobozi Geoffrey**, brother to the Respondent had a house on the suit land but this house was not shown to court. The only toilet seen by court on the suit land belonged to the Appellants' father **Kato Paul.**

- [13] Counsel for the Appellants concluded that the Respondent did not know how much land was given to his father **John Byembandwa** or to the Appellants' father; **Kato Paul**. That therefore, the Appellants were in possession of the suit land as owners by virtue of their father's lawful possession.
- [14] Counsel for the Respondent on the other hand submitted that there were no contradictions in the evidence of the Respondent. That the Respondent clarified that the suit land originally belonged to his grandfather **Erasto Kahigwa** who brought his brother **Philimon Kaheru** on the land and they stayed together thereon from the 1960s. That as regards the size of the plot that **Erasto Kahigwa** gave **Paul Kato**, the father of the Appellants; the **50ftx100ft** was information the Respondent got from his parents as an estimated size.
- [15] As regards the location of the pit latrine, Counsel submitted that no evidence was given by the Appellants to challenge the Respondent's evidence to the effect that the Appellants' father was allowed to put a latrine on the suit land because the rest of the land surrounding the pit latrine was being used by the Respondent's family.
- [16] Upon perusal of the Respondent's evidence on page 8 of the proceedings, I find thus:
- "The father of late Byembandwa John was late Philimon Kaheru who was resident on this very land. This land originally belonged to Erasto Kahigwa brother of Philimon Kaheru My grandfather Philimon Kaheru owned the same land..... It was Erasto Kahigwa who bought the land and brought his brother Kaheru and stayed with him from the late 1960s. The land belonged to Kahigwa Erasto".*
- [17] This court's understanding of the above evidence as adduced by the Respondent **Ayesiga Moses (PW1)** is that the late **Philimon Kaheru** and **Erasto Kahigwa** were brothers and therefore both uncles to his father, the late **Byembandwa John**. He was therefore justified to refer

to both of them as his grandfathers. There is therefore no contradiction in the Respondent's pleadings and his evidence when he testified that the suit land originally belonged to his grandfather **Erasto Kahigwa** who upon buying it, brought his brother **Philimon Kaheru** to stay with him on the land.

[18] As regards the size of the land his father **John Byembandwa** got from the late **Erasto Kahigwa**, The Respondent (PW1), testified at page 9 of the proceedings that he did not know the size but knew the boundaries as “**emitoma**” trees to the side of **Kwebiha Andrea**, acacia trees where it borders with **Kyamanywa Gabriel** on the east and eucalyptus trees where it borders with **Baguma William**. Then a road of Kintongole-Kasongoire to Kijara.

[19] The Respondent, (PW1) then testified further that on the northern side is himself and the part of land which was given to the Appellants' father measuring about **50ftx100ft**, that the land shares boundaries with that given to the Appellants' father. **Kwebiha Andrea** (PW2), a brother to the late **John Byembandwa** also testified that the plot given to the Appellants' father is now being occupied by the Appellants where they operate shops. That though the plot was not measured, it was not 5 acres, the size of the disputed portion of land.

[20] Once the Respondent had adduced evidence establishing that the Appellants' father was given a plot measuring about **50ftx 100ft**, the burden shifted to the Appellants to prove the contrary, see **Annette Tumusiime Vs Louis Gugones & Anor H.C.C.S No. 269 of 2005** where it was held that;

” When a party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof. In other words, his allegation is presumed to be true unless his opponent adduce evidence to rebut the presumption”.

[21] In the instant case, the Appellants failed to adduce any such evidence in rebuttal. Both **Sunday Lawrence** (DW1) and **Mwesigwa Alfred** (DW2)

adduced evidence of a document through **Kasangaki Emmanuel** (DW6) dated **22.8.1987** (D. Exh.I) where **Erasto Kahigwa** allegedly gave out the land to both **John Byembandwa** and **Paul Kato**, father to the Respondent and the Appellants respectively. According to DW6, it is **Erasto Kahigwa** who called the R.C. Committee to open the boundaries that led to the execution of the document, **D.Exh.1**.

[22] As regards this document (D. Exh. 1) the trial magistrate found agreeing with PW2, **Kwebiiha's** evidence as follows:

"..... the said land originally belonged to the late Erasto Kahigwa..... There is no way how Erasto Kahigwa could have given land to the defendant's father in 1987 when Erasto Kahigwa died in 1986".

[23] Indeed, there is overwhelming evidence that **Erasto Kahigwa** died in **1986** as conceded to by **Irumba Yabezi** (DW5) aged 69 years during cross examination and **Kasangaki Emmanuel** (DW6), its purported chief witness as an R.C. official then. If then the said **Erasto Kahigwa** died in 1986, he would not have executed **D. Exh. 1** which do not even have the endorsements of the Respondent's father **John Byembandwa** and the Appellants' father, **Kato Paul** as the beneficiaries. In view of the foregoing, I find that the trial magistrate was justified to conclude that the document (D. Exh. 1) is to be regarded as a forged document which was made long after the death of **Erasto Kahigwa**.

[24] As regards the location of the Appellants' pit latrine, whereas the Appellants claim that because its location was in the suit land, that then, that is evidence that they are owners of the suit land, on record there is overwhelming evidence that was not challenged by the Appellants that the Appellants' father was merely allowed to build a pit latrine on the suit land as was justifiably believed by the trial magistrate who had the opportunity of observing the witnesses testify in court.

[25] As regards the location of **Busobozi Geoffrey's** (brother to the Respondent) house, whereas the locus court proceedings are scanty

and unexplainably brief and therefore not satisfactory, the sketch of the locus appear to support the findings of the trial magistrate and the overwhelming evidence of the Respondent's side, that **Busobozi Geoffrey** had a house on the suit land which later collapsed when it was abandoned, and that the Respondent's family continued to utilize the land since 2013 when the Appellants trespassed on the suit land by extending from their plot of land.

[26] In conclusion, I find that the trial magistrate reached his decision in favor of the Respondent after analyzing the evidence on record and getting satisfied that as the whole, the evidence of the Respondent proved on the balance of probabilities that the suit land formed part of the estate of the Respondent's father and the entering of the Appellants 'thereon constituted trespass.

[27] In the premises, I find grounds **1, 2, 4 and 5** without any merit and as a result, they accordingly fail.

Ground 3: The trial Chief Magistrate erred in law and fact when he held that the defence evidence amounted to hearsay evidence hence leading to a miscarriage of justice:

[28] Whereas I agree that the evidence of **DW1** and **DW3** is not necessarily hearsay evidence but part of resgestae evidence as adduced by the Appellants generally, the trial magistrate's decision was not based on this finding. The main point is that the Appellants adduced fake evidence to support their claims of ownership of the 5-acre suit land. The document the Appellants relied on as conferring them interest on the land (**D. Exh.1**) was a forged document that did not even bear the endorsement of the parties' parents as its beneficiaries. The available evidence is that the Appellants are in occupation of their plot of land of about 50x100ft which their father Paulo Kato got from **Erasto Kahigwa** on which they operate shops but now, they appear to want to extend to the Respondent's land acquired from his father **Byembandwa John** who also inherited it from **Erasto Kahigwa**.

[29] All in all the entire of the Appellants' appeal is found to lack merit. The trial magistrate's judgment and orders are accordingly upheld. The appeal is in the premises dismissed with costs to the Respondent.

Dated at Hoima this **21st** day of **June**, 2024.

.....
Byaruhanga Jesse Rugyema
JUDGE