

1. NYAPA PAUL
2. KASUSU SIMON
3. EGOMBE DOMINIC
4. NYOBA PETER
5. ACHERI MARTIN
6. MBAYO BONIFACE
7. NYAUDI JOSEPH
8. KUSUMALI NASURU APPELLANTS

**THE REGIDTERED TRUSTEES OF THE ARCHDIOCESE
OF TORORO ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

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6. The issues for the trial court's resolution were-

- (a) Who owns the suit land?
- (b) What remedies are available to the parties?

7. The trial magistrate resolved the above issues in favour of the Respondent hence, this Appeal.

8. **Grounds of Appeal**

- (a) The learned trial chief magistrate erred in law and in fact when he held that during locus visit, it was confirmed that it was the church in possession of the suit land yet the Defendants'/Appellants' relative's graves are visible on the land adjust to that of the church;
 - (b) That the Learned trial chief magistrate erred in law and in fact when he failed to distinguish between the land which was donated to the church and the land which belongs to the Defendants/Appellants yet the Defendants have been using their land;
 - (c) That the Learned Chief Magistrate erred in law and in fact when he concluded that both parties admitted that the Plaintiff had been in possession of the suit land since 1929 to date;
 - (d) That the learned chief magistrate erred in law and in fact when he held that there was no failed land transaction between the plaintiff and Okou Constant;
 - (e) That the learned trial chief magistrate erred in law and in fact when he noted that the issue of donation is admitted by both the plaintiff and the Defendant's witnesses, thought the disagreement is on the year of donation and size of donation but failed to resolve this point of disagreement;
 - (f) That the learned trial chief magistrate erred in law and in fact when he held that the plaintiff had proved that she is the rightful owner of the suit land;
 - (g) That the learned trial chief magistrate erred in law and fact when he ordered general damages of Ugx: 10,000,000/= against the defendants.
9. They prayed that the Appeal be allowed, the judgment and orders of the lower court be set aside and order for the costs for both the lower court and the appellate court be made in favour of the Appellants.

10. **Legal Representation**

11. Luchivya & Co. Advocates represented the Appellants and Owori & Company Advocates & Solicitors represented the Respondents.

12. **Duty of the first Appellate Court**

13. This Court is aware of its duty as the first Appellate which is to evaluate the evidence of both parties given in the lower court without isolation. The same principle was reinstated in **Akbar Hussein Godi Vs Uganda SCCA No.03/2013**.

14. I will resolve grounds 1, 2, 3,4,5 and 6 together as argued by both counsel below-

Ground No.1: *The learned trial chief magistrate erred in law and in fact when he held that during locus visit, it was confirmed that it was the church in possession of the suit land yet the Defendants'/Appellants' relative's graves are visible on the land adjacent to that of the church.*

Ground No. 2: *That the Learned trial chief magistrate erred in law and in fact when he failed to distinguish between the land which was donated to the church and the land which belongs to the Defendants/Appellants yet the Defendants have been using their land.*

Ground No.3: *That the Learned Chief Magistrate erred in law and in fact when he concluded that both parties admitted that the Plaintiff had been in possession of the suit land since 1929 to date.*

Ground No. 4: *That the learned chief magistrate erred in law and in fact when he held that there was no failed land transaction between the plaintiff and Okou Constant.*

Ground No. 5: *That the learned trial chief magistrate erred in law and in fact when he noted that the issue of donation is admitted by both the plaintiff and the Defendant's witnesses, thought the disagreement is on the year of donation and size of donation but failed to resolve this point of disagreement*

Ground No. 6: *That the learned trial chief magistrate erred in law and in fact when he held that the plaintiff had proved that she is the rightful owner of the suit land*

15. **Determination**

16. Counsel for the Appellants/Defendants while referring this court to the evidence of both the Appellants and the Respondent submitted that there is overwhelming evidence both from the Respondent's/Plaintiff's side and the defence which clearly shows that the church has never been in possession of the suit land and the same cannot be said to be the church's land when clearly the church's land ends at the *Jambula* tree.

17. He argued that the graves of the Appellants/Defendants relatives are on the West of the Church's land after the boundary mark which is the *Jambula* tree which can't be said that the graves are on the church land.
18. Counsel contended that none of the Respondent's/Plaintiff's witnesses told court the size of the land which was donated to the church as there is no documentation about the size of the land which was given to the church. Counsel submitted that it defeats common sense of how a full church with a history allegedly spanning from 1929 in that area can fail to have any documentation of such important asset such as land.
19. He submitted that the fact the Respondent/plaintiff did not know the correct size of their land clearly explains why when the Respondent attempted to survey her land in 2017, is when the dispute sparked off after they encroached onto the defendant's land. He referred this court to Paragraph 4 (c) of the Plaint.
20. Counsel further submitted that according to the defence evidence, the Respondent/plaintiff was donated land in 1963 and not in 1929 and hence the conclusion by the learned trial magistrate that both parties admitted that the Respondent/plaintiff has been in possession of the suit land since 1929 is not supported by any evidence on the record because the defendants and their witness never admitted to this fact anywhere.
21. Counsel added that it was the Respondent/Plaintiff who started the dispute when she purported to survey land and illegally included the defendants' land with force destroying their food crops which was very unfortunate but despite all these, the defendants did not get any justice as the criminal file kept shifting from office to office as seen at page 29 of the proceedings which was later abandoned.
22. Counsel for the Respondent/Plaintiff on the other hand submitted that at locus, court was shown the church land, houses of the church and Odipanya Primary School which is also a school owned by the church. He contended that Kemba's grave was on the church land and that the church did not ask for the land in 1962
23. Counsel cited the evidence of PW2 who said that all he knows is that his father gave land measuring 25 acres to the church in 1929 but he made no agreement for the church. This size of the land was confirmed by PW4, PW5 and PW6 who said that the land is about 30 acres
24. Regarding the burial ground; counsel for the Respondent/Plaintiff submitted that the land in dispute has graves of Kemba, Okorouni and his wife Mbayo who donated land to the church and were buried before the Appellants were born. He argued that the only person who was

buried after, was Kemba who was buried in 1996. Counsel submitted that if this was a burial ground, then how come no one was buried from that time to date because it cannot be said that the defendants were not losing relatives. Counsel contended that at locus the Appellants/ Defendants admitted that they lose relatives but they do not burry them on the suit land but on their respective pieces of land. Hence, the suit land cannot be said to be a burial ground.

25. Regarding ownership by the Appellants/ Defendants; counsel for the Respondent/Plaintiff submitted that the agreement DEXH.1 was not signed by any witness nor witnessed by the seller or buyer. He argued that the current suit was instituted in court in February, 2018 and in order to legitimize their false claims, the Appellants/ Defendants filed for letters of administration in Pallisa in 2019 vide cause No. 58 of 2019 for Okou and cause No. 119 of 2019 for Kemba. He submitted that the same was an afterthought.

26. Counsel submitted that the Defendant Okiria Paul said that Okou Constant sold one acre of land to Difasi Okello, that Okello's home is on the suit land and he was buried there as well but there was no agreement to prove the same. He contended that the one acre was not shown to court nor his grave during locus.

27. Counsel argued that according to the 2nd to 5th Appellants/ Defendants they inherited 8 acres from their ancestors and have consistently utilized the same for cultivation, residence and burial grounds but according to the evidence of DW2, he does not claim ownership of this land but he instead avers that the suit land belonged to Kemba and Egombe Dominic but does not testify to utilization of the suit land.

28. Regarding departure from proceeding; Counsel for the Respondent/Plaintiff submitted that the sizes as testified to by the witnesses are estimates because none of them has measured the land and what they were testifying about are just approximations.

29. **Analysis of the above grounds by court.**

30. According to counsel for the Appellants, the upshot of all the above six grounds relates to the location of the defendants' relatives' graves, the extent of land which was donated, year of donation and who owns the suit land.

31. For this court to be able to answer the above questions, it will make reference to the relevant parts of the trial court's evidence.

32. I have carefully studied the trial court's record and noted that the land in dispute was formally for a one late Ogwanga father to the 3rd Appellant and grandfather to the 2nd, 4th to 8th Appellants. According to

the evidence of the 3rd Appellant who testified as DW4 the suit land measures 17 acres. The late Ogwanga according to the defence evidence died and a one Kemba succeeded him and his property. Kemba allegedly sold 9 acres to the father of the 1st Appellant in 1968 and the rest of the land which was 8 acres was left to be taken care of by the 3rd Appellant for the benefit of late Kemba's four sisters since he did not leave any child. However, according to the Respondent's evidence especially that of PW1, Ogwanga was one of the people who donated the church land.

33. **Location of the Appellants' / Defendants' relatives graves:**

34. According to the evidence of PW1, PW2 and PW3 the suit land has 3 graves. However, when they list the name of the deceased persons buried on the suit land, they exceed the 3 talked about by them. For example, PW3 said ***"The land has 3 graves that's; the grave of Kemba, his father Ogwanga, Mbayo and also Mbayo's wives and Kakononyi."*** From a glance of that evidence, it is clear that the number of the deceased persons buried on the suit land exceeds the 3 talked about by the Respondent's witnesses.

35. The Appellants' witnesses on the other hand testified that part of the suit land is their grave yard which the late Kemba inherited from their late father or grandfather Ogwanga and that is why Kemba who died in 1996 was also buried on the same land as his father Ogwanga. For purposes of emphasis, I will quote the evidence of DW1, DW2, DW5 and DW6 verbatim below-

DW1 said; ***".....the land is for my father Ogwanga. He died and buried on the disputed land. My father inherited the land from his father. After his death, Kemba Emuno inherited him and was buried on the same land as my father...."***

DW2 said ***"Besides the 3 graves we also have 4 graves of our relatives buried there."***

DW5 said; ***"Kemba died and was buried on that very land....the graves are on the disputed land. It is the clan that gave Kemba land in dispute."***

DW6 said; ***"The 8 acres used by Dominic are for grave yards. Ogwanga, Kemba, Kevin, Sanu are some of the 7 graves on the land."***

36. Despite the presence of the above evidence, PW1 who was the only witness alive at the time said that the late Ogwanga was one of those who donated the church land and the land allegedly talked about includes the grave yards. The Respondent's witnesses explained why

Kemba was buried on the suit land in 1996 and also added that since then, the Respondents have never buried any other relatives on the suit land.

37. What is obvious from the foregoing, is that the Respondent were aware of the alleged graves on the suit land. PW1 who testified about the Appellants grandfather or father donating the land to the Respondent's church is aged 107 years and he was the *Mutaka* of the area when the land was donated to the Respondent. For that reason, he is presumed to have knowledge about the history of the suit land unlike the Appellants who were not present at the time.
38. Therefore, the evidence of the Appellants claiming the suit land to belong to them is understandable though cannot be relied upon since they do not have full knowledge of what transpired in 1929 and that is why their evidence streams from 1960's to date.
39. Going forward, I will handle the issue of the year of donation and the issue of who owns the land concurrently as below-
40. The Respondent's witnesses told court that the Respondent has been using the suit land since 1929 when it was donated to it especially the evidence of PW6 the former head teacher of the school who testified that she used to use the suit land claimed by the Appellants for cultivation. The Appellants also claim to have been using the same for cultivation but started in 1999 and 2010 respectively as per the evidence of DW3, DW5 and DW6. However, as per the evidence of the Respondent, that is the period the Appellants started trespassing on the suit land which caused a dispute between the parties.
41. From the Respondent's evidence, the church land was donated in 1929 and later in 1978 other people like Ombayo and Mpande Yosam also donated to the school and the church another piece of land. (See PW3's evidence). The evidence of PW1 who was present at the time said that Ogwanga also donated land to the church where he was buried with his wife and later his son Kemba. Which means the land late Ogwanga donated had graves.
42. Regarding the 1st Appellant's land, PW2 said; ***"Kemba sold a piece of his share from the disputed land."*** This evidence was buttressed by the Appellant's evidence especially that of DW3 and DW4 which indicates that the late Kemba sold land to the 1st Appellant's father from the disputed land. However, as already discussed, the evidence of the Respondents is clear that the suit land was earlier on donated to the Respondent church by the late Ogwanga, father of late Kemba, which means it no longer formed part of his estate.
43. It is trite that a person cannot give what he does not own which in Latin is called *"Nemo dat quod non habet"* hence, late Kemba could not

inherit what did not belong to his late father. His late father Ogwanga had already donated the suit land to the Respondent Church.

44. In **Halling Manzoor V. Serwan Singh Baram SCCA NO. 09 of 2001**, Justice Mulenga (RIP) stated that; *"Having ruled that the defendant had not repossessed his legal interest in the suit properties at the time he purported to sell the same to the plaintiff on 1.4. 94_ (sic) the plaintiff could not have acquired an equitable interest to entitle him in this case to specific performance. It would not be available to him."*
45. In the instant case, late Ogwanga father of late Kemba having donated the suit land to the Respondent Church, the same no longer formed part of his estate and could not be inherited. For that reason, he did not pass on any legal or equitable interest to the father of the 1st Appellant.
46. Regarding the 2nd to 8th Appellants' land, all the Appellants' witnesses told court that the 8 acres were the balance of the land that late Kemba inherited from his father Ogwanga which was left in the hands of the 3rd Appellant. The 3rd Appellant in his evidence said he has been using the land for cultivation with his son. DW5 said he has been using the suit land for cultivation of cassava and other types of food staffs. This evidence was buttressed by DW6.
47. However, as discussed in the foregoing paragraphs, the alleged suit land had already been donated to the Respondent church by the late Ogwanga, father and grandfather of the Appellants. Therefore, the issue of whether there are graves or not, is something that the late Ogwanga did with full knowledge and the same was known by the Respondent.
48. The suit land having already been donated to the Respondent church, it could not be inherited by late Kemba or Egombe since it no longer formed part of late Ogwanga's estate.
49. Regarding the boundaries: PW1 said that there are boundary marks separating the different land and these are planted trees. He added that; **"there are some graves in the West Past the boundary marks."** PW2 said; **"There are graves after that boundary tree."** This piece of evidence confirms that there are boundary marks on the land.
50. PW4 aged 74 said; **"We went through the land and planted boundary marks on the whole land.....the sub-county chief planted a boundary marks separating the school from Egombe's land.** PW6 said; **"I am the one and chairperson LC1 who planted the mark around the school to enclose it in 2000..... Jambula trees were there separating church land from that of the neighbors."** PW6 however contradicted herself in re-examination when he said that the Jambula trees were not planted as boundary marks.

51. However, contrary to the above, DW6 the chairperson of the area whom I found to be truthful in this regard told court that; ***“Okiria and Dominic came to me and asked me to hold a meeting between them and the church to make proper demarcation. They never responded. On 10/8/2017, Okiria Paul and Dominic told me that the church refused to sit and discuss the demarcation. I forwarded them in that letter to chairman LC11. The surveys went back until proper demarcations were made with neighbors. Even with LC11 the church refused to meet to get the demarcation and the land was later injuncted.”***
52. The above evidence clearly indicates that the Appellants did not know where their boundaries were. And for the Respondent, the fact that they brought a surveyor, it is presumed that they knew where their land passed because one cannot survey land which he or she does not know since the purpose of survey is only to open boundaries for clear identification.
53. The fact that witnesses from both sides talked about the *Jambula* tree to be the boundary that separated the two pieces of land, was speculative since none of them is a surveyor or clearly gave a proper history of why the alleged *Jambula* tree was planted in that particular area.
54. It is noted from the evidence that the Respondents contradicted themselves regarding the size of the suit land. Whereas some said; the land measured 25 acres, others said 40 acres and others said 30 acres.
55. Counsel for the Respondent submitted that what the Respondent’s witnesses told court regarding the size of the land were just estimates since they did not know the exact size of the land. I agree with counsel.
56. I also note that from both sides most of the witnesses were not present in 1929 when the land was allegedly donated to the Respondent church. However, the only witness (PW1) who was present, clearly stated that the late Ogwanga father and grandfather of the Appellants donated the suit land to the Respondent church.
57. In the circumstance, I find that the trial magistrate properly evaluated the evidence on the court record.
58. Grounds No. 1, 2, 3, 4, 5 and 6 are answered in the negative.
59. ***Ground No.7: That the learned trial chief magistrate erred in law and fact when he ordered general damages of Ugx: 10,000,000/= against the defendants.***



60. The position of the law is that general damages are granted at the discretion of court and the appellate court is under no duty to interfere with such a grant if it was exercised judiciously.
61. I have found no fault in the award and it is accordingly upheld.
62. Ground No.7 is also answered in the negative.
63. In **Crown Beverages Ltd V. Sendu Edward SCCA No. 01 of 2005** and **U.R. Virupakshaiah V. Sarvamma & Anr, Supreme Court of India Civil Appeal No. 7346 of 2008**, Court held that-
- “In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or it is settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.”*
64. Considering the discussion in the body of this judgment, the findings line well with the decision of the lower court and I have no reason to fault the same.
65. However, before I take leave of this matter, I would like to state that time in memorial, some individuals and members of the community freely and voluntarily donated land to religious institutions to build schools hospitals etc. However, although such people donated land, of recent, we are experiencing a new generation of the donors' relatives who were not present at the point of donation claiming for the land which was donated by their deceased relatives, which is not right. The public is therefore cautioned to desist from such claims.
66. In the circumstance, this appeal fails.
67. The costs of this Appeal are awarded to the Respondent.

I so order

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LUBEGA FAROUQ
JUDGE

DATE: 11th March, 2024