

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBALE
HCT- CV –CA-0043/2011**

**AKANGO JACKSONAPPELLANT
VERSUS
WALSON WOLUYA & 3 OTHERS.....RESPONDENT**

BEFORE: THE HONOURABLE JUSTICE STEPHEN MUSOTA

JUDGMENT

This appeal is against the whole of the decision contained in the judgment of the learned Magistrate Grade one Busia dated 5th May, 2011 in Civil suit No 075 of 2007. The appellant’s claim in the lower court against the respondents jointly and severally was for a declaration that the disputed land is the property of the appellant. The appellant also prayed for a permanent injunction, general damages and mesne profits, interest at 20% from the date of judgment and the costs of the suit.

According to the judgment of the learned trial Magistrate the appellant acquired a stretch of land measuring approximately 4 acres by way of donation from the late Buluma Besweri in 1966. Later in time the appellant purchased the same land from the late Buluma Besweri by an agreement dated 20th September, 1976. The appellant has been in possession of the suit property without any adverse claim from anyone. He used and developed the land until 2007 when the defendants entered the

Appellant/plaintiff's land, planted boundary marks and declared it the property of the late Buluma Besweri.

The respondents deny the plaintiff's claim and prayed for the dismissal of the suit with costs.

The issues for resolution by the trial court were:

- 1 Whether or not the respondents trespassed on the plaintiff's land and if so,
- 2 Whether the respondents were liable.
- 3 Remedies available.

The learned trial Magistrate resolved issues 1 and 2 together. After his analysis of the evidence, he found that the appellant's agreement "was greatly" contested by the supposed vendor **Buluma Besweri** and the other defendants particularly **Ayet** who witnessed the same and that besides the appellant did very little to authenticate the sale agreement. He concluded that there was no meeting of minds and therefore the appellants claim had to fail.

The appellant filed an appeal against the decision of the learned trial magistrate raising five grounds of appeal that:

- 1 The learned trial Magistrate erred in law and in fact when he found that the suit land does not belong to the appellant
- 2 The learned trial magistrate erred in law and infact when he disregarded the agreement of the appellant and thereby arriving at a wrong decision
- 3 The learned trial magistrate erred in law and fact when he disregarded Misc. Application No 1 of 2011 on record and went

ahead to make judgment in the main suit thereby coming to a wrongful decision

4 The learned trial Magistrate erred in law and in fact when he failed to strike the name of **Buluma Besweri** from the plaint and expunge his evidence from the record after his death, thereby coming to a wrong decision.

5 The learned trial magistrate erred in law, and infact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision.

The appellant prayed that:

- i) The appeal be allowed
- ii) The decision of the learned trial Magistrate be set aside and judgment be entered in favour of the appellant in the main suit
- iii) Costs be awarded to the appellant in the appeal and the court below
- iv) Court may make any other order it deems fit

At the hearing of the appeal, the appellant was represented by M/S Wameli & Co. Advocates while the respondents were represented by M/S Nagemi & Co. advocates. Court allowed respective counsel to file written submissions in support of their respective cases. I will not reproduce the said submissions but suffice to say that I have carefully studied the same and related the same to the evidence adduced at the trial which I also studied and comprehended. I will go ahead and decide the appeal as argued by respective counsel.

As rightly submitted by learned counsel for the appellant it is settled law that a first appellate is under duty to subject the entire evidence on record to an exhaustive scrutiny, evaluate it and make its own conclusion while bearing in mind the fact that the court never observed the witnesses under cross-examination to test their veracity.

I will decide the grounds of appeal as argued by the appellant starting with grounds 1 and 2 & 5 together.

In his submissions **Mr. Nagemi** for the respondent contended that whereas the appellant complains that the learned trial magistrate is said to have erred in law and fact when he found that the suit land does not belong to the appellant, no law allegedly flouted by the trial Magistrate were cited by learned counsel for the appellant. Further that the facts in which the learned magistrate erred in or decided wrongly have not been addressed. In **Nagemi** further submitted that the appellant does not cite nor discuss the law which the learned magistrate disregarded or erred in. That the trial magistrate properly summed up the evidence adduced by both sides and their witnesses. That he properly evaluated the evidence and considered the submissions of both learned counsel and found as he did.

Regarding grounds 5, **Mr. Nagemi** submitted that the judgment of the Magistrate was in line with the agreed issues framed by the parties. That he just evaluated the evidence adduced on the said issues.

Mr. Wameli for the appellants submitted to the contrary and I agreed with him. When I perused the proceedings and submissions of the lower court, I

found that indeed learned counsel for the appellant clearly cited Article 237 (g) of the Constitution of the Republic of Uganda. The appellant also cited Sections 5 and 6 of the Limitation Act. From the evidence adduced at the trial it is clear that the appellant had lived on the suit land for over 40 years while his sons who were born on the said land have grown up there and built 7 houses and established families. They have lived on the land in harmony. The appellant told court that he constructed his first house on the land in 1966 which collapsed. He constructed another one on the land. That he has been in possession of the land since 1966 to date. The appellant was supported by PW2 **Zedekia Buluma** at the time of testimony. He said that he has been a neighbour to the appellant since he bought his portion of land in 1974. That the appellant has been in possession of the suit land since PW2 came to stay near him. That he witnessed when the appellant bought the land. PW2 bought his land from **Mr. Buluma Guloba**. The rest of the prosecution witnesses corroborated each other about the ownership of the suit land by the appellant. However, when I read the learned Magistrate's judgment, I noted that whereas the aforementioned facts are reflected on the lower court record he did not properly consider them implying that he did not exhaustively evaluate the said evidence. He did not consider the said evidence in relation to the law of Limitation as submitted by learned counsel for the appellant nor did he take into account the provisions of Articles 237 (g) of the Constitution. The constitution protects both lawful and bonafide occupants of land Section 29 (2) a of the Land Act Cap 227 as amended provides that:

“ *...a bonafide occupant of land means a person who before coming into force of the 1995 constitution had occupied and utilized or developed any land un challenged by the registered*

owner or agent of the registered owner for twelve years or more”

I also agreed with the submission by learned counsels for the appellant that the learned Magistrate erred in law and fact when he disregarded the sale agreement executed between the appellant and **Buluma Besweri** in 1976. The said sale agreement was not disputed when **Besweri Buluma** testified as DWI. The said sale agreement clearly indicated that **Buluma Besweri** had sold the suit property to the appellant as translated into English.

It is not explained why the appellant’s ownership of the suit land is challenged far later in 2007 after several decades of quiet enjoyment of the said land and when the seller was already a very old man who could no longer recollect what transpired and no longer remembers his neighbours.

When I perused the evidence I did not find any serious challenge to the evidence of the appellant apart from a scheme by the respondents to dispossess the appellant of his land through a concerted conspiracy. What the appellant adduced in evidence regarding the sale agreement was secondary evidence which is admissible in courts of law.

In his judgment, the trial Magistrate held thus:

*“.....I find that the plaintiff’s claim to this land is by sale agreement dated 20th September, 1976 which sale agreement ha been greatly contested by the supposed vendor the late **Buluma Besweri** and other defendants particularly **Ayub** who witnessed the same and besides the plaintiff did very little to authenticate his evidence.”*

Whereas **Ayub Justo** DW3 told court that the late **Buluma Besweri** gave land to the appellant amongst other people because they used to chase

monkeys and baboons he did not state that he witnessed the same sale agreement.

The trial magistrate did not refer to the evidence of PW2 Zedekia **Buluma** and other witnesses who stated that they found the appellant resident on his land in 1974 without any problems about its ownership.

In the unlikely event that the agreement could have been a forgery, the fact of the gift *intervivos* to the appellant by the late **Buluma Besweri** would still entitle the appellant to the land he has occupied for decades.

For the reasons I have given above, I will find that grounds 1, 2 and 5 will succeed

Grounds 3 and 4.

In these grounds of appeal the appellant complained that Misc. application no 1/2011 was filed on court record on 11/1/2011 to set aside the improper judgment sought by **Mr. Nagemi**. The appellant wanted the court to set aside the said judgment. The trial magistrate refused arguing that a mere letter is not sufficient to set aside the judgment of court because it was *functus officio*. The appellants were ordered to file a formal application to set aside the judgment. After ignoring the application, court went ahead to write the final judgment in the main suit. That failure by the trial magistrate to hear the interlocutory application on merit and dismissing it was wrong.

On this matter I agree with the submissions by **Mr. Nagemi** that the said application did not form part of the issues raised by the appellant in the

lower court. The appellant never raised the issue of this application before the trial court. It is therefore erroneous for the appellant to have raised this matter on appeal. Regarding ground 4 that the learned trial Magistrate failed to strike the name of **Buluma Besweri** from the plaint and expunge his evidence from the record after his death thereby coming to a wrong conclusion, I agree with the submission by **Mr. Nagemi** on this issue. It is not the law that evidence of witnesses who die after their testimonies is expunged from the record. Such evidence will have formed part of the record and should be weighed together with other evidence even if the dead witness is substituted by the administrator of his /her estate. It remains valid evidence.

In any case according to the record of proceedings **Buluma Besweri** (DWI) was one of the five defendants sued by the appellant in the lower court. He only died before judgment was delivered. One **Wilson Woluya & Co.** defendant and original defendant No 2 successfully applied for letters of administration for the deceased. The record reveals that counsel for the defendants then **Edith Nalunkuma** informed court that:

“Letters of administration have since been obtained I seek an adjournment to file an amended plaint to “hold” the legal representative of the first defendant substituted.”

It is therefore apparent that the appellant’s counsel took the necessary steps to substitute the deceased. Infact it did not warrant a complete overhaul of the plaint. A mere striking out the names of the deceased would do. In any

case a look at the judgment shows that the deceased was substituted by adding against the names of **Wilson Woluya** the phrase.

“Administrator of the estate of the late Buluma Besweri”

Even the heading to the memorandum of appeal does not include the deceased’s names. This means the appellant was alive to the substitution Both grounds 3 and four must fail.

Consequently, given that grounds 3 and 4 were minor to the determination of this appeal and considering that the main grounds 1, 2 and 5 crucial to the determination of this appeal have succeeded, I will allow this appeal.

The appellant proved on a balance of probabilities that he is the rightful owner of the suit land. The judgment and orders of the trial magistrate are hereby set aside.

Judgment is entered for the appellant.

The appellant shall get the taxed costs of this court and the lower court.

I so order.

Stephen Musota

Judge

03/12/2013