THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0025-2007
(Arising from Mbale DLT Claim No. 23 of 2005)

HENRY MULONGO…….APPELLANT
VERSUS
WABWAYI STEPHEN……..…RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the decision and orders of Mbale District Land Tribunal dated 9th January 2007. The appellant **Henry Mulongo** represented by M/s Wegoye & Co. Advocates was the Respondent and the respondent represented by M/s Okuku & Co. Advocates was the claimant.

The background to this dispute as can be deduced from the tribunal's record is that the respondent herein alleged that the appellant whose land neighbours his bought a piece of land from one **Mushikoma** but was allegedly not shown boundary marks or had no boundary marks planted for him. The respondent claimed that instead of asking **Mushikoma** who sold to him land to demarcate the land for him, the appellant decided to do it himself and in the process encroached on the respondent's land. It is revealed that the LC.I tried to handle the case but failed and pushed it to LC.II who apparently decided in favour of the respondent. It was alleged that the appellant became violent to the respondent's workmen and involved police in the dispute.

The disputed land is situate in Lambo village, Bunambutye Parish, Busiu sub-county, Mbale District. On the other hand, the appellant in his written statement of defence denied sharing a boundary with the respondent. He told the tribunal that **Mushikoma** who sold him the land showed him the boundary and the neighbours before he died.

Further that the LC.I did not fail to hear the case but feared the lack of jurisdiction and referred the matter to the LC.II which allegedly decided in favour of the respondent. The appellant further averred that the respondent herein had no cause of action.

The evidence adduced at the trial was as follows:-

The respondent herein told the tribunal that he knew the appellant as a cousin brother with whom he has a land dispute. That he inherited the land from his father **Henry Mulongo** (not the appellant) in 1986 and has been cultivating the same up to 2003. When the appellant got his workmen and took them to police. Prior to this, the appellant had planted a boundary on the land when the respondent was not there. The respondent reported the matter to the LC.I which pushed it to LC.II but the appellant objected to it because it had no jurisdiction although he had filed the same. That the land in dispute is 10 paces by 40 paces. It is bordered in the East by **Stephen Nabusima**, in the West by **Mushikoma,** in the south is the respondent and in the north is the appellant. In the north is a swamp.

The respondent sought from the tribunal orders for vacant possession, costs and damages. The respondent called two independent witnesses to wit **CW.2 Tadeo Herende** and **CW.3 Stephen Nabusina**.

CW.2 told the tribunal that he knows the respondent as his brother who resides in Bunambutye. That the appellant resides in the same village. That the appellant entered the respondent's land. That on the East of the land is **Mushikoma** and in the West is the respondent. That nobody was using the land at the time of trial.

In cross-examination CW.2 said that the appellant had encroached on the middle part of the land and crossed the swamp.

CW.3 told the tribunal that the parties hereto are cousin brothers. That the appellant has entered into the respondent's land by planting boundary marks by about 10ft x 15ft. That the respondent inherited the land and the appellant bought the land from the late **Gabriel Mushikoma. CW.3** was not present during the purchase.

On his part, the appellant testified alone. He said the respondent is his cousin brother and they have a boundary dispute. That he bought the suit land from one **Gabriel Mushikoma**. He tendered a copy of the agreement Exhibit R.1 because he did not bring the original. The said exhibit showed that the land was bought at shs.310,000/= and was 150 paces x 40 paces. The appellant further testified that the land borders him in the East and so is Taracha Stream. That on one side is a widow of **Stephen Butoto** in the West is **John Wabwayi** and in the south is **Stephen Buto**. Further that he

does not share a boundary with the respondent but shares with **Stephen Busima** and when he was shown boundaries by **Mushikoma** his neighbours were present. That the respondent has entered in the suit land from the side of the stream.

When cross-examined the appellant testified that there were demarcations when he bought the land from **Mushikoma**. That the stream talked about is seasonal. That there is no boundary mark with **Stephen Busima** the fact he denies because he is a friend to the respondent and his witness. That the seller of the land called neighbours during the negotiations and one **Paul Harende** took measurements.

After evaluating the above evidence, the land tribunal found for the respondent and held that the parties hereto shared a boundary as was seen during the visit to the locus in quo.

The tribunal found something fishy with the appellant's claim because he did not call in evidence one **Paul Harende** who took measurements and because the neighbours who were present during negotiations did not sign the final sale agreement. That on a balance of probabilities basing on the evidence the appellant could have been shown the respondent's land. That the appellant encroached on the respondent's land. The tribunal also awarded damages for crops destroyed valued at 140,000/=.

Finally the tribunal ordered that the appellant immediately vacates the respondent's land.

The appellant was dissatisfied with the above decision and orders hence this appeal.

In the memorandum of appeal seven grounds of appeal were raised that:-

1. The trial court erred in law and fact when it failed, refused or neglected to give the evidence before it an exhaustive and proper scrutiny.
2. The trial court erred in law and fact when it acted on hearsay evidence.
3. The trial court erred in law and fact when it relied for its decision on extraneous matters.
4. The trial court erred in law and fact when it conducted the visit to the *locus in quo* in a perfunctory and haphazard manner.
5. The trial court erred in law and fact when it failed to hold that the parties were never neighbours.
6. The trial court erred in law and fact when it failed to hold that the land in dispute was the property of the appellant.
7. The decision of the lower court has caused a grave failure of justice.

The appellant prayed that:

(a) The appeal be allowed.
(b) The decision of the lower court be quashed and its orders be set aside.
(c) Judgment be entered for the appellant.
(d) The appellant be awarded costs in this and the court below.

At the hearing of the appeal court allowed respective counsel to file written submissions. However **Mr. Okuku** complained that the appellants did not

comply with the time frame given and filed their submissions out of schedule without leave of court. However, as rightly pointed out by M**r. Wegoye** for the appellant, court allowed the appellant to file submissions belatedly by 25th September 2012. This was done by consent on 6th September 2012. Therefore the submissions by the appellant are properly on record.

As a first appellate court, this court has the duty to re-evaluate the evidence adduced at the trial and reach its own conclusion if the findings by the lower court can be supported.

I have done this and I have considered the submissions by respective counsel. I will go ahead and decide the appeal as argued starting with ground 1.

Ground 1:

According to learned counsel for the appellant, the tribunal fabricated evidence on which they based to reach their conclusions. That there was nothing in evidence to indicate that the appellant demarcated the land himself and encroached on the respondent's land. Further that the tribunal misdirected itself on the identity of the parties because it referred to the respondent as **Mulonge Henry** (Claimant). The appellant also complained that the tribunal misdirected itself when it made its conclusions in the judgment.

I am unable to agree with the complaints of the appellant because the lower court's trial involved very brief evidence on both sides. There was also what

the tribunal gathered when it visited the *locus in quo*. It is the sum total of this evidence that the tribunal used to reach its conclusions. It should be noted that this court did not record the evidence. It did not observe the witness' demeanour. It did not visit the *locus in quo*. It should only depart from the findings of fact by the trial court if there is concrete reason to do so.

From my evaluation of the evidence, I agree with the submissions by **Mr. Okuku** that it is not disputed that the appellant bought his alleged plot from one **Mushikoma** who never showed him or planted boundary marks. At the *locus in quo*, a sketch plan was drawn and the tribunal found as a fact that the parties hereto indeed share a boundary. It was found as a fact that these people are neighbours. I did not find anywhere the tribunal relied on a non-existent LC record. Infact it is the witnesses that alluded to this fact but not the tribunal.

In the judgment, what the tribunal did in the first ½ of its judgment was to summarize the evidence as testimonies by the parties. The second half is where the evaluation of evidence was done.

I do not agree with learned counsel for the appellant that the appellant gave consistent evidence that he bought the land at shs.310,000/= from **Mushikoma**. This was not proved on a balance of probabilities. He did not call any independent evidence to prove his claim. There is no indication that the people who witnessed the purchase agreement which was a photocopy no longer exist. Three people are said to have witnessed the sale i.e. **Charles Nabusimah Masaba, Jackson Wandela** and **George Ponyokho**. The person who is said to have measured the land **Paul Harende** was not

also called to support the appellant. It appears none of these people were neighbours to the suit land. Neighbours were only present during negotiations but not when the purchase agreement was made. I agree with the tribunal that this rendered the so called transaction fishy. As rightly concluded by the tribunal which had the feel of the trial, the appellant might have been shown the respondent's land.

The appellant criticized the tribunals order that the appellant vacates the land immediately yet **CW.2 Tadeo Kharende** testified to the effect that nobody is using the land. That one cannot vacate a place he or she does not occupy. I do not agree. Vacating land does not imply that one occupies the land. Whoever is in possession of or in control of a disputed land can be ordered to vacate. I find no fault with the said order.

Regarding the claim by the respondent that he inherited the land from his father the late **Henry Mulongo** yet he had no letters of administration, it has no legal problem. As rightly submitted by **Mr. Okuku**, the law allows him to claim so as a beneficiary who has a right to the estate of his father. The respondent was entitled to protect his interest in the estate of his father. I am of the considered view and in agreement with learned counsel for the respondent that the trial tribunal properly evaluated the evidence as a whole. The evidence was very brief and was not complicated. There is no need to interfere with its findings of fact and law.

Ground 2:

This ground faults the tribunal for basing its decision on hearsay evidence. That this evidence is contained in the testimony of CW.3 when he stated that the respondent inherited the land from his father when he was not there.

When I studied the brief evidence by CW.3, I noted that it comprised three sentences only. He said that the parties hereto are cousins and they have a land dispute. That the appellant had entered the claimant's land by planting boundary marks by about 10ft x 15 ft. That the claimant (respondent) inherited the land and the appellant bought the land from **Gabriel Mushikoma**.

CW.3 concluded by saying that he was not there.

In cross-examination, CW.3 emphasized that the appellant had gone beyond to the respondent's land.

I have found no indication that the tribunal relied on hearsay evidence to reach their conclusions. They evaluated the evidence as a whole. Even if the assertion by CW.3 that the respondent inherited the land was excluded, there still remains evidence to prove on a balance of probabilities that the respondent owns the suit land and that the appellant failed to prove on a balance of probabilities that he bought and owns the suit land.

Ground 3:

This ground alleges that the tribunal relied for its decision on extraneous matters because no evidence was adduced to challenge Exhibit R.II and no question was asked in cross-examination or by court about the said exhibit.

After hearing and evaluating the evidence, court is enjoined to make a decision and give reasons for relying on or rejecting evidence adduced at the trial. The fact that Exhibit RC.I which was a copy of the original was admitted did not imply that the tribunal will allow it on the face of it without any further proof. The tribunal rejected the agreement and gave reasons for it. It held that:

> *"……from the respondent's evidence, he was not shown the boundaries in the presence of the neighbours except one Paul Harende who took the measurements. The respondent did not call the said Paul Harende. The respondent unconvincingly told the tribunal that the seller of the land called neighbours to witness the agreement but they did not sign it. And the neighbours were only present during the negotiations and NOT when they agreed on the price. We thought witnessing the agreement meant signing or attesting one's thumb print on it. ……."*

The tribunal had the authority as an adjudicating forum to scrutinize the exhibited document and accept its contents or reject it.
I will find that this ground of appeal has no merit.

Ground 4:

The procedure regarding the visit to the *locus in quo* has been rightly expressed by learned counsel for the appellant. Indeed the tribunal visited

locus in quo. The main purpose was to show boundaries between the parties and this is reflected on the sketch drawn by the chairperson.

In my view, given the brief evidence given by the parties, nothing elaborate would be expected from the visit to the *locus in quo.* There is no indication that the list with no title contains anything said at the visit. It cannot be said that the *locus in quo* visit was turned into a rally.

I am not convinced that the visit to the *locus in quo* was done in a perfunctory manner or in a haphazard manner. This ground must fail as well.

Grounds 5 and 6:

These two grounds relate to ground 1. They concern the manner in which the tribunal evaluated the evidence before it. As I have already held, I am satisfied that the tribunal properly evaluated the evidence before it. The respondent ably proved his case on a balance of probabilities. Whereas the respondent produced two independent witnesses the appellant was alone. He did not produce any witness and even failed to produce the alleged seller. He did not produce the author of the agreement. He did not produce any of the people who witnessed the agreement. He produced a photocopy of the agreement yet the original was not lost. No neighbours to the land were present when the transaction was concluded. The person who purportedly measured the land was not produced as a witness. The agreement produced by the appellant remained suspect.

The tribunal had all reason to find for the respondent and find that these people are neighbours after visiting the *locus in quo*. These grounds of appeal must fail.

Ground 7:

For the reasons given in this judgment, I am in agreement with **Mr. Okuku** learned counsel for the respondent that the Land Tribunal was alive to the facts of the case and the law and cannot be said to have occasioned a miscarriage of justice.

Consequently I will find that this appeal lacks merit and ought to be dismissed with costs here and in the tribunal below. The decision of the tribunal is upheld.

Stephen Musota

JUDGE

02.05.2013