

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

**HCT-04-CV-CA-0024-2013  
(FROM MBALE CIVIL SUIT NO.0031/2006)**

**NAMONDO HAMISI.....APPELLANT**

**VERSUS**

**SEVENTH DAY ADVENTIST  
ASSOCIATION OF UGANDA.....RESPONDENT**

03.04.2014

Appellant present.

Obedo on brief for Owori for appellant.

Respondent absent.

Dagira for Respondents present.

Obedo: Matter is in court for hearing of the appeal holding brief for counsel

Owori: Am ready to proceed, if court allows me file written submissions.

Dagira: I will not be hard, on counsel Obedo, we shall file a reply once served.

Court: Schedule for written submissions is granted as below.

Appellant files by 11.04.2014. Respondent files by 22.04.2014. Rejoinder by 30.04.2014.

**Henry I. Kawesa**

**JUDGE**

**03.04.2014**

18.06.2014

Dagira for Respondent.

Obedo for Appellant.

Parties absent.

Dagira: Matter is for fixation of judgment date.

Court: Judgment fixed for 22<sup>nd</sup> August, 2014.

**Henry I. Kawesa**

**JUDGE**

**18.06.2014**

18.09.2014

Parties absent.

Dagira for Respondent.

Owori for Appellant.

Dagira: We are ready to receive judgment.

Court: Judgment communicated in presence of the above counsel for the respondents.

**Henry I. Kawesa**

**JUDGE**

**18.09.2014**

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**ASSOCIATION OF UGANDA.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This appeal was brought by the appellant against the decision of **His Worship Singiza Douglas**, Magistrate Grade I.

The appeal raised six (6) grounds that:

1. The learned trial Magistrate in law and in fact when he formed an unbalanced view of the evidence and as a result reached a decision which was insupportable if the defence was taken into account.
2. That the learned trial Magistrate erred in law and fact when he held that the appellant was a trespasser on the suit land and awarded shs. 5,000,000/= in trespass.
3. The trial Magistrate erred in law and fact when he awarded damages of 7,000,000/= at the commercial rate of interest commencing from the first act of trespass till payment in full to the Respondent/plaintiff.

4. That the trial Magistrate erred in law and fact when he failed to exhaustively consider the evidence of Appellant as a whole thereby reaching a wrong decision.
5. That the learned trial Magistrate erred in law and fact when he relied on the Respondent's certificate as proof of ownership in disregard of the legal submission of counsel that the acquisition of the title was tainted with fraud.
6. Because the learned trial Magistrate erred in law and fact upon his failure to exercise the judicial function to adequately appraise and evaluate the evidence on record thus occasioning a miscarriage of justice.

Appellants prayed to this court for orders that:

- a) Appeal be allowed.
- b) Certificate of Title fraudulently obtained be cancelled.
- c) Judgment/Decree in the lower court be set aside.
- d) Judgment be entered for the appellant in this court and below.
- e) Appellant be granted costs in this court and the court of trial.

In their written submissions, both appellants and Respondents reminded this court of its duty as a first appellate court; as in *PANDYA V. R (1957) E.A 336*; which I do acknowledge and adopt.

Appellants chose to address court on Grounds 1, 4, 5, jointly, then Grounds 2 and 3 together, concluding with a further submission on Ground 5 alone.

Respondents adopted the same order of address, only adding an address on Ground 6 which appellant never addressed.

This court will maintain the same order, while determining this appeal.

**The facts:**

The appellants were sued by Respondents under Civil Suit 0031/2006 for recovery of part of land comprised in FR V 316 Folio 18 Plot 46 Block 3 Kakungulu Estate Mbale. They sought recovery of land, general damages for trespass and costs.

Plaintiff alleged that between 1992/93 defendant (appellant) entered respondent's land (plaintiff), constructed a house upon it and in due process threatened the plaintiff when confronted to vacate.

Defendant denied the claim and alleged the land was his as he bought it from Wakadyembe John. He further alleged that the land title by plaintiff was a forgery and was fraudulently obtained.

During the trial in the lower court, plaintiff (respondent) led evidence through PW.1 who told court that he had sold the said land to respondent at a cost of 50,000/= . He also told court that at time of sale, the defendant/Appellant was not existing as a tenant on that land.

A certificate of Title was exhibited as Ex.P.11 as confirmation of ownership by plaintiff/Respondent.

PW.2 gave evidence confirming that Respondent/Plaintiff had indeed bought the land. He confirmed the fact that there had been a case of threatening violence between plaintiff and defendant. Proceedings were duly exhibited as PE.IV.

In defence evidence was led through DW.1- who told court that the land was his, and he had bought from **Wakadyemba**. An agreement Ex.P.6 was exhibited as proof of that transaction. He said the land was bought in 1992.

DW.2 confirmed to court that he had sold the land to defendant and even made an agreement for him in 1992 at shs. 125,000/=. Agreement was tendered in as Exhibit D.1.

**DW.3 Fazila Gimono** wife of defendant told court that she was present when her husband bought the land. However in cross-examination she later conceded that the agreement was made in 1992, she was not around but in Busajabwankuba home.

Court visited locus and took down evidence of CW.1 the LC.I Chairman **Were Samson**- who testified regarding the fact that the land was owned by Kakungulu as landlord, who used to sell directly to those who wanted. He said the land in dispute had been part of Kakungulu's estate with tenants who used to pay Busulu. Later attempts to survey were frustrated, whereupon court fixed the matter for judgment. The trial Magistrate found for plaintiffs/Respondents.

### **Resolution of Issues:**

#### **Grounds 1, 4, & 5**

It's appellant's contention that the Magistrate did not balance the evidence which to them showed that;

- (i) Appellant was a customary owner of the land;
- (ii) That he had lived on the land undisturbed since 1992.

However the Respondent argued that among others that the land was part of Plot 46 Block 3 FRV 316 Folio 18. He further faulted appellant's failure to prove fraud. He reviewed all witness evidence and agreed with the Magistrate's findings thereon.

I have carefully re-evaluated the evidence on record. I find that the trial court was guided by three issues;

1. Whether the plaintiff was the lawful proprietor of the land in dispute.
2. Whether the defendant trespassed on plaintiff's land.
3. Remedies

The trial court while reviewing the evidence and the law considered the provisions of Article 237 (3) of 1995 Constitution and considered the land tenure systems in Uganda. He also considered the meaning of "lawful occupant" and "Bonafide occupant". He referred to section 29 of the Land Act and then made findings that plaintiff had acquired their interest on the land in 1982 vide PEX.1. he reasoned that since court had determined Criminal Case No. 42/200 and found defendant liable on criminal trespass- he was not protected by the "12 year period Rule" to qualify as a lawful occupant.

By virtue of evidence on record the Magistrate found that appellant is not a lawful occupant, not customary owner, and not a bonafide occupant.

I have come to the same conclusion as above and do agree with the submissions raised in defence by Respondents on this issue.

Evidence that is on record, the testimonies of the witnesses, and all exhibits when weighed together lend credence to the above findings. The evidence shows that Respondent is a registered proprietor of land, which was sold to him, and cut off from the estate of Kakungulu who owned the mother title. It is clear that in regularising ownership the Respondent took steps to survey, and to compensate or seek to compensate those who had Bibanja's on the said land. Evidence of CW.1 and PW.1, PW.2. Compensation, seems to have failed regarding appellant who in any case according to evidence was proved by court to be a trespasser on the land by the year 2000.

Without digressing further, I am satisfied with the review of evidence and the law by the trial court, and satisfied with the findings and conclusions thereon. I find no merit in arguments raised by appellants in ground 1, 4 and 5. They all do fail.

**Grounds 2 and 3:**

By evidence on record, I have already found that the finding by the trial Magistrate that appellant was a trespasser, was a right finding.

On ground 3, the Magistrate is faulted for the award of shs.7,000,000/= with interest at commercial rate from date of trespass to payment in full.

The review of evidence on record shows that PW.1, PW.2 and CW.1 all were agreed on the fact that the Respondent's occupation of this kind was as a result of a valid purchase. Evidence further shows that Respondent attempted to involve appellant in the survey process but appellant rejected.



It is on evidence that the entire land was the estate of the late **Kakungulu** and was surveyed and titled. Respondent's evidence was that even by time of purchase the survey stones were still intact, and hence there was no indication that appellant was living on that land by time of purchase. CW.1 confirmed that by the time of purchase appellants were not living on that land- this was further confirmed by PW.1 and PW.2.

In defence, evidence of DW.1, and DW.2 and DW.3, was subjected to cross cross-examination as a result of which it got discredited and left many unanswered questions for example; while PW.1 and PW.2 clearly showed court the agreement and Title for the land, showing that Respondent was on the land by 1982, the testimony of DW.1 that **Wakadyembe** sold the land to him in 1992, and the land for the church was being occupied by **Wakadyembe**.

DW.2 contradicted himself in cross-examination regarding the year the sale was done, those present, the amount of consideration (see pages 21 and 25 of typed record of proceedings)- These left gaps of doubt as to whether the sale ever happened. The exhibited agreements, on record contain very carrying contents as to locations, neighbours and signatories there of when you compare Exhibit D.1 and Exhibit P.6 which are all copies of the sale agreement made on same day and place for same transaction. DW.2's explanation for this discrepancy on page 25 is untenable because the differences are so glaring, causing further doubt if these agreements were authentic or not.

**DW.III Fazila Gimono**- whom DW.1 said knew much, said that at time of purchase it was **Gidudu** in occupation of the land. However during cross-

examination DW.11 who sold the land said **Gidudu** was just a neighbour to the land, and he was only told by “Makafu that **Gidudu** had land in the neighbourhood”. Further in cross-examination she said she was in Busajabwankuba at home by the time the agreement was made.

The above contradictions are just a few of the many other contradictions which make it impossible to believe the evidence of the appellant as it is in the lower court. faced with that type of evidence, it is my finding that the trial Court which had the opportunity to observe these witnesses as they testified, was right to conclude the way the Magistrate did.

The finding that the appellant was a trespasser is founded on evidence on record and I affirm the same.

I also agree with Respondent’s counsel on the issue of damages. An appellate court will only interfere with the award if appellant can show a misapplication of the principle of law on damages. See *Vithuladas & Sons Ltd & Ors v. Francis Mateka (2001-2005) 2 HCB 68*, the appellant did not show such misapplication,.

I do not find merit in the said grounds and they do fail.

**Ground 5:**

Though repeated in submissions Ground 5 has already been found to fail. There is no proof on record that the Certificate of Title was obtained by fraud. Apart from mentioning it in pleadings, no attempt to address the lower court on the issue of fraud was done. A review of evidence does not show that appellants led the

necessary evidence and it was ignored by court. Fraud in land matters as pointed out by the trial Magistrate must be specifically proved. This was not done. This ground also fails.

**Ground 6:**

As rightly pointed out by Respondent's counsel, appellants abandoned this ground and chose not to address it. However it is a replica of grounds 1, 4 and 5 and must also fail for similar reasons.

In the final analysis this appeal has failed on all grounds raised.

It is found to be of no merit and is accordingly dismissed with costs to the Respondents.

I so order.

**Henry I. Kawesa**

**JUDGE**

**18.09.2014**