

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CIVIL APPEAL NO. 0127 OF 2013**

**(Arising from FPT – 21 – CV – CS – 04 of 2008)**

**DALIKO KISEMBO .....APPELLANT**

**VERSUS**

**KATURAMU SANCITO.....RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is an appeal against the judgment, decision and orders of His Worship Kakooza Elias Magistrate Grade one Kyenjojo delivered at Kyenjojo in FPT – 21 – CV – CS – 04 of 2008 on 3<sup>rd</sup> October.

**Back ground**

The Respondent filed a Civil Suit against the Appellant seeking for the following orders; a declaration that the suit land belongs to him; a declaration that the Defendant is a trespasser on the suit land; vacant possession; general damages; and costs of the suit.

That the Respondent on 4<sup>th</sup> January 1992 acquired the suit land from Steven Byaruhanga, through purchase at UGX 200,000/= and an agreement was executed in regard to the same, built there on and has since been in occupation of the same. That, the Appellant, trespassed on the suit land and has inconvenienced the Respondent through his unlawful acts.

The Appellant on the other hand in his Written Statement of Defence averred that he was given the suit land by his father Kabuleta Augustine to cultivate seasonally and is therefore using his father's land temporarily. That, his father had been in occupation of the same since the Appellant's childhood without any interference. That the sale agreement is a forgery and the Appellant has been on the said land since his childhood. That the Respondent in 2006 stated that the suit land did belong to him and not the Appellant. That Byaruhanga came to rectify the boundary issue however; the Respondent used Police to harass him and also objected to the same. The Appellant prayed for the suit to be dismissed with costs.

The following issues were raised for determination;

1. Whether the Plaintiff is the rightful owner of the suit land?
2. Whether the Defendant has trespassed on the suit land?
3. What remedies are available to the parties?

The trial Magistrate after hearing the evidence of both sides and visiting locus found in favour of the Respondent as the owner of the suit land and the Appellant a trespasser, costs were also awarded against the Appellant.

The Appellant being dissatisfied with the decision of the trial Magistrate lodged this appeal whose grounds are as follows;

1. That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence before him and consequently came to wrong conclusions.
2. That the learned trial Magistrate erred in law and in fact when he disregarded the evidence of the seller of the disputed land he sold to the Respondent.
3. That the learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the Appellant a trespasser thereon.

Counsel Bwiruka Richard appeared for the Appellant and M/s Rwabwogo & Co. Advocates represented the Respondent.

The first ground was struck out by this Appellate Court for being too general and offending the provisions of **Order 43 Rule 1** of the Civil Procedure Act in a Ruling regarding the preliminary objection as raised by Counsel for the Respondent. Therefore submission is only on the two other grounds.

**Ground 2: That the learned trial Magistrate erred in law and in fact when he disregarded the evidence of the seller of the disputed land he sold to the Respondent.**

In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

*“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge.”*

In the instant case the seller (Byaruhanga Steven) told Court that when the current dispute as to boundaries arose he took time and came to rectify the same but the Respondent did not let him do so and instead used Police to harass the seller and the people who were present. The Respondent categorically refused to have the boundaries re-demarcated according to what he had purchased. A second attempt was made with the help of Police and new boundary marks were later planted but the Respondent refused to acknowledge the boundaries.

Counsel for the Appellant submitted that the purchaser cannot claim more than the vendor intended to sell to him thus making him a trespasser since he wants to own more land than he bought.

Counsel for the Respondent on the other hand submitted that the Appellant told Court that the suit land did not belong to him but had been given permission to use seasonally. And that the Respondent in his testimony had told Court that he purchased the suit land in 1992 and also gave permission to one Enid Kabyanga to use from 1992 to 1997 and she used the same

without any interference. That in regard to the sale agreement as tendered in Court by the Respondent being a forgery, this was never proved in Court.

Counsel for the Appellant in this regard submitted that the sale agreement was not authentic because the vendor DW4 told Court that he was paid UGX 180,000/= and the balance of UGX 20,000/= later on and not 200,000/= cash as stated by the sale agreement. Secondly, that the sale agreement was not even signed by the seller or the buyer himself. The same agreement was even denied by the seller in Court because the transaction was never reduced into writing.

Further, that DW4 testified that the land did belong to the Appellant's father and therefore he could not sell what did not belong to him. That in the circumstances the Respondent should have sought a remedy from the seller and not trespass on the Appellant's land.

Counsel for the Respondent also submitted that Court did visit locus and recorded two testimonies of Rose Kasabiti and Enid Kabyanga. That the two witnesses confirmed the fact that they had used the suit land for a period of five years without any interference and this was not challenged by the Appellant.

Counsel for the Respondent in submissions stated that the Appellant never challenged the evidence of the two witnesses at locus who had used the suit land for 5 years that is 1992-1995 without any interference.

Counsel for the Appellant in rejoinder submitted that the two witnesses at the locus-in-quo were never reflected as Court witnesses in the locus proceedings. That if they were indeed Court witnesses why then were the parties not allowed to cross-examine them? That this offends the requirement of a fair trial and the conduct of the locus proceedings as discussed in the case of **Yeseri Waibi versus Edisa Lusi Byandala (1982) H.C.B 28**.

Further that the evidence of the two witnesses does not show that the Respondent is the owner of the suit land. The licence to use the land for a short time by DW4 and the Respondent does not take away the fact that the land belonged to the Appellant's father DW2.

Court however should note that apart from recording of the testimonies of the witnesses the trial Magistrate did not record any findings/observations at the locus-in-quo in the proceedings but only did mention the same in his judgment. That notwithstanding the findings of the locus in quo can be related to the evidence of PW4 who told Court that new boundary marks as found during the locus visit had been planted after the indulgence of Police after the land dispute had arisen.

In my opinion indeed the learned trial Magistrate erred in law and in fact when he disregarded the evidence of the seller of the disputed land he sold to the Respondent. The seller did categorically tell Court that when he had of the land dispute between the Appellant and the Respondent he came to rectify the boundaries but the Respondent refused to have that done. That in itself speaks volumes. If the Respondent was in actual possession of what he had bought, then the same would have been clarified by the seller but the Respondent did not

give the seller that chance. In as far as the sale agreement is concerned am inclined to believe that it is a forgery for lack of signatures of both the seller and the buyer.

I also note that the Appellant never claimed the suit land as his and he also stated that if the Respondent had issues or any disputes regarding the said land then these should have been addressed to his father who was the owner of the land therefore there is no way the Appellant would have instituted a case against the two locus witnesses when he actually was not the owner of the suit land. The trial Magistrate's failure to regard this evidence led him to a wrong finding and therefore this ground succeeds.

**Ground 3: That the learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the Appellant a trespasser thereon.**

In the instant case the seller (Byaruhanga Stephen) clearly told Court that he did not sell the disputed land to the Respondent. Much as PW2 told Court that he was present when the land was being sold he did not tell Court that he previously knew that extent of Byaruhanga's land.

Counsel for the Appellant in his submissions noted that the transaction between the Respondent and Byaruhanga did not involve the Appellant and his father. This would have helped in confirming the boundaries of the land that was being sold to the Respondent. That with all the above it is evident that a non-owner cannot transfer good title to another person. Therefore, the Respondent should restrict himself to the land that he purchased and not interfere with the quiet possession of Appellant and his father.

Counsel for the Respondent on the other hand submitted that the Appellant did not know the land of the Respondent since the time the transaction was taking place the Appellant was in Kampala. Furthermore, that the boundary marks were planted three years ago and yet the land was bought more than 14 years ago. That the Appellant therefore has no claim against the Respondent.

In my opinion I find that the Respondent intends to claim more than he did purchase otherwise he would not have resisted when Byaruhanga had come to rectify the boundaries and this was also witnessed by third parties. In as far as the new boundary marks are concerned I believe DW4 in his testimony told Court that with the help of Police they were eventually able to plant boundary marks. In the circumstances therefore the trial Magistrate was wrong in holding the Appellant as a trespasser.

This appeal is allowed with costs.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**27/10/2016**