

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MASINDI

CIVIL APPEAL NO. HCT-12-CV-CA-005 OF 2011

5 *(Arising from Land claim No. 011 of 2006 before the chief Magistrate, Hoima)*

IRUMBA CORNELIUS:.....APPELLANT

VERSUS

BYENKYA CHARLES:..... RESPONDENT

10 **BEFORE: HON. JUSTICE WILSON MASALU MUSENE**

JUDGMENT

The Respondent brought an action against the Appellant before the Hoima District land Tribunal for trespass on customary land, measuring approximately three acres, located at Kihoroito-
15 Kasingo village, Hoima District and sought a declaration that he is the true owner of the suit land, general damages and costs of the suit.

Briefly, the facts giving rise to this appeal are that the Respondent inherited the suit land from his late father Anderea Tibamanya who passed away in 1985. The Respondent went for further studies in Kampala and left his brother in charge of the suit land. In 2000 the appellant
20 trespassed onto the land by crossing the known boundary and forcefully started cultivating the land. Efforts to stop his activities on the suit land were ignored or rebuffed. The Appellant's case was that the suit land was given to his (Appellant) late father by the Omukama of Bunyoro Kitara Kingdom, Sir Tito Winyi Gafabusa in 1910, in appreciation for his good services as a dresser to the King. In 1970 his late father allowed the Respondent's father to occupy the land
25 temporarily.

The trial Chief Magistrate disbelieved the Appellant's evidence and entered judgment for the Respondent, hence this appeal.

The appeal is founded on three grounds of appeal, to wit:-

- 5 1) That the Learned Trial magistrate erred in law and fact when he declared the Respondent the rightful owner of the suit land without considering closely the evidence adduced by the appellant thereby occasioning miscarriage of Justice.
- 2) The Trial Magistrate erred in law and fact when he granted the Respondent a permanent injunction without considering closely the evidence adduced by the Appellant thereby occasioning a miscarriage of justice.
- 10 3) The trial Magistrate erred in law and fact when he ordered the appellant to pay the Respondent general damages of Ugx shs **3,000,000/=** and exemplary damage of **Ugx shs 1,000,000/=** without any basis thereby occasioning a miscarriage of justice.

At the hearing, the appellant was represented by **Mr. Kizito Deo** of legal aid project while **Mr. Tugume Moses** appeared for the Respondent. Both counsel agreed and did file written
15 submissions.

Counsel for the appellant argued grounds 1 and 2 concurrently and ground 3 separately. I will follow the same line since both grounds are concerned with the issue of evaluation of evidence by the trial Magistrate.

20 In the judgment, the trial Magistrate briefly laid out the evidence of both sides before he came to the conclusion:

“I so rule that the disputed land is the property of the Plaintiff and not that of the defendant”

Looking at the judgment, it is evident the trial Chief Magistrate did not evaluate the evidence as
25 a whole, by considering the strengths and weaknesses of either side before coming to the finding as he did. However, it is the duty of the first appellate court to subject the evidence to

fresh scrutiny and arrive at its own conclusions, bearing in mind, I did not have the opportunity to observe the demeanour of the witnesses as they testified during trial.

Considering the evidence on record, it is evident each side laid claim to the suit land through inheritance from their respective parents.

5 According to the appellant's version, Appellant is the customary owner and/or beneficiary of the suit land measuring about one and half acres situate at Kihoroito, Kasingo, Hoima having inherited the same from his father the late George Kabyecapire and mother Felista Bucayaya who had acquired the same from Bunyoro Kitara kingdom.

10 That around 1970, a friend to the appellant's father, the late Andereya Tibem,anya (father to the Respondent) requested for the suit land to temporarily stay, which my father accepted. The late Andereya Tibemanya (father to the Respondent) started living on the suit land and upon the demise of the appellant's father in 1979 and upon perusal of his will which demanded that the said late Andereya Tibemwanya and one Francis Gafabusa leave his land, the two (2) families
15 left the land earlier allocated to them.

That the late Andereya Tibemanya (father to the Respondent) left the suit land in 1983 and went to Rwekobe and the Respondent only resurfaced in 2006 and started laying baseless claims of ownership of the suit land.

20 The Respondent's version on the other hand was that the suit land was originally property of the late Nyendwoha alias Muganda who bequeathed it to his nephew Anderea Tibemanya father of the plaintiff and husband of Kezekia the Plaintiff's mother.

Upon the death of both his parents, the Plaintiff was taken to Kampala by his relatives to continue with his studies leaving the suit land under the care of his relatives who would use hired
25 labour to maintain it.

Ground one and two

Counsel for the appellant submitted that the trial Magistrate failed to address himself as to the correct procedure to be followed at the locus in quo. He quoted the case of **Yeseri Waibi vs Edisa Lusi Byandala [1982] HCB 28**, “*The Honourable Court held that the practice of visiting the locus in quo is to check on the evidence given by witness and not to fill the gap for then the trial Magistrate may run the risk of making himself a witness in the case. That the trial Judge or Magistrate should make a note of what takes place at the locus in quo and if a witness points out any place or demonstrates any movement to the court, then the witness should be recalled by the court and give evidence of what occurred.*”

10 He concluded that locus in quo visits are necessary to enable the court to determine boundaries of the land in dispute and special features.

Counsel for the Respondent on the other hand submitted that the Respondent who testified as PW6 clearly explained to the best of his knowledge how the suit land was distinct from the appellant’s land and the 2 portions were separated by a path from Hoima-Fort Portal road to Kasingo trading centre and that he had inherited this land from his mother and father who had died leaving this customary land developed with permanent crops and 2 semi permanent houses (mud and wattle Mabati/iron roofed houses) and that even his mother was buried on the suit land and her grave is still there.

20 The Respondent’s version of how he got the suit land was corroborated by PW1 (an immediate neighbour to the suit land), PW3 (also an immediate neighbour to the suit land) as well as PW2, PW4 and PW5 with the bulk of the evidence from the Respondent’s witnesses clearly explaining that the suit land was formerly property of **Nyendwoha alias Muganda** a paternal aunt of **Tibemanya Anderea** the father of the Plaintiff and husband to the Plaintiff’s mother **Kezekia**.

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On locus in quo visit, counsel stated that it was agreed upon by consent of both parties.

The Appellant, Irumba Cornelious testified as DW1 on page 21 of the proceedings. He stated that the disputed land is his Kibanja which he acquired in 1984, from his father George Kabyecapire who in turn acquired from the Omukama of Bunyoro Kitara in 1910. He added that he was born in 1957 on the land in dispute plus his siblings. DW1's further testimony was that
5 Andereya, the father of Charles Byenja was allowed to temporarily use the land by his father in 1970 but left peacefully in 1983. And that Plaintiff/Respondent's father was buried in Rwekobe.

DW1 testified that it was in 2006 when Plaintiff/Respondent sued him. He also confirmed that the disputed land is 1 ½ acres.

DW2, Kiiza Teddy, supported the Appellant. She denied knowledge of a woman called
10 Muganda and confirmed it was the Defendant/appellant who planted the fruit trees on the disputed land.

On page 39 of the proceedings, DW3, Balyesiima Apollonari was also consistent and supportive of Appellant's case.

DW3 testified that he is a resident of Kasigo village born in 1942 and that he personally
15 attended a meeting in 1970 called by the Sub County Chief called Siira Kyamukaga in which the late Andereya Tibemanya (father to the Respondent) was introduced to the village and that the late Andereya Tibemanya (father to the Respondent) returned the suit land to its lawful owners and left in 1983.

So whereas the existence of Muganda, through whom the Respondent was claiming was not
20 known and could not be traced, the Appellant's case and the witnesses in support were consistent. The Respondent did not rebut the Appellant's case that Plaintiff/Respondent left in 1983, and only turned around 23 years later in 2006 to sue the Appellant. Even then, PW6, the Respondent testified that he is a resident of Rwakobe village, Kibingo parish, Busisi Sub-County where he has a home, as opposed to the suit land where he has no developments. And the
25 evidence on record is that it is at Rwekobe where Respondent's father died and was buried, and not the suit land. So if the trial Magistrate had properly evaluated the evidence, he would have found in favour of the appellant.

Another witness for the Respondent PW2 Anderea Bifera Munda , testified that he is from another L.C I. That the suit land belongs to the Respondent and that when he was leaving for Kampala, he left the suit land in the hands of Yohana Rukyerekere. This piece of evidence contradicts PW6's (Respondent's) who testified on page 17,last paragraph of the record of proceedings that his brother Joseph used to care take the suit land, PW4 on page 12 of the record of proceedings testified the Respondent left the suit land in the hands of one Biribonwa who is not a resident.

This is another indication that the trial Magistrate did not critically evaluate evidence on record, otherwise he would have decided in favour of appellant whose case was more consistent than Respondent and his witnesses. The contradictions in Respondent's case were real and on record. In **Constantino Okwel alias Magendo vs Uganda SC Cr. App. No. 12 of 1990**, the Supreme Court laid down the law as to contradictions and inconsistencies court stated that "in assessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected, minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness. Moreover, it is open to a trial judge to find out that a witness has been substantially truthful even though he lied in some particular respect.

So whereas counsel for the Respondent submitted that the Respondent cannot be faulted for building in Rwakobe and not on the suit land, this court finds that the leaving of the same in 1983, only to come back after 23 years in 2006 was an afterthought. It also confirms the Appellant's consistent case that his father temporarily gave to Respondent's father but not permanently and that is why they left. And the courts in this country will not allow reckless claims of land everywhere by people like Respondent so as to destabilize others.

In the premises, I find and hold that the trial Magistrate did not properly evaluate the evidence on record and came to the wrongful conclusion in favour of the Respondent.

Grounds No 1 and 2 of the appeal are hereby allowed.

Ground 3.

The trial Magistrate erred in law and fact when he ordered the Appellant to pay the Respondent general damages of Ugx shs **3,000,000/=** and exemplary damage of **Ugx shs 1,000,000/=** without any basis thereby occasioning a miscarriage of justice.

5 Having found and held that the appellant did not trespass on the suit land of 1 ½ acres as it was rightly his, then it was not necessary to order the appellant to pay Respondent general damages of UGX 3,000,000/= and exemplary damages of UGX 1,000,000/=. The finding by the trial Magistrate that the Respondent never got the opportunity to re-use and benefit from the 1 ½ acres in dispute was erroneous.

10 General damages are monetary compensation (money won) in a lawsuit for injuries suffered (such as pain, suffering, and inability to perform certain functions) or breach of contract for which there is no exact money value which can be calculated.

It is trite law that general damages are awarded at the discretion of court and are as a result of the Natural consequences of the Defendants Act or omission.

15 It is also trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental stress, pain and suffering. General damages must be pleaded and proved. **Kampala District Land Board & George Mitala vs Venansio Babweyana SCCA 2/2007.**

20 All the evidence by the Plaintiff/Respondent and that of the appellant alluded to the fact that the Plaintiff/Respondent had left the suit land long ago and that he had no development on the suit land whatsoever. There was never any physical inconvenience, mental stress pain and suffering.

I therefore agree with the submissions of counsel for Appellant that the award of general damages of UGX shs 3,000,000/= baseless and an afterthought by the trial Magistrate. The same also costs doubt as to whether the trial Magistrate actually addressed himself on the law governing the award of general damages or just awarded a figure that came into his mind.

25 **On Exemplary damages.** The position of the law concerning exemplary damages is that they must be specifically pleaded together with the facts relied on. **Kasule vs Makerere University [1975] HCB 76.**

In **Joseph Lukwago vs AG HCCS NO. 1156 of 1988** Court laid down principles governing an award or otherwise of exemplary damages.

1. *The conduct of the servant of the Defendant towards the Plaintiff was oppressive arbitrary, high handed or even unconstitutional or*
2. *The conduct of the Defendants servant was calculated by him to make profit for himself which may well exceed the compensation payable to the Plaintiff; or*
3. *Where it is provided by law “Even in those situations, court still had to consider whether the Plaintiff was the victim of the punishable behavior. Ultimately, the court has discretion in the award of exemplary damages.”*

Since the evidence by Respondent did not in any way allude to the conditions stated above, then I equally find and hold that the award of UGX 1,000,000/= as exemplary damages was uncalled for.

Ground 3 of appeal is also allowed.

Having allowed all the grounds of appeal, I do hereby set aside the judgment and orders of the Lower Court and decree that the land in dispute belongs to the appellant. I also award Appellant costs of this appeal.

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W. Masalu Musene
Judge
02/08/2017