

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 16 OF 2013

(Arising from Civil Suit No. 57 of 2006)

KIWANUKA ELIAS:.....APPELLANT

VERSUS

YOWANA KOMUBITOKO & 4 ORS:.....RESPONDENT

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

10

JUDGMENT

The Appellant, Kiwanuka Elias, being dissatisfied with the Judgment and orders of the Magistrate Grade One, Hoima, appealed to this court.

The Respondents were Yowana Komubitoke & 4 others.

Grounds of appeal:

- 1) The Learned Trial Magistrate gradeone erred in law and fact when he failed to properly evaluate the evidence on record thus leading him to reach a wrong decision.
- 2) The learned trial magistrate Grade one erred in law and fact when he relied on the evidence of DW6 when it was clear on record that the evidence of DW6 was not tested through cross examination owing to the need for handwriting expert's opinion.
- 3) The learned trial Magistrate erred in law when he failed to conduct a visit to the locus in quo in accordance with the law thus leading him to reach a wrong decision that prejudiced the Appellant.

20

The brief facts are that the appellant sued the Respondents for trespass on his land situate at ngogole 1, Kyangwali parish, kyangwali sub County, Buhaguzi County, Hoima District which he claimed to have bought from D2's mother whereas the 1st and 2nd Defendants claimed to be the owners of the suit land having occupied the same prior to the appellant's purchase of his portion.

10 In the lower court, the appellant produced three witnesses, herself as PW1, Byabashaija Nyansio (PW2) and Rostiko Kajubi (PW3) to prove his case. The Respondent's on the other hand produced 8 witnesses namely, Yowana Komubitoke, the 1st Defendant testified as DW1, Kabadaki Beatrice as DW2, John Katusiime testified as DW3, Ahumuza Robert DW4, Francis Batoro testified as DW5, Abigaba Javenali testified as DW6, Margaret Nseka as DW7 and Byaruhanga Deo testified as DW8.

Judgment in the above mentioned suit was given in favour of the Respondents when the trial Magistrate declared that the suit land belongs to the 1st and 2nd Defendants, that there was no trespass on the suit land, found that the appellant was not entitled to the remedies sought and the suit was dismissed with costs.

Grounds 1 and 2 of appeal were argued together as they touch on evaluation of evidence.

20 Counsel for appellant submitted that the trial Magistrate in his judgment criticized heavily the Appellant's evidence relating to the sale agreement. In the 1st instance, the trial magistrate criticized EPI on the ground that it did not have address and on the ground that there was no report produced by the Appellant to the effect that the original agreement was burnt and the appellant reported the destruction of the original agreement to LCS and police. The trial Magistrate also wondered how the appellant could have saved Exp 1 a photo copy and lost the original in a fire.

He added that the appellant is a lay person who after the loss of the agreement could not know that there was need to report to the Police the destruction of the original agreement by fire. We also wish this court to note that it is very possible for one to lose the original of his document and retain a photocopy which he had kept at a different place from the original. It is also our submission that lack of the address on EXP 1 was not fatal to the exhibit taking

into consideration the fact that the agreement was written in a rural setting where people write what they think was important.

It should be noted that the Appellant testified to the effect that the 2nd Respondent did not sign the agreement because her husband had signed the agreement. The appellant's testimony was corroborated by evidence of PW2 who was present during the buying of the suit land by the appellant. All this evidence was thrown away by the trial Magistrate.

10 The other contention was that after a short cross examination, counsel for the appellant requested court to refer the matter to a handwriting expert because the two agreements that was presented by the Appellant and that presented by the 2nd Respondent were alleged to have been executed by the same person DW6 although DW6 denied executing EXPI and admitted executing IDDI. It was after the handwriting expert's opinion that cross examination of DW6 would continue. At that point cross examination of DW6 was halted pending the handwriting expert's opinion when it would resume.

Nevertheless the opinion of the handwriting expert was not sought by court but the trial Magistrate went ahead to rely on the evidence of DW6 without affording counsel for the appellant a chance to exhaustively cross examine DW6 as had been planned. This means the evidence of DW6 was never tested by way of cross examination and re-examination.

Counsel for Appellant also emphasized contradictions in the evidence of the Respondents.

20 He gave DW6 whose evidence was relied on heavily by the trial Magistrate told court that the agreement (IDDI) was made at the home of the appellant see page 25 line 2. However, during the short cross examination before counsel for the appellant applied to halt cross examination until after the handwriting expert's opinion at page 26 last paragraph 1st line DW6 told court the agreement was made on the land that was sold to the appellant.

Apart from the above contradictions, the Respondents witnesses contradicted themselves on the boundaries of the suit land. DW6 talked about a swamp on the south, east –Tomasi. Kabonesa and a Mukoko tree and North the 1st Respondent (Komubitoke) and at the same time a road to Tontema. DW7 gave different boundaries from DW6. DW1 a different version of boundaries from DW2. Whereas the evidence of DW3 to DW5 was useless as

they knew nothing about the suit land and whatever they told Court had been told to them but not what they knew.

He concluded that the Appellant's case was supported by the 2nd Respondent and her witnesses. This evidence was supported by the 2nd Respondent and her witnesses. According to the appellant, after Kabusomba had left the suit land after harvesting her crops which were on the suit land by the time the appellant purchased the same, the Appellant started using it for grazing and does not know that DW7 used the land. The evidence of DW2 supported the Appellant's evidence that since Kabusomba left the Appellant was using the suit land until the Respondents trespassed. See page 4 line 20 to 23 and page 11, 2nd paragraph 1st line of the record of proceedings.

10

Counsel for the Respondent submitted that around early 1991 bought land located at Ngogole 1, Kyangwali Parish, Kyangwali sub county, Buhaguzi County, Hoima District from a one Kachweka Yeneki (the mother of the 2nd Respondent (DW2) for valuable consideration of **UGX 25,000/= (twenty five thousand Uganda shillings only)** by a written agreement drawn by abigaba Jovenali (PW6) in the presence of the appellant (PW1) , 2nd respondent (DW2), Phillip Byabasaija and komubitoke Yowana (DW1) . he added that what is in dispute is whether the Appellant bought land including the suit portion which at the time of purchase was being occupied by a one Kabusomba. The suit portion's boundaries are the appellant Elias Kiwanuka in the East, Yowana Komubitoke in the west, the path to tontema and yoronimu Tibinulire in the North and in the south the main road from Hoima to Kyangwali.

20

He stressed that its important to note the defendants' fact that Kachweka Yeneki's neighbour in the west was Yowana Komubitoke (the 1st Respondent) and the two shared a common boundary which the appellant/Plaintiff according to the plaintiff crosses into the 1st Respondent's land by 40*20 yards. The 3rd-5th Respondents were sued as agents or children of the 2nd Respondent on the suit property and in their defences stated that they derive their interest or authority on the suit land from the 2nd Respondent.

Counsel for the Respondent further submitted that Appellant's agreement dated 17.2.1991 (Exhibit PI) was rejected by DW6, Abigaba Jovenani who was alleged to have written it. He

added that since even PW2, Byabasaija Nyansio who was stated by appellant as a witness to the said agreement also rejected having signed the same, and so the ExP I. relied on by appellant was a forgery. Counsel also maintained that since PW3, Rostiko Kajubi was not a witness to the agreement executed between appellant and Kachweka Yeneki, then he could not testify as to which portion the Appellant bought.

He therefore argued that the trial Magistrate correctly disbelieved Appellant's evidence. Counsel for Respondent concluded that the learned trial Magistrate therefore rightly held that the suit land did not belong to the appellant, he having failed to adduce evidence to discharge his burden of proving on a balance of probabilities that the suit land belonged to him because of the following:-

10

- i) DW6 who authored the agreement between the appellant and the mother of the 2nd Defendant denied having authored Exh PI and acknowledged to have drawn DID I dated 17/3/1991 as the genuine agreement of sale and that the same excluded the suit land.
- ii) DW6 testified that he was the one who cleared the bush along the boundary line of the land that the appellant bought and that the same excluded the suit land which at the time was occupied by a one Kabusomba.
- iii) The Appellant did not call any eye witness to the transaction of 1991 to testify on the boundaries that he bought, PW2 who he called even denied ever signing Exh PI.
- 20 iv) The 1st Defendant (DW1) testified and his evidence was not rebutted in any way that he has been a neighbour to the suit land since 1970 when he acquired his portion from a one Kaahwa Maimuna in 1970 when she sifted to Kaseta. That he was present when Kacweka Yeneki sold part of the gland to the appellant in 1991 leaving the portion neighbouring his land unsold.
- v) The Appellant had no single development on the suit land, it's rather the 2nd-5th Respondents who possess gardens on the suit property.

Further , Kabusomba and nseka have been utilizing the suit property on the authority of Yeneki Kachweka and the 2nd Defendant respectively.

I have considered the submissions on both sides and I am inclined to agree with the finding and holding of the trial Magistrate as regards to who owns the suit land. The sale/purchase agreement by the Plaintiff/appellant was very vital in this case. Whereas the Plaintiff/Appellant testified that the original agreement was burnt in a tobacco barn, he did not elaborate on how he managed to save the photocopy.

Secondly, and as correctly held by the trial Magistrate, the sale agreement exhibit PI bears no address of the village and parish where the land is situated. And to make matters worse for appellant, who was said to have written the sale/purchase agreement dated 7.2.1991 disowned the same (PEXH1) as a forgery. DW6 stated on page 26 of the proceedings as follows:

10 “ ***This agreement dated 7.2.1991, I know nothing about it. It has no address. I am seeing my names in it but I don’t know how my names are appearing here. The Plaintiff was wrong to tell court that I witnessed it. In this agreement the parties are Kachweka Yeneki the seller and Kiwanuka Elias the buyer. I never witnessed it at all.***”

So when a person who is said to have witnessed the agreement denies the same as against the Plaintiff/Appellant, then I find and hold that the appellant did not prove his case on the balance of probabilities as required by the law.

In the premises, I agree with the submissions of counsel for the appellant that the evidence of DW6 discredits the Plaintiff/Appellant’s version. It supports the 2nd Defendant/Respondent’s version that Appellant bought part of her mother’s land and not the whole of it as alleged. So
20 ground No. 1 and 2 of Appeal are hereby rejected.

Ground No.3

The learned trial Magistrate erred in law when he failed to conduct a visit to the locus in quo in accordance with the law thus leading him to reach a wrong decision that prejudiced the Appellant.

Whereas Counsel for the Appellant insisted that the trial Magistrate failed to conduct the visit to locus in quo in accordance with the law, and thereby prejudiced the Appellant, counsel for the Respondent maintained that locus in quo was visited. I have seen the file and indeed the records indicate that locus in quo was visited. The law and practice on locus in quo and what happens

during locus in quo is well settled. Visiting locus in quo is provided for by practice direction No. 1 of 2007. There are many decided cases on locus in quo what should be noted is that locus in quo is not mandatory in all cases. In the present case and from evidence on record, it was clear that DW1 shared a boundary with the suit land, whereby it emerged that it was not sold to Appellant but was owned by D2 (2nd Respondent). So it was not a boundary dispute but ownership of a particular parcel of land which as already held was never sold to Appellant as claimed.

Secondly, it is clear that the trial Magistrate based his judgment on the testimonies of the witnesses in court and so any slight reference to the proceedings at the locus in quo were not fatal.

The third ground of appeal is also hereby disallowed.

In conclusion therefore having rejected all grounds of appeal, I proceed to dismiss the whole appeal and confirm the judgment and orders of the lower Court. I also award costs to the Respondents.

.....

W. Masalu Musene

Judge

08/08/2017.