

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 021 OF 2011

{Arising from civil suit No. 21 of 2004}

- 5 1. KWEBIIHA EMMANUEL
 2. KACHOPE SEZI:.....APPELLANTS

VERSUS

1. RWANGA FURUJENSIO
 2. MWIRUKI FIRIMON
10 3. NGASIRWA KI FENEHANSI:.....RESPONDENTS

BEFORE: HON. JUSTICE W. MASALU MUSENE

JUDGMENT

15 This appeal arises out of the Judgment and orders of the Grade one Magistrate Hoima, His
worship Ndangula Richard. The Respondents **Rwanga Furujensio, Mwiruki Firimoni and
Nga Sirwaki Fenehansi** sued the appellants, **Kwebiha Emmanuel and Kachope Sezi** in the
lower court seeking a declaration that the suit land belongs to the Respondents, a permanent
injunction, against the appellants and their workers restraining the appellants from acts of the
20 trespass, general damages and costs of the suit.

The appellants on their part denied trespassing on the respondents land but instead claimed to be
owners of the suit land located at Kakende-Muhonda-Nsereko L.C Buhaguzi county Hoima
District having acquired the same by way of purchase from one Kasibante in 1984 and lived in
25 the same uninterrupted since 1984 up to 2001 when the Respondents trespassed thereon and

chased the appellants away. The Appellants instead accused the Respondent for trespassing on the suit land.

The trial Magistrate decided the case in favour of the Respondents, hence this appeal. The grounds of appeal were:-

- 5 1). The Learned Trial magistrate Grade One 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 and when he held that the suit land belongs to the Plaintiffs when there was no evidence to the contrary.
- 3) The learned trial Magistrate Grade One erred in law and fact when he failed to conduct a
10 visit to the locus in quo in accordance with the law thus leading him to reach a wrong decision that prejudiced the Appellants.

Counsel for the Appellant urged grounds 1 and 2 together.

He submitted that the learned trial Magistrate failed to properly evaluate the evidence on record and in so doing end up making a wrong decision that the suit land belongs to the
15 Respondent yet there was no evidence on record to support his findings.

He added that the evidence of the appellants was clear and unchallenged compared to the evidence of the Respondents which was unclear and full of inconsistencies and contradictions that rendered it unbelievable. Further the trial Magistrate concentrated on irrelevant issues such as lack of agreement between DW2 and the Respondents which
20 were clearly explained by the witness of the Appellants.

Counsel for the appellant further submitted that the agreement DW2 had made when buying land from Bigora (PW2) was destroyed by termites. He added that the trial Magistrate did not direct his mind on that piece of evidence, otherwise he would have decided in favour of appellants.

Counsel for the Respondents on the other hand submitted that the trial Magistrate properly
25 evaluated the evidence on record and rightfully decided that the suit land belonged to the Respondents.

As first Appellate Court, it is my obligation to re-examine, re-appraise and re-evaluate the evidence on record, and come to my own inference of facts and conclusions, while bearing in mind the fact that the trial Magistrate had the opportunity to determine the demeanour of the witnesses as they testified. See **Pandya v r [1957] E.A 336** .

- 5 Secondly, under Section 101 (1) and (2) of evidence Act, whoever desires any court to give judgment as to any Legal rights or liability dependent on existence of facts, which he or she asserts, must prove that those facts exist.

In the present case, the burden of proof was on the Respondents to prove ownership of the land in dispute.

- 10 I have considered and studied the evidence of both sides in the Lower Court.

PW1, Fulugensio Rwanga's testimony was that himself and his brothers, the co-Respondents were born on the land in dispute and have grown up there, now having children and grand children.

- 15 He added that in the year 2001, they had a physical confrontation with the Appellants who wanted to grab their land. On page 7 of the proceedings, PWI denied ever selling any piece of land to one Kasibante, adding that Kasibante does not even stay on the village where the disputed land is. PWI concluded on page 8 of the proceedings that all his parents died and were buried on the disputed land and that Yovani Bikoora, is the heir and elder brother. PWI's
20 testimony was supported in all particulars by PW2, Yovan Bikoora, aged 79 years who testified on page 11 of the proceedings that whereas he knew one Kasibante as a person he has never sold him any part of the land in dispute like his brother PWI, PW2 confirmed that he was born on the land in dispute in 1932, and that they inherited the same from their father Rwita and grandfather Mpampara s/o Rukuka. On page 12 of the proceedings, PW2 testified that he knew
25 nothing about the alleged sale Agreement between him and Kasibante, and that the Appellants now and even Kasibante have never been or lived on the land in dispute in Muhonda/Nseruko/Kakende village.

The same consistent and supportive evidence of appellant's case was given by PW3, Leo kitakule another old man aged 70 years and a neighbour to the disputed land. PW3 testified that appellants have all along been neighbours and he knew their father Rwita and grandfather Mpampara who all along lived on the disputed land. PW3 was also the L.C I Chairman of the village where the land in dispute is, having served as a **Mayumba Kumi** leader from 1980-1982. He reiterated that none of the Respondents or their family has ever sold land to Kasibante and that the truth was that the Appellants don't own the disputed land.

In my view and as correctly submitted by counsel for the Respondents, the case of the Respondents was very consistent throughout. This is as opposed to Appellant's case where DW1, **Kwebiiha Emmanuel** alleged that they bought the disputed land from one Kasibante in 1984 at UGX 40,000/= .

DW1's further testified that Kasibante had bought the said land earlier from the Respondents and PW2, Bikoora Yovani and that the land in question was 100 acres. When DW1 was cross-examined by the Advocate for respondents on page 21 of the proceedings, he stated that he did not ask the Appellants whether they had sold the said land to Kasibante earlier or not. This Court wonders how DW1, Kwebiiha Emmanuel and his colleague could have bought such a vast acreage of land, 100 acres, without making appropriate inquiries or carrying out any diligence.

DW2, **Kasibante Petro**, testified on page 23 of the proceedings that he bought the land from the four appellants (including Yovani Bikoora). DW2, at one point testified that there were no people on land in dispute when one William Musogota called him to buy it. But at the same time, he testified that there were coffee trees, bananas and jackfruit trees, and four houses belonging to the Respondents.

This Court wonders how empty land could at the same time have houses, bananas, coffee trees and Jackfruit trees at the same time. In my view, DW2, Kasibante was not a truthful witness.

DW2 added that in 1984, he sold to the appellants at the same price of UGX 40,000/= and moved away. Court again wonders how he could sell the same land at the same price after 8 years of his stay and improvements. But to the appellant's case more doubtable, DW2 on page

25 of the proceedings testified that he did not recall any witness or at all who witnessed him purchasing the land from the Respondents.

At the same time DW2 conceded that there were many grave yards when he bought the disputed land. This was contradicted by DW1, Kwebiiha Emmanuel when on page 22 of the proceedings
5 he stated that they did not see any grave yards on the disputed land. So we have a situation where the seller, DW2 was saying there were graves, while the purchaser, DW1 denied any graves or grave yards. That was a fundamental and major contradiction in the Appellant's case, given the consistent testimonies of the Respondents that they have lived on the land in dispute throughout and buried thereon many of their Departed children and parents. DW2 on page 26
10 of the proceedings stated that the sale Agreement was strategically eaten by termites around 1985, one year after purchase. DW3, Yosefu Sejjuko made the Appellant's case more confusing. His testimony was that appellants bought the land in dispute from Kasibante in 1994 (page 28 proceedings). This was contradictor of DW1, 1st Appellant who stated that they bought in 1984 and even DW2, Kasibante whose earlier testimony was that he sold in 1984.
15 And moreover, DW3 claimed to have written the sale agreement. He also mentioned people like Nyakoojo and one Mariseri Zagumira as being present but none was called as a witness.

DW3 also testified that although he was not present when his father Kasibante was buying the land in dispute, that he saw the agreement and the seller was Bikoora. On the contrary, his father Kasibante (DW2) had already testified that he bought from the Respondents. There was
20 also another inconsistency with regard to the number of years Kasibante and DW3 (his son) occupied or stayed on the land in dispute, whether 14 years, 8 years or 7 years.

All the above highlighted inconsistencies and contradictions in the Appellant's case with regard to the alleged purchase of 100 acres of the land in dispute left a lot to be desired. This court cannot believe their testimonies as opposed to the more consistent and reliable case of the
25 Appellants who have stayed on the disputed land throughout and have never left it.

I am therefore unable to fault the findings and holdings of the trial Magistrate and so grounds No 1 and 2 of appeal are hereby rejected.

Ground 3:

The learned trial Magistrate Grade One erred in law and fact when he failed to conduct a visit to the locus in quo in accordance with the law thus leading him to reach a wrong
5 **decision that prejudiced the Appellants.**

Counsel for the Appellants submitted that the trial Magistrate failed to conduct the visit to locus in quo in accordance with the Law and the appellants were prejudiced.

10 Counsel added that the trial Magistrate did not accord the Appellants an opportunity to say anything at the locus. And that it was defeating the purpose of locus whereby each party had to show court what he/she said while in Court.

Counsel added that that while at the locus, the trial Magistrate called fresh evidence from fresh and new witnesses. This was against the well procedure for locus visit as outlined in the case cited above. The procedure is unless it was intimated to court that either party will call some
15 witnesses while at the locus for some reasons court will not allow fresh evidence to be called. In the instant case none of the parties had intimated to Court that he would call fresh evidence but the trial Magistrate went ahead to record fresh evidence while at the locus which he went ahead to heavily rely on in his judgment. This was not only irregular but was also illegal and prejudiced the Appellants.

20 He concluded that it was wrong for the trial Magistrate to base or rely on his observations at the locus in quo in his judgment.

Counsel for the Respondents in reply stated that the locus in quo proceedings were properly carried out by Court in the presence of many residents and the parties to the suit. He added that PWI showed the Court the different grave yards he had talked of in court. And that the
25 appellants did not rebut his evidence. Counsel added that the independent witness talked about was **Messach Nyakoojo, a Mukuru Womugongo** who was brought by appellants.

Counsel added that even then, Advocate for appellants also examined him. He concluded that there was nothing prejudicial with the procedure at the locus in quo ,

I have considered the submissions on both sides and studied the record of proceedings at the locus in quo (pages 30,31,32,33,34 and 35).

The Law with regard to visiting of locus in quo is now settled and there are a host of authorities on what happens at the locus in quo. They include **Yeseri Waibi vs Edisa Lucy Byandala?**

- 5 Also in 2007, the Honourable the Chief Justice by then, **Odoki CJ. Issued practice Direction No. 1 of 2007** regarding visiting of locus in quo.

In a nut shell, the purpose of visiting locus in quo is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features such as graves
10 and/or grave yards of Departed ones on either side, to confirm boundaries and neighbours to the disputed land, to show whatever Developments either party may have put up on the disputed land, and any other matters relevant to the case. It is during locus in quo that witnesses who were unable to go to court either due to physical disability or advanced age may testify. However, if the trial court finds/or is satisfied that the evidence given in court is enough, then he
15 or she may not visit the locus in quo. Evidence at the locus in quo cannot be a substitute for evidence already given in court. It can only supplement.

It should therefore be noted that visiting locus in quo is not mandatory. It depends on the circumstances of each case. However, once locus in quo is visited, all the relevant procedures must be followed. Witnesses must testify or give evidence after taking oath or affirmation and
20 they are liable to cross examination by the parties and/or their advocates.

All evidence and proceedings at the locus in quo must be recorded and form part of court record. It is also important to note that evidence at locus cannot be considered in isolation from the existing evidence recorded in Court.

In the present case, the record reveals that whichever witness that testified at locus in quo was
25 subjected to cross examination by Advocates on both sides and was fully recorded. I also did not find any much departure or variance with the testimonies given on either side by the parties in court. And in my view, the trial magistrate in his judgment did not rely solely on the proceedings at the locus in quo.

I am therefore unable to find any faults with the proceedings at the locus in quo. The 3rd ground of appeal therefore collapses.

Having held and found all grounds of appeal in the negative, I do hereby proceed to dismiss this
5 appeal and confirm the judgment and orders of the lower Court.

I also do hereby award costs to the Respondents.

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10 **Wilson Masalu Musene**
Judge
07/08/2017