

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT - 01 - LD - CA - 0029 - 2013
(Arising from Civil Suit No. 008 of 2011)

5 **KATARIKAWE**
NAFUTARI.....
APPELLANT

VERSUS

10 **KAMUBERI**
ALOZIO.....
. RESPONDENT

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

15 **Judgment**

Brief facts

This is an appeal arising from civil suit no. 008 of 2011, in the Chief Magistrates Court of Fort Portal Holden at Kamwenge, where the plaintiff/appellant's claim against the
20 defendant/Respondent was for, a declaration that he was the rightful owner of the suit land and that the Respondent was a trespasser, to secure a permanent injunction, eviction order, general damages and costs of the suit.

25 That the plaintiff/appellant claimed to have owned the suit land since 25th March 2001 having bought the same from a one Twinomugisha Claudia and that the Respondent was aware and witnessed the sale. That, the Appellant had been using the same, for cultivation and animal farming.

30 That, in 2010, the Respondent started claiming and asserting ownership of the lower part of R. Mpanga as his and even

trespassed on it and planted “emitooma” poles on the upper part and about ten eucalyptus trees on the lower part and it is where he grazed his cattle. The appellant was also charged with criminal trespass and was being restricted and harassed by the Respondent from quiet enjoyment, occupation and ownership of the suit land and had suffered continued inconvenience, loss and damage.

The Respondent on the other hand in his written statement of defence denied all the allegations the Appellant had put against him.

Issues for determination in the lower court were:

1. Whether the suit land belongs to the plaintiff?
2. Whether the defendant trespassed on the suit land?
3. What are remedies available to the parties?

In resolving the issues, the trial Magistrate concluded that the land belonged to the Respondent, no trespass had been committed by the Respondent and that there were no remedies available to the Appellant.

Judgment was passed in favour of the Respondent. The appellant being dissatisfied with the judgment of the lower Court lodged the instant appeal.

Grounds of appeal as per the memorandum of appeal are:

- a) That the trial Magistrate erred in law and fact when he failed to evaluate the evidence on record properly thereby arriving at a wrong decision.
- b) That the trial Magistrate erred in law and fact when he failed to interpret properly the agreement between the appellant and Twinomugisha Karaudiya in respect of the suit land.
- c) That the trial Magistrate erred in law and fact when he declared the respondent the owner of the suit land.

- d) That the trial Magistrate erred in law and fact when he based his judgment on extraneous matters
- 65 e) That the trial Magistrate erred in law and fact when he failed to conduct the locus quo in accordance with the recognised principles or law.
- f) That the trial Magistrate erred in law and fact when he failed to appreciate or consider that the lower part of the
- 70 suit land is a wetland controlled and managed by NEMA.

The appellant in his appeal made the following prayers:

1. That the appeal be upheld.
2. That the lower court's judgment and decision be reversed.
3. That in the alternative but without prejudice to the
- 75 foregoing, an order for retrial.
4. Costs of this appeal.

Representation:

Counsel Arinaitwe Ambrose appeared for the Appellant and Counsel James Ahabwe for the Respondent. By consent both

80 parties agreed to file written submissions.

Appeals are a creature of statute and an entitlement to any aggrieved party to a suit. **Section 78**, of the Civil Procedure Act, Cap. 71, provides that:

85 *"Where an appeal from any order is allowed, it shall lie to the court to which an appeal would lie from the decree in the suit in which the order was made."*

Duty of the first Appellate Court:

The duty of the first Appellate Court is to re-evaluate the evidence of the trial Court and re-appraise it, and draw its own

90 conclusion. In so doing, it subjects the entire evidence on record, to a fresh and exhaustive scrutiny. **(See: Ephriam Ongom and Another versus Francis Benga, Supreme Court Civil Appeal No. 10 of 1987, Flora Mbambu and Another versus Serapio Mukine [1979] HCB 47).**

95 **Resolution of the grounds:**

Grounds 1, 2 and 3 are discussed jointly and the other grounds are discussed separately.

Grounds 1, 2 and 3:

100 **1. That the trial Magistrate erred in law and fact when he failed to evaluate the evidence on record properly thereby arriving at a wrong decision.**

105 **2. That, the trial Magistrate erred in law and fact, when, he failed to properly interpret the agreement between the appellant and Twinomugisha Karaudiya, in respect of the suit land.**

3. That, the trial Magistrate erred in law and fact when he declared the respondent the owner of the suit land.

110 The Appellant claimed to have acquired the suit land by way of purchase. Purchase of land which is recognised by the Registration of Titles Act, Cap. 230 and the Contracts Act, No.7/2010 as one of the ways to acquire land in Uganda.

115 **PW1** Nafutali Katarikawe the Appellant in the instant case, stated that he bought his land from a one Claudia Twinomugisha on 25th/3/2001 at 300,000/= and that the Respondent had trespassed on the said land, yet he was one of the people who witnessed the sale. That, the neighbours to the suit land are; in the south is R. Mpanga, in the East is Setara, Ruhunu and Rhoda, in the North is Ndaberese and in the West is Johnson. That, the defendant came and planted eucalyptus and bark trees on the defendants land. Furthermore, that, the agreement was executed by Claudia and that the document was not a forgery.

125 PW2, PW3, PW4, are among the witnesses who attested to the agreement of sale. The respondent also, signed on the sale agreement. PW5 testified that he was the one that sold land to Twinomugisha Karaudiya, who in turn sold the same to the appellant.

130 The respondent did not dispute that the signature thereon was not his, but only alleged that it was a forgery “because he signed in a black book” which he did not produce in court.

135 It was not in dispute that the land which the appellant bought from Claudia formally belonged to Setara. However, Setara, no longer stayed in the same area. During the locus visit it was observed that between the suit land and land bought from Claudia there was land referred to as Abakazi’s land and also land for Garasi (DW3) however this was not reproduced on the sketch map. Much, as the appellant brought witnesses to testify about the sale agreement, and the suit belonging to him, it is clearly seen that the pieces of land belonging to the appellant and respondent are different. The suit land in the instant case is what belongs to the Appellant and not Respondent as per the sketch map extracted during the locus visit and the sale agreement.

145 Thus, the suit land belongs to the Appellant and the trial magistrate did not properly evaluate the evidence on record and arrived at an incorrect decision.

This ground therefore succeeds.

Ground 4: That, the trial Magistrate erred in law and fact when, he based his judgment on extraneous matters.

150 The Appellant in a bid to prove his case brought a number of witnesses who corroborated his evidence that the suit land belonged to him and the same was also observed at locus though the trial Magistrate chose to take the neighbours and boundaries as per the description of the Respondent yet the sketch map had the contrary. The trial Magistrate also based his decision on the fact that the Appellant’s and Respondent’s daughter’s relationship had failed as a ground for which there was a disputed alleged because the Appellant was not refunded the bride price he had paid.

160 I agree with the submissions for Counsel for the Appellant that the trial Magistrate should have based his decision on the

evidence as adduced in Court and at locus as opposed to the character of the Appellant and personal relations.

This ground therefore succeeds.

165 **Ground 5: That, the trial Magistrate erred in law and fact, when, he failed to conduct the locus in quo in accordance with the recognised principles of law.**

It was aptly held by Sir Udo Udoma CJ. (R.I.P) in **Mukasa versus Uganda (1964) EA 698 at page 700** that:

170 *“A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that*
175 *after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence.”*

Both Counsel for the appellant and the respondent in their submissions stated that; court visited locus in the presence of
180 both parties and their witnesses. The proceedings of what transpired at locus are also on record and a sketch plan attached there to.

Counsel for the respondent relied on the case of **Badru Kabalega versus Sepriano Mugangu (1992) KALR 265**,
185 where court inter alia stated that:

“The purpose of visiting locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross examined.”

In line with this case and what is on record, in my opinion, there
190 was no miscarriage of justice occasioned to the Appellant nor the Respondent and the locus visit was done appropriately.

Furthermore, in **Bale and 2 ors versus Okumu, Civil Appeal No. 21 of 2005**, p.4 Justice Bashaija K. Andrew stated that;

195 *"It is clear that the view of a locus in - quo is in addition to; and cannot be a substitute for evidence already given in court. It would follow that visiting locus in-quo by court is not mandatory and court reserves the right to visit locus in-quo in deserving cases - which is its discretion to exercise".*

200 I find that the locus in quo was properly conducted however, the trial Magistrate in his judgment ignored his findings as obtained during the locus visit. As for the allegations made by Counsel for the Appellant there is no evidence on record to prove them. If there was a mistrial at locus then the parties and their advocates ought to have addressed the same to the trial
205 Magistrate. This ground therefore fails.

Ground 6: That the trial magistrate erred in law and fact when he failed to appreciate or consider that the lower part of the suit land is a wet land controlled and managed by NEMA.

210 Counsel for the Appellant submitted that the lower part of the suit land was a wetland thus belonged to NEMA and the Appellant has a right through it to fetch water, and access water for drinking for the cattle just like all his neighbours.

215 Counsel for the Respondent on the other hand submitted that the issue of the wetland was never raised during scheduling and the Appellant did not lead evidence to that effect. That if the appellant indeed felt the need to access R. Mpanga like the other residents do, then he should in a diplomatic manner have approached the respondent and sought his consent to do so
220 other than using fraudulent means.

I have addressed my mind to both submissions for which am grateful and also looked at the Court record. It is my finding that the suit land belongs to the Appellant as per the sale agreement PE1 the Appellant purchased land that went up to R.
225 Mpanga which he is entitled to. The Respondent should use what he purchased as the Appellant also utilises what belongs to him.

230 In regard to the land belonging to NEMA, it is an obvious fact that all wetlands are managed and controlled by NEMA, therefore, they cannot be legally owned by an individual save for those that apply for licences to utilise them for a known period of time. Just like other natural resources one can use a wetland but cannot own it.

This ground therefore succeeds.

235 In a nutshell this appeal is allowed with costs to the Appellant both in this appeal and in the lower Court. The decision of the lower Court is set aside.

Right of appeal is explained.

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OYUKO. ANTHONY OJOK

JUDGE

30/11/2017

245 Judgment read and delivered in open Court in the presence of;

1. Counsel Ahabwe James for the Respondent.
2. The Respondent.
3. Beatrice Katusabe - Court Clerk.

In the absence of the Appellant and his Counsel.

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OYUKO. ANTHONY OJOK

JUDGE

255 **30/11/2017**