THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 48 OF 2014

(*Arising from Civil Suit No. 041 of 2008 at Hoima Chief Magistrate's Court***)**

1. **DOVICO BANOBA**
2. **PLAXEDA KABONESA**
3. **JOSEPH ERIBANKYA::APPELLANTS**
4. **ALINAWE DONOZIYO**

VERSUS

1. **BAINOMUGISHA MARY**
2. **SARAH D/O DEO BIRINAWE**
3. **KOMUHANGI JOSEPH**
4. **MULINZI EMMANUEL::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellants named above being dissatisfied with the Judgment and Orders of His Worship Ndangwa Richard the magistrate Grade One of Hoima Chief Magistrates court in the above mentioned suit, appeals against the whole judgment of the said court on the following grounds:

1 The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus misleading him to reach a wrong decision.

2 The Learned trial Magistrate erred in law and fact when he held that the suit land (Registered properly in the names of five proprietors) belongs solely to the

Defendants/Respondents late father Deo Birinawe, when there was overwhelming evidence to the contrary.

3 The Learned Trial Magistrate erred in law and in fact when he relied on mere speculations and hearsays not backed by any evidence thereby coming to wrong conclusions.

4 The Learned Trial Magistrate erred in law when he failed to conduct a visit to the locus in quo in accordance with the law governing it this leading him to reach a wrong decision.

The Appellants were represented by M/s Kagwa Owoyesigire & Co. Advocates, while the Respondents were represented by M/s Baryabanza & Co. Advocates**.**

Brief background:

The Appellants instituted this suit against the Respondents seeking for a declaration that the suit land belongs to them and the Respondents are trespassers, a permanent injunction, and an eviction order, an order directing the Respondents to handover the certificate of title to the Plaintiffs, general damages and costs of the suit.

The Respondents on their part denied the Appellants' claims and claimed that they are not trespassers but that the suit land belongs to them since the suit land belonged to their late father. The matter was heard and decided in favour of the Respondents thus this appeal.

Counsel for the Appellants argued grounds No. 1,2 and 3 together.

He submitted that the trial Magistrate erred to resolve that the suit land belongs solely to the Respondents while their un equivocal evidence was that a Certificate of Title exists registered in the names of the Appellants and Respondents father.

He added that all the parties were jointly registered to have equal shares, hence tenants in common. Infact counsel for the Appellants dwelt on the pleadings, plaint and written statement of defence to conclude that the intention was to have both sides as family members to be registered jointly and/or as tenants in common.

Counsel for the Respondents on the other hand submitted that pleadings alone were not enough unless they are supported by credible evidence.

Counsel for the Respondents went on to submit that if we according to the Plaint, in 4 (a-(i) that **Dovico Banoba** identified the suit land and started the process of the certificate of title in the names of Kwebiha John and sons (his father) that the sons included the late Dodoviko and the late Deo Birinawe father of the Respondents and the rest of siblings the 2nd , 3rd and 4th Respondents. However, a perusal of the Certificate of Title PIDI clearly shows that the name Kwebiha John does not exist as one of the Registered Proprietor, why if it is true that the 1st Appellant is the one who begun the process of registering the suit land and included among the applicants the name of his father Kwebiha John? No evidence was adduced by the Appellants to explain why the name of Kwebiha John was missing in the first Certificate of title yet they claim that it emanated from the process the late father of the 1st Appellant started where the said name was included. Conversely a perusal of the 2nd certificate of title PID2 which according to page 4 line 13 from the top of the Appellants submission the 1st appellant agree that he applied and obtained, the name of Kwebiha John who was in 1996 when the said title PID2 was got was already dead but excludes the name of **Deo Birinawe** the father of the Respondents. This defeats counsel for the Appellants' claim that the suit land was, identified by the late **Dodoviko Banoba** (1st Appellant) and out of his love for his family and generosity he invited his father and siblings to share.

It should also be noted that there is no way the late father of the 1st Appellant could have identified the suit land in 1978 and invite his father and siblings to share the suit land when the father of the Appellants according to the evidence of PW2 at page 15 line 9 from the top of the record of proceedings died in 1963 before the said land was allegedly identified by the 1st Appellant. This is a pure lie that exposes the Appellants' motive in the instant case.

He wondered how the father of the Respondents **Deo Birinawe** would have processed the second title, DID2 and include the name of their father who was already dead by then but excluded his own name in the same Certificate (PID2).

I have considered the submissions on both sides and studied the record of proceedings and Judgment of the lower court.

PW1, Busobozi Francis a son of the 1st Appellant, testified that the disputed land has two titles, 1st tile 113 hectares and 2nd title , 119 hectares . He added that the names on the titles are Dovico **Banoba , Josephat Eribankya, Donozio Aliwawe, Deo Birinawe a**nd **Plaxeda Kabonesa**. He also insisted both titles are valid.

PW2, **Donoziyo Alinawe** testified on page 13 of the proceedings that it is Defendants/ Respondents who are residing on the land in dispute. He added that they applied for that land in the names of their father and that when title came out, he never saw it.

PW3, **Plaxeda Kabonesa**, 2nd Appellant testified on page 17 of the proceedings that although she applied for the land together with her co-appellants jointly, she did not remember when they filled the forms and she does not know where the land in dispute is located. She also added that she has never utilized the land in question, and that it is the Defendants/ Respondents who are in occupation.

During Re-examination on page 18, PW3, **Plaxeda Kabonesa** added that she was 12 years and in p. 5 when she filled the application forms PW4 was **Martin Byenkya** who was not any helpful to appellant's case. He told court on page 21 of the proceedings that he knew nothing pertaining to the suit land save seeing cattle and cultivation. He did not know how Plaxeda Kabonesa came into picture.

PW5 was **Xavier Kaganda**, the L.C I Chairperson of Katerega II village. He stated that the suit land belonged to **Dovico and Deo Birinawe,** two people only. PW5 categorically told Court that **Deo Eribankya and Alinawe Donoziyo**, 4th Appellant have never utilized the land in dispute. He also confirmed he had never seen **Plaxeda Kabonesa**, 2nd Appellant utilize the land in dispute and that when **Dovico d**ied, (1st Appellant), he was buried in his home in Kihemba, away

from the suit land . PW6 also confirmed that it is Komuhangi, s/o Deo (3rd Respondent) who is staying on the suit land and has stayed on it for long. The 1st Respondent, Bainomugisha Mary testified as DWI. She told Court that the Plaintiffs/Appellants are her uncles and Aunt but the suit land belongs to their father **Deo Birinawe** who passed on and left the disputed land for them. DW1 was born on the suit land and grew up thereon. She was 41 years old and added that their father, used other people's names to acquire the land but none of the Plaintiffs was on the Certificate. She concluded that in 2008, when **Dovico Bitamazire** and his sons came with a second title to their land issued in 1996, and yet the one of their father was issued in 1993, she went to the land office in Kampala to find out why there were two titles on the same land. She added that the 2nd title which had been obtained after the death of their father was cancelled. And that the Appellants did not obtain or co-own the land with their deceased father, **Deo Birinawe**. DW1 confirmed during cross examination that their father had been told in the lands offices to apply as a group and not as an individual.

DW2, was **Mbabazi Deo** also confirmed more or less what DWI had stated. He confirmed the suit land belonged to Deo Birinawe, the father of the Respondents. DW3 was John Tibasoka who equally confirmed that the owner of the disputed land was the late **Deo Birinawe** and that he was the one who identified the land for the deceased in 1972. He denied seeing any of the Appellants by then.

DW3 was equally consistent and denied knowledge of **Dovico Banoba.**

DW4, **Yohana Baihandugo** testified that the land in dispute belongs to **Deo Birinawe**, the father of the Respondents. He confirmed it was **Tibasoka John** (DW3) who identified the land in dispute for **Deo Birinawe** and that **Dovico** (1st Appellant) acquired his own land neighbouring the one in dispute. My own scrutiny of the evidence on record shows that the respondents and their witnesses were very consistent and straight forward as to the ownership of the disputed land by **Deo Birinawe**, the deceased father of the Respondents. DW1, **Bainomugisha Mary** was detailed and elaborate. She explained to Court how the second title to the disputed land, obtained after the death of their father was cancelled. The evidence of the Respondents and their witnesses was confirmed by PW5, Xavier kaganda, the L.C I Chairman of the area. Even PW3, Plaxeda Kabonesa, 2nd Appellant confirmed that she has never been on the land in dispute.

Furthermore, this Court could not believe her when she stated that she applied for the disputed land with **Dovico Banoba** when she was 12 years and in Primary Five. That was an open lie because she was not an adult and it is only adults who could fill land application forms even up to now. This Court was therefore surprised by the submissions of counsel for the appellants that Respondent's witnesses were inconsistent and contradictory. The record clearly bears any one out as to how the Respondents and their witnesses are consistent and straight forward, as opposed to appellants and their witnesses.

Some of the Appellant's witnesses, including L.C I Chairman supported, the Respondents. I also agree with Counsel for the Respondents that Doviko Banoba was a nickname of Rudoviko Bitamazire and so he could not apply for the land using his nickname. This was confirmed by DW2, the son of Rudoviko Bitamazire alias Doviko Banoba. Even PW3 also stated that Doviko Banoba was also called Doviko Bitamazire. The Appellants had no evidence to support their claim on the disputed land but wanted to take advantage of the death of respondents' father and similarity in names on the Certificate of Title. This court cannot allow such flagrant and open handed attempts by the appellants to rob the children of Deo Birinawe (Respndents) of their land.

Counsel for the appellants labored so much to bring to this Court the similarities in some aspects of the appellants' pleadings and those of the Respondents to establish what he called a common intention by the Appellants' and the Defendants' father to co own the suit land as tenants in common. Counsel also dwelt much on the errors in the spelling of the names of the appellants on the first title. There was no evidence adduced by the appellants to show that there were errors in the spelling of their names in the first tile apart from PW2 who told court that he learnt that his name had been misspelt when he saw pleadings from Court.

But , if it is true that PW2 learnt of the error in the spelling of his name from the pleadings, one wonders why he didn't swear a statutory declaration verifying his name and later tender it in Court as an exhibit.

Counsel for the appellants also discussed at length the law relating to co-ownership and concluded that the trial Magistrate erred in deciding in Respondent's favour. However, the law

relating to co-ownership was quoted out of context and was not applicable to the circumstances of this case. The trial Magistrate was therefore correct when he held that if the Plaintiff (Appellants) had ever entrusted the Defendants (Respondents) father to process the title to the suit land, then they should not have waited for his death and then trace the alleged Title. The appellants should have done so when Respondents' father was still alive. This was particularly in the absence of any scintilla of evidence on record to show that the appellants ever used the land in dispute during the lifetime of Respondent's father.

I accordingly uphold the submissions of Counsel for Respondents and holding of the trial Magistrate that the Plaintiffs/Appellants knew so well that the suit land belonged to the Defendants/Respondents' late father and he had a Certificate of title to the effect. It was after his death that they came up with all tricks to grab the suit land from the Defendants/Respondents. They went ahead to process a second title excluding Defendants/Respondents father names. Indeed when they were defeated before the Registrar then they filed this suit, and appeal. They have equally failed.

I therefore find and hold that the trial Magistrate properly evaluated the evidence on record and held in favour of Respondents. Grounds 1, 2 and 3 of appeal are therefore hereby rejected.

Ground 4

The Learned Trial Magistrate erred in law when he failed to conduct a visit to the locus in quo in accordance with the law governing it this leading him to reach a wrong decision.

Counsel for the Appellant complained that the manner in which the locus visit was conducted was in unprofessional way; when the trial Magistrate failed and or ignored to draw a sketch map at locus for the suit land, he did not visit the part in dispute where the Appellants used to graze from but he only visited the Respondents part only. The Magistrate did not record the cross examination proceedings of both sides which were done at locus visit.

He added that upon carefully reading the lower Court proceedings , he have discovered that the trial Magistrate did not record the evidence of **Mr. Joseph Eribankya** who is the 3rd Appellant and was DW6 whose evidence was got on the day of locus visit, who testified as PW6, his evidence is not indicated anywhere on the record of proceedings nor did he consider or refer to it at all in his judgment, the afore mentioned conduct or omissions of the trial Magistrate was fatal to the whole trial and it led him to reach to a wrong and a biased decision.

In reply, Counsel for Respondent submitted that what is in dispute is that the trial Magistrate did not follow the legally accepted procedure of visiting the locus in quo and we agree with counsel for the Appellants that true the trial Magistrate failed to follow the procedure required when he visited the locus in quo in as far as he did not record in the record of proceedings all that transpired during the locus visit including the trial Magistrate's observations and findings.

However, he added that there was no miscarriage of Justice caused to the Appellants.

It is unfortunate that a witness testifies whether in court or at locus and his evidence is not recorded by the trial Magistrate. That is indeed contrary to the conduct of proceedings at the locus in quo. Such practice is to be condemned by this Court.

However, a critical analysis of the evidence on record reveals that the trial magistrate would not have arrived at a contrary decision. My findings are the mistake of the trial Magistrate at the locus notwithstanding, on the basis of the evidence on record, this Court agrees that the Judgment and orders in favour of the Respondents was proper and is hereby upheld.

I accordingly do hereby dismiss this appeal and decree that the disputed land belongs to the Respondents.

I also award costs of this appeal to the Respondents.

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Wilson Masalu Musene

Judge

14/08/2017