

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 036 OF 2013

5 **(Arising out of the Civil Suit No. 27 of 10 of Iganga at Kaliro)**

1. **ISABIRYE PAUL Alias KAAKO**
2. **ISABIRYE PAUL NVIRI.....APPELLANTS**

10 **VERSUS**

1. **WALUBO AKUZASI**
2. **GEDE PATRICK.....RESPONDENTS**

15 **JUDGMENT ON APPEAL**
BEFORE HON. LADY JUSTICE EVA K. LUSWATA

This is an appeal from the decision of Her Worship Nvanungi Sylvia delivered at Kaliroon
09/04/2013.

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Background:-

The facts admitted by the lower court are that the suit land located in Wakilele Mawulire, Kaliro District was at some point the property of the late Gede Wakilerere (hereinafter referred to as the deceased). That the deceased who died in 1952 left the suit land as a bequest to his son Gede
25 Patrick (the 2nd respondent) and another called Waibi (now deceased). That at his birth, Gede was taken to Kemjo to be cared for by one Kakaire and the land was left under the custody and control of Walubo Akuzasi the 1st respondent.

That during 2009, the appellants moved onto the suit land uninvited and even made claim to it.
30 The respondents then sued the appellants in trespass with a claim for general damages, which the

appellants contested. Judgment was entered in favour of the respondents on all issues raised and thus this appeal raised on the following five grounds:-

- 1) **That the trial Magistrate erred in law and in fact when he failed to evaluate the evidence and as such reached a wrong decision.**
- 5 2) **That the trial Magistrate erred in law and in fact when she failed to hold that the case was time barred.**
- 3) **That the trial Magistrate erred in law and in fact when she failed to follow the law and procedure relating to the locus quo hence occasioning miscarriage of Justice.**
- 10 4) **That the trial magistrate erred in law and in fact when she held that the Appellants are the rightful owners of the suit land whereas not.**
- 5) **That the trial magistrate erred in law and in fact when she held that the suit land was entrusted to the 1st Respondent whereas not.**

The reference to appellants in ground 4 of the appeal is obviously an error. Court takes the liberty to consider it a reference to the respondents against whom this appeal was filed

Resolution of the grounds of appeal:-

The appellants were represented by Mangeni Law Chambers & Co., Advocates while M/s Balidawa-Ngobi & Co. & Advocates represented the respondents. Arguments in support and against the appeal were presented by written submissions which I will consider keenly before making my decision. However, judging that some of the grounds could be merged, and the fact that a preliminary point of law was raised against the appeal in general, I choose not to follow the order by the counsel in their submissions.

25 Again, while considering the correctness of the Magistrate's decision, I am mindful of the fact that I am sitting as a first appellate Court. I therefore bear the duty to subject the evidence presented in the lower court to fresh and exhaustive scrutiny and come to my own conclusions, due respect being given to the fact that it is the trial court that had the opportunity to observe, listen to and record the evidence at first hand. See for example **Ramkrishan Pandya vs.**

**Republic (1957) EA 336 and Father Nanensio Begumisa & 3 Others Vs Eric Tibesiga SCCA
No. 17/220 (2004 KALR at 236)**

Ground 2:

- 5 This ground appears to be a point of law which ordinarily should have, but was not raised in the lower Court. None the less, I am enjoined to consider its merit, for if it were to succeed, then the proceedings in the lower Court are deemed to have been in error and this appeal would automatically succeed on that ground alone.
- 10 Appellant's counsel argued that his clients entered onto the suit land in the 1990s and thus the claim being brought more than 15 years after, would make it time barred. His counterpart disagreed. He argued that the pleadings and evidence indicated that the cause of action arose in or around 2009 when the both appellants forcefully entered into the suit land without consent of the respondents. That immediately thereafter in 2010, the suit was filed. He further argued that
- 15 the testimony of **DW2** Isabirye Nviri that he entered the suit land in 1989 was never proved or believed by the trial Magistrate.

Section 5 of the Limitation Act Cap 80 provides that;

- 20 *“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.”*

- DW4** stated that the appellants migrated onto the suit land in 2002. On the other hand, **DW1**. Stated in his testimony that he constructed on the disputed land in 1991 but later contradicted
- 25 himself when he said that he constructed the house in 2004. On the other hand, **PW1, PW2, PW4** were consistent in their testimony that before 2009, the appellants were using the land for cultivation with the permission of **PW1**. That they began their unauthorised construction in 2009. In my view, that would be the time that the cause of action a rose.

Those testimonies are an indication that the appellants were uncertain of the year in which they occupied/constructed on the suit land. Thus the respondents' testimony was more credible and since this suit was filed in 2010, only one year after the confirmed trespass, the suit could not be time barred. I also note that it was an agreed fact during the scheduling conference held
5 on 9/5/2011, that it was the appellants in occupation of the suit land by then. Thus irrespective of the date they gained possession, their occupation would be deemed to be a continuing trespass, which is also actionable at law.

I accordingly find no merit in that objection and ground 2 accordingly fails.

10 **Ground 3:**

Citing much authority, appellant's counsel argued that although the Magistrate visited the locus, she neglected to refer to the proceedings recorded there which he deemed a deviance from the established procedure of carrying out a locus visit and thus, a fatal error to the proceedings as a whole. In reply, respondent's counsel argued that the Magistrate not only visited the locus but in
15 her judgment, she did determine that the appellants overstepped the boundary of their land and trespassed onto the suit land. That in any case, appellant's counsel did not show how the alleged violation of the procedure to be followed at a visit of the locus in quo affected the outcome of the suit or occasioned a miscarriage of justice.

In David Acar & 3 Others Vs Alfred Acar Aliro (1982) HCB 60, Karoka J (as he then was)
20 noted that "*when the court deems it necessary to visit locus in quo, then both parties and their witnesses and counsel (if any) must be involved. Any observations by the trial Magistrate must be recorded down and must form part of the proceedings...*"

I add that such a visit can be guided by the procedure laid down in the Practice Direction No. 1/2007 that the Court should:-

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- i. Ensure that all the parties, their witnesses, and Advocates, if any are present.
 - ii. Allow the parties and their witnesses to adduce evidence at the *locus in quo*.
 - iii. Allow cross examination by either party, or his/her counsel.
 - iv. Record all the proceedings at the locus in quo.

- v. Record any observation, view, opinion, or conclusion of the court including drawing of a sketch plan if necessary.

Having perused the record, I am of the view that the Magistrate substantially followed the required procedure at the locus. PW1, DW2, 5 and 4 were recalled to give evidence. Much of what was collected was evidence pointing to the boundaries of the suit land with adjoining land and neighbors. The Magistrate not only recorded evidence but even drew a sketch map giving a pictorial representation of what the various witnesses had stated.

Nothing in the regulations or available precedents seems to suggest that the Court must in her judgment specifically refer to the findings at a locus. They will do so only when the facts require. None the less, as pointed out by the respondent's counsel, in her judgment (at pages 3-5), the Magistrate did make reference to her findings at the locus. She specifically mentioned what the different witnesses had pointed out during the locus visit (e.g. PW5) and used those testimonies to evaluate the evidence as a whole. There would thus be no merit in appellant's counsel's submissions.

Ground three also fails.

Grounds 1, 4 and 5:

In ground one, the appellant attacked the manner in which the evidence was evaluated. In counsel's view, this resulted into an erroneous conclusion on who rightly if at all, was a care taker of the suit land or its true ownership. I will accordingly handle grounds 1, 4 and 5 together.

PW1 Waluso Akuzasi stated that originally the land was owned by Gede Wakilele who was Waibi Wakilele and Patrick Gede's father. That during 1964, the suit land was entrusted to him merely as caretaker for both. He continued that Waibi died in 1986. He also revealed that the appellants' grandparents were occupying a swamp lying to the south of the suit land and the graveyards for their ancestors (including that of their father) are located on that same land. That on request, in 1997, he permitted the appellants to temporary farm the suit land. However that

during 2009, the appellants who are his sons, using force, constructed grass thatched houses in the middle of the suit land and even removed the graveyards of the respondents' ancestors.

PW4 Henry Kakaire supported much of that evidence. Gede added specifically that after Waibi's death in Bunya, the clan entrusted the suit land to Waluzo Akuzasi and that it is **DW3** Lubogo
5 Daniel who excavated his father's grave.

PW5 explained that the deceased died before Gede was born and it was the decision of the clan to appoint Akuzasi Walubo caretaker of the suit land in trust for the two orphans, Gede Patrick and Wakilele. That the defendants father Nsadhu Waguha was born on that swamp and grew up
10 there. He also revealed that the appellants and their ancestors before them owned and occupied, and the ancestors were even buried in the land below the boundary mark in the swamp.

According to **DW1** Isabirye Paul, he moved from Naigugu to the suit land in 1973 and constructed a house on it with permission of his father. He later contradicted himself when he said that he constructed the house in 2004. However, he conceded that Edward Walubo, the 1st
15 respondent's son also had a house on the suit land that he had constructed in 2009 with permission from his father.

DW2 Isabirye Paul Nviri testified that they were born and first resided near the water below the suit land and that Isabirye Kaako the 1st appellant constructed a house on the suit land in the
20 1980s. That evidence was substantially supported by **DW3** and **DW4** who added that originally Yokoni the appellant's grandfather first resided at the bottom of the swamp for a long period before the appellants moving closer, crossing a path and eventually moving into the suit land in 2002. While at locus, **DW5** pointed out three pieces of land one of which he claimed was owned by Nsadhu Woguna the 1st respondent's father. He conceded that he had observed the 1st
25 respondent renting out the suit land in the past 40 years and that the appellants had only moved there five to six years prior to filing of the suit.

I note that the Magistrate did take into consideration all the above pieces of evidence. She concluded, and in fact it appears not to have been in dispute that, the suit land was originally owned by the deceased who was succeeded by his two sons Waibi and Gede Patrick. The strong evidence provided by **PW1-4** is that the suit land was for a period of time under the control of Akuzasi Walubo as caretaker was also not seriously challenged. The evidence by the respondents' witnesses is that the appellants originally occupied land situated below the suit land in a swamp. That evidence was in fact supported by **DW3, DW4** and **DW5** in their testimonies.

Counsel for the appellants argued in his submissions that the trial Magistrate misdirected herself in not making a finding that the respondents had nothing to prove ownership of the suit land. That observation could be correct, but this being unregistered land, neither party produced any documentary evidence of ownership. The Learned Magistrate thus relied on the oral testimonies and the locus visit. PW1 Akuzasi Walubo being a clan leader and only surviving elder of the Badyanga clan was better placed to give the correct history of the suit land.

In general, much of the appellant's evidence did not contradict Akuzasi and Gede's testimonies. The Magistrate considered that fact and took note of the witnesses' demeanor to conclude that the respondents' evidence as a whole was more credible than that of the appellants.

I have perused the records and do agree with the Magistrate. She also found as a fact that PW1 allowed the 1st appellant to utilize the lower part of the suit land for cultivation and the latter exceeded the portion given to him to trespass into the suit land. On the other hand that, the 2nd appellant wrongfully included a portion of the suit land into land originally bought by his father Dyoli, cut down trees and removed the deceased's grave. She rightly deemed those actions as trespass.

I have no reason to find fault with the Learned Magistrate's findings above. She properly evaluated the evidence and came to the correct conclusion that the respondents were the rightful owners of the suit land. There was also strong evidence to support the 1st respondent's testimony that the suit land was entrusted to him as caretaker for the benefit of both Gede and the late Waibi. The Learned Magistrate's finding was thus correct.

In conclusion grounds 1, 4 and 5 also fail.

4. Conclusion.

In summary, I find no merit in the appeal which is therefore, dismissed with costs to the respondents.

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I so order.

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EVA K. LUSWATA

JUDGE

08/01/2018

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