

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0028 OF 2017

(Arising from FPT – 00 – CV – CS – 0036 of 2013)

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1. ALITUHA EDWARD }APPELLANTS
2. MUGABO BEATRICE }

VERSUS

ASTONE MANYINDO.....RESPONDENT

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BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE

Judgment

The Appellants Alituha Edward and Mugabo Beatrice being dissatisfied with the judgment and orders of His Worship Emokor Samuel, Chief Magistrate at Chief Magistrate’s Court of Fort Portal at Fort Portal delivered on the 25th day of April 2017, instituted the instant appeal whose grounds as per the Amended Memorandum of Appeal are as follows;

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1. That the learned trial Chief Magistrate erred in law and fact when he held that Taliwanyuma Placid from whom the Appellants derive title to the suit land was not a bonafide occupant under **Section 29(2)** of the Land Act and that therefore the Appellants were not bonafide occupants on the suit land.
2. That the learned trial Chief Magistrate erred in law and fact when he held that Taliwanyuma Placid had no interest in the suit land which he could pass to the Appellants.
3. That the learned trial Chief Magistrate erred in law and in fact when he held that the Appellants have trespassed by extension on the suit land beyond what their father occupied.

4. That the learned trial Chief Magistrate erred in law and fact when he awarded the Respondent general damages which were not proved in evidence.
5. That the learned trial Chief Magistrate erred in law and fact when he did not allow the Appellants to show Court all the old developments and houses of their father, brothers, uncles graves proving that they have maintained long possession of all the ring of land neighbouring the main road including the suit land and it was an error not to put these developments on record.

Brief back ground facts:

The Respondent filed Civil Suit No. 0036 of 2013 against the Appellants seeking an eviction order against the Appellants/Defendants from the suit land, a permanent injunction, a demolition order of the Appellants/Defendants illegal structures on the suit land, compensatory damages, general damages, interest and costs.

In the Complaint, the Respondent contended that he is the registered proprietor of land comprised in Block 20 Plot 3 at Buhaza measuring approximately 40 acres and that between 2009 and 2012, the 1st and 2nd Defendant now 1st and 2nd Appellants respectively trespassed on the suit land and constructed thereon two structures among other developments.

The Respondent/Plaintiff averred that the entry of the Appellants/Defendants filed a written statement of defence where they contended that they are bonafide occupants on the suit land having acquired it from their father the late Placid Taliwanyuma who has been in occupation of the same for the last over 50 years having obtained it from his father who is buried thereon.

The Appellants/Defendants further averred that they have got developments on the suit land like houses and banana plantations. Therefore, the Appellants/Defendants denied that the Respondent/Plaintiff had a cause of action against them and prayed that the suit be dismissed with costs. Judgment on the matter was delivered on 25/4/2017 against the Appellants/Defendants.

M/s Kayonga, Musinguzi & Co. Advocates represented the Appellants and M/s Acellam Collins & Co. Advocates represented the Respondent.

Grounds: 1, 2 and 3 are discussed jointly, Grounds: 4 and 5 are discussed separately.

Grounds 1, 2 and 3:

1. That the learned trial Chief Magistrate erred in law and fact when he held that Taliwanyuma Placid from whom the Appellants derive title to the suit land was not a bonafide occupant under Section 29(2) of the Land Act and that therefore the Appellants were not bonafide occupants on the suit land.
- 5 2. That the learned trial Chief Magistrate erred in law and fact when he held that Taliwanyuma Placid had no interest in the suit land which he could pass to the Respondents.
- 10 3. That the learned trial Chief Magistrate erred in law and in fact when he held that the Appellants have trespassed by extension on the suit land beyond what their father occupied.

Counsel for the Appellants submitted that the Appellants told Court that they got the suit land from their father Taliwanyuma Placid who testified as DW3 who confirmed the same, he even told Court that he had given his other two Children Byamukama and Jolly land but they were not sued. That the DW3 told Court that he got his land from his father by way of inheritance and at the time of his testimony in Court he was aged 90 years. That the Respondent also confirmed the long usage of the suit land by Taliwanyuma and so did PW2 Kajumba Margaret. That is clear from the above evidence that Taliwanyuma was a bonafide occupant who passed on his interest to the Appellants as per the provisions of **Section 29 (2) (a)** of the Land Act. Thus, the Appellants are bonafide occupants of the suit land and it was therefore erroneous for the trial Magistrate to hold that the Appellants were trespassers by extension having shown that they had been possession of the suit land for a very long time.

Counsel for the Appellants added that the evidence of the Appellants was not challenged and they and their father are in occupation of the suit land. That it was even admitted by PW2 that the Appellants' father was found on the suit land by the Respondent who came in 1983 and they have been on the suit land for over 50 years. Thus, the Appellants cannot be said to be trespassers since their father was a bonafide occupant who passed on the same interest to them.

Counsel for the Respondent on the other submitted that the Respondent got the suit land from Peredasi Kabaduma through the then Uganda Commercial Bank at a purchase price of UGX 200,000/= in 1983 and the title was transferred into his name. That his title was never challenged by the Appellants and under **Section 59** of the Registration of Titles Act, a

Certificate is conclusive proof of ownership meaning the suit land measuring 40 acres belongs to the Respondent.

Counsel for the Respondent added that it was the testimony of the Respondent that upon purchase of the suit land upon inspection he found four homesteads belonging to Katima Michael, Mutodio, Rwakaikara and Benwa. That he took them as people living on his land and allowed them to stay but they are all deceased now.

Further, that in 1994 he discovered that Taliwanyuma had occupied the house left behind by Michael Katima and started utilizing land measuring approximately two acres including a banana plantation. That in 2005, he discovered that Taliwanyuma was constructing a permanent house away from the house he took over from Katima. That the Respondent allowed him to occupy the house for compassionate reasons but told him not to exceed a certain point.

Furthermore, that in 2009 after realizing that encroachers were likely to come in, he summoned a meeting for everyone that was living on the land through the local leaders and the Sub-County Chief among others. That Taliwanyuma sent his son Jolly Deo and the resolutions of the meeting were as follows;

1. That the Respondent would take over the land in 6 months which was at the end of 2009;
2. That no one would build a new house on the land without the Respondent's consent;
3. No permanent crops were to be grown;
4. No one would sell or give out portions of the land.

Counsel for the Respondent went on to submit that the said document dated 20/5/2009 was signed by all the tenants including Taliwanyuma, it was tendered in evidence, admitted and marked as Exhibit P.5 on 11th September, 2015. That in the circumstances the Appellants cannot be said to be bonafide occupants because even in 2012 the son of Taliwanyuma came to the Respondent to ask for permission to build on the suit land but he was reminded about the resolutions reached on 20/5/2009. The Appellants' occupation of the suit land was challenged in 1994 and 2009 so they are trespassers on the suit land and Taliwanyuma could not give out beyond the portion he was given to construct on.

Counsel for the Respondent also noted that when Court visited the locus in quo, there were no graves on the suit land belonging to any relatives of the Appellants. That Placid himself

upon his demise was not buried on the suit land and there are no homesteads on the suit land belonging to any of the brothers or relatives of Taliwanyuma. Thus, the trial Magistrate cannot be faulted for finding that the Appellants were not bonafide occupants of the suit land and ordered for their eviction and demolition of their structures from the Respondent's land.

5 I have carefully studied the submissions on both sides and the judgment of the lower Court. I am also aware of the duty of this Court as a first Appellate Court to re-appraise all evidence on record and reach its own conclusions bearing in mind that it neither heard nor saw witnesses during the hearing to assess their demeanour. The case of **Selle versus Associated Motor Boat Ltd [1968] E.A 123 and Sanyu Lwanga Musoke versus Sam Galiwanga,**
10 **SCCA No. 48 of 1995**, Justice A. Karokora, (J.S.C as he then was), held;

“... it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross examination so as to test their veracity...”

15 In the present case, there is no dispute that the Respondent, Aston Manyindo is the registered proprietor of land comprised in Block 20 Plot 3 at Buhaza Kyarusenzi, Kyenjojo District measuring approximately 40 acres. What is in contention is whether the Appellants are **“bonafide occupants”** of approximately 4 acres on the said registered land of the Respondent. The Certificate of Title was exhibited in the lower Court as P.1.

20 The Appellants on the other hand maintained that they are bonafide occupants who were given their respective plots by their father, Taliwanyuma placid. The second Appellant, Magabo Beatrice testified as DW1 in the lower Court. On pages 18, 19 and 20 of the lower Court record, DW1's testimony was that she was born in Kyarusenzi on 27/11/1977 and they have always lived on the suit property as family land and that it is approximately 4 acres. The
25 2nd Appellant's case as DW1 on page 20 was:

*“I was given part of the Family land. The remaining part on which the family is on is 4 acres. On those 4 acres are banana plantations, pine trees, avocado trees, jack fruit trees. My two brothers also have a house on that land. They are Jolly Deogratiuous and Byamukama Clovis. My parents also have an old house on that plot where we grew. We also graze cows
30 on that piece.”*

DW2 also exhibited in Court permission to construct from Kyarusozi Sub-County, general receipt dated 9/7/2010 and a document from her father giving her the plot. DW2, during cross-examination on page 21 denied the allegation that her father's house initially belonged to Katina. She denied being a trespasser and concluded on page 22 of the proceedings that her father owns about 4 acres on the land in question. DW1 also emphasised that Jolly and Clovis have their homes on the 4 acres belonging to her father.

The 1st Appellant testified as DW2 on pages 23 and 24 of the lower Court record. DW2 reiterated that his father, who is about 90-93 years gave him the piece of land 50 x 100ft where he has built rentals. And that what he was given is within about 4-5 acres of his father.

10 DW2 added that his father and grandfather also lived on that land. Taliwanyuma Placid, the father of the two Appellants testified as DW3. He stated that he is the one who gave the Appellants now land to build on. DW3 reiterated that he acquired the land by inheritance and that his elder brother was buried on that very piece of land which is approximately 3 acres. On page 26 of the proceedings, DW3 testified:-

15 *“My Kibanja stretches from where my old structure is up to the road where shops are located. I have two other children Jolly Deogratiuous and Twesige Jude and also Clovis Byamukama...I am the one who gave Byamukama and Jolly where they built their houses.”*

It is important to note that DW3 testified at the locus in quo as he was too old to move to Court.

20 DW3 concluded that it was his father who planted the eucalyptus trees and he also planted some of them. I find the case of the Appellants very consistent and straight forward and was strongly supported by their father, an old man of 90 years old. Their case was that their Kibanja is approximately 4-5 acres and DW3 Taliwanyuma Placid emphasised that his Kibanja stretches from where his old structure is up to the road where slopes are located.

25 However, on page 5 of his judgment, the trial Magistrate stated that the bond of contention is not the approximate 4 acres on which Taliwanyuma is settled but rather the two structures above his house along the main road. That was an erroneous finding and was not supported by evidence on record as clearly stated by DW1, DW2, and DW3. There is no way Taliwanyuma's Kibanja can be separated from the Appellants' structures because
30 Taliwanyuma (DW3), the father of the Appellants gave them as his children. And out of his same kibanja, he gave his other children, Jolly Deogratiuous and Byamukama Clovis who

were not sued. And there is no way Taliwanyuma Placid can be separated from the Appellants because ground 2 of the appeal is that the learned trial Chief Magistrate erred in law and fact when he held that Taliwanyuma Placid had no interest in the suit land which he could pass to the Appellants. On page 10 of the proceedings, PW1, Aston Manyindo stated:-

5 **“I sued Alituha and Mugabo because they are trespassers on my land. Their father has been on my plot for a long time and I recognise his occupancy.”**

The moment the Respondent recognised the occupancy of placid Taliwanyuma who gave Appellants as his children, then there is no way those developments can be separated. Placid Taliwanyuma clearly testified that his kibanja extended up to the road where the shop
10 structures put up by the Appellants were. And since Aston Manyindo recognised the Appellants’ father as having been there for a long time and did not dispute his occupancy, and Taliwanyuma being an old man of 90 years.

I find and hold that Taliwanyuma and his children the Appellants whom he gave part, all qualify to be **bona fide occupants** who are protected by the law.

15 I therefore disagree with the submissions of Counsel for the Respondent that the Appellants, who were supported by their father, (DW3) did not give credible evidence of ownership of the disputed land. In my view, the evidence was credible because the Respondent, Aston Manyindo himself testified that Taliwanyuma had been on his land for a long time and he recognised his occupancy.

20 Even PW2, Kajumba Margaret on page 14 of the proceedings during cross examination testified as follows:

**“Taliwanyuma was a brother to Katima... He came late and occupied Katima’s house. Katima was born on that land. Their father was in Kampala. Taliwanyuma was also born on the same land. I know that their father was buried on that piece of land and
25 their graves are even there.”**

Given such evidence on record by PW2 (Respondent’s witness) in support of the Appellants and their father who was born there, then I reject the submissions by Counsel for the Respondent that the presence of the Appellants’ father amounted to trespass and that he could not derive any interest to pass to the Appellants.

The same error was made by the trial Chief Magistrate when on page 7 of his judgment at the top he stated:

5 **“Taliwanyuma, it is my considered opinion could not pass on any interests or rights to the Defendants when he authorised them to construct houses above his own structure because he had none.”**

It was erroneous for the trial Chief Magistrate to decide the case on the basis of his own opinion other than the evidence on record which was overwhelming that the Appellants and their father who gave them were bonafide occupants. The Appellants did not in the circumstances trespass by extension on the suit land.

10 And this Court wonders how the Respondent allegedly left Taliwanyuma to build a permanent house as an old man as submitted by Counsel for the Respondent if Taliwanyuma and his children, the Appellants were not bonafide occupants.

Section 29(2)(a) of the Land Act defines a bonfide occupant to mean a person who before coming in force of the Constitution of 1995, had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more. And **Section 29(5)** of the same Land Act provides:-

15 **“Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this section shall be taken to be a bonafide occupant for purposes of this Act.”**

20 The Appellants, who acquired from their father Taliwanyuma are therefore bonafide occupants under **Section 29(5)** of the Land Act, Cap. 227, Laws of Uganda.

The trial Chief Magistrate therefore erred when he held that the Appellants were trespassers by extension on the suit land as the Appellants showed in their evidence that they have been in long possession and use of the suit land and they have developments thereon. I do not need to repeat the evidence of DW1 which I have already quoted and that evidence was unchallenged. It showed that the Appellants and their father are in occupation of the suit land so they cannot be trespassers. It was therefore an erroneous decision on the part of the trial Magistrate as pointed out under Ground 3 of appeal. In the case of **Justine E. M. N. Lutaaya versus Sterling engineering Company Limited, Civil Appeal No. 11 of 2002, Justice Mulenga (JSC) (RIP) held:**

“Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes with another person’s lawful possession of that land.”

In the present case and as outlined from the evidence on record, it was the Appellants and their father who were in possession of their Kibanja (suit land) and so they could not be trespassers. As already noted, the evidence of PW2, Margaret Kajumba supported the Appellants’ case that Placid Taliwanyuma was born on the suit land. And having utilised the suit land in question for a long time, given the advanced age of the Appellants’ father of 90 years, it is the finding and holding of this Court that the Appellants are not trespassers but bonafide occupants. The Land Amendment Act of 2010 confers upon bonafide occupants security of tenure.

Both the registered proprietors like this case, and the lawful or bonafide occupants, like the Appellants are all protected. The trial Chief Magistrate therefore made an erroneous decision on page 7 of his judgment that the Appellants be evicted. That was as a result of poor evaluation of evidence on record and so that order of eviction and demolition of houses of the Appellant **cannot stand**. All in all, and in view of what I have outlined above, I allow grounds 1, 2 and 3 of appeal.

Ground 4:

That the learned trial Chief Magistrate erred in law and fact when he awarded the Respondent general damages which were not proved in evidence.

Counsel for the Respondent submitted that there is no requirement that general damages must be specifically proved. He quoted **Lord Macnaghten** in the case of **stroms versus Hutchinson [1905] A.C 515**, where it was held that general damages are such as the law will presume to be the natural and probable consequence of the act complained of. He added that considering the infringement, the award of UGX 10,000,000/= was not even adequate compensation for the Respondent as a result of illegal activities of the Appellants. Since I have found and held that the Appellants were not trespassers but bona fide occupants who are entitled to equal protection of the law as stated in the **Land Act**, and **the Land Amendment Act of 2010**, then the Appellants cannot pay general damages. But before I take leave of this ground of appeal which is hereby allowed, I agree with the submissions of Counsel for the Appellant about the comments of the trial Chief Magistrate on the matter. On page 7 of the Lower Court Judgment, the Chief Magistrate stated:

“The Plaintiff has prayed for compensatory and general damages against the Defendants. There was no evidence in this regard that was led by the Plaintiff or Counsel in his Written Submissions.”

In Kibimba Rice Company Ltd versus Umar Salim, SCCA No. 7 of 1988, it was held,

- 5 **“Evidence had to be led to prove claims for general damages for inconvenience, mental suffering and anguish. Counsel having been unable to show any particular evidence on this claim, it was correct to make no award.”**

Similarly in the present case, since the Chief Magistrate held that there was no evidence on record to prove general damages, it was erroneous to go ahead and award general damages of
10 UGX 10,000,000/=.

And the trial Magistrate did not exercise his discretion judiciously so Ground No. 4 of appeal is hereby allowed.

- Ground 5: That the learned trial Chief Magistrate erred in law and fact when he did not allow the Appellants to show Court all the old developments and houses of their
15 father, brothers, uncles graves proving that they have maintained long possession of all the ring of land neighbouring the main road including the suit land and it was an error not to put these developments on record.**

Having allowed the four grounds of appeal above, particularly grounds 1-3, I find and hold that it is not necessary for this Court, as an Appellate Court to revisit the locus in quo.

- 20 In **Turyahikayo James and 2 Others versus Ruremire Denis, Kabale High Court Civil Appeal No. 83 of 2009**, it was held that irregularity in receiving evidence at the locus in quo does not per se render the proceedings a nullity provided that the Court can make an effective, practicable and workable decision that resolves the conflict on the merits of the case.

- 25 I entirely agree with the above holding and I have made an effective, workable and lawful decision with regard with regard to the conflict between the parties under grounds 1, 2, 3 and 4. I therefore disregard ground 5 of appeal.

In conclusion therefore, having allowed all grounds of appeal, I do hereby allow the appeal by the Appellants and set aside the judgment and orders of the Lower Court.

And in view of the provisions of **Order 2 Rules 9** of the Civil Procedure Rules which empowers this Court to make binding declarations of right, I do hereby declare the Appellants as bonafide occupants on the land in dispute. The Appellants are therefore entitled to the equal protection of the law much in the same way as the Respondent, the Registered
5 Proprietor.

Lastly, I award costs of this appeal to the Appellants.

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WILSON MASALU MUSENE

10 **JUDGE**

11/3/2019