

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

5 **CIVIL APPEAL NO. 102 OF 2015**
(Arising out of the Civil Suit No. 35 of 2009 of Kamuli Magistrate’s Court)

WILBER BWAMIKI
(ADMINISTRATOR OF THE ESTATE
10 **OF TEREZA NAKISUYI)..... APPELLANT**

VERSUS

ELIAB BALIKAMARA..... RESPONDENT

15

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

This is an appeal from the decision of His Worship Benson Semondo delivered at Kamuli on
20 8/10/2014.

Background:-

The respondent, Eliab Balikamara sued Tereza Nakisuyi (now deceased) in trespass with respect
to unregistered land located in Bubogo Zone, Kasamira Village, Bugulumya Sub County,
25 Buzaya County in the Kamuli District (hereinafter referred to as the suit land). The facts
admitted by the lower court are that Balikamara with his mother Samali Takani obtained the suit
land by purchase in 1944 and subsequently, entrusted it into the care, first of Saulo in 1958, and
then Wilber Bwamiki the latter’s son, in 1979 Balikamara eventually made the decision to
reclaim the suit land during 2002, and requested his sister Tereza Nakisuyi to issue a notice
30 against Bwamiki and the LCs of his intentions to reclaim it. That Nakisuyi instead issued the
notice in her name and thereupon assumed ownership by hiring the land to third parties. Nakisuyi

died during the pendance of the suit and Wilber Bwamiki took out Letters of Administration in respect of her estate.

The accepted facts in defence are that the suit land belonged to Nakisuyi, the mother of Wilber Bwamiki. That Saulo Bwamiki(father of Wilber Bwamiki) bought the suit land for Samali Takani, as his wife, and Balikamara only came to live in Saulo Bwamiki's household but eventually returned to his father's land.

Having evaluated the evidence, the trial Magistrate found Bwamiki to be in trespass and gave judgment in favour of Balikamara on all issues raised. Bwamiki being dissatisfied with that decision filed this appeal raised on the following five grounds:-

- 1) **That the trial Magistrate erred in law and in fact when he failed to find that the respondent's case was barred by limitation.**
- 2) **That the trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record and thereby arrived at a wrong and unfair decision.**
- 3) **That the learned trial Magistrate erred in law and fact when he failed to find that on a balance of probabilities, the respondent has failed to prove his claim**
- 4) **That the learned trial magistrate erred in law and fact when he found and believed the plaintiff was lawful owner of the suit land yet he had never been in possession thereof or at all and the defendant who was in possession did not hold the same on his account.**
- 5) **That the learned trial magistrate erred in law and fact when he irregularly conducted the locus in quo and also failed to take into consideration the evidence adduced at locus.**

Resolution of the grounds of appeal:-

The appellant was represented by M/s Rwakafuuzi & Co., Advocates while M/s Habakurama& Co. & Advocates represented Balikamara. Arguments in support and against the appeal were presented by written submissions which I will consider keenly before making my decision. I agree with the appellant's counsel that some of the grounds are so closely related that they

required merging. My decision will thus follow the sequence of the submissions with regard to the raised grounds of appeal, save that ground one, will be resolved separately.

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. This is because, during a first appeal, the parties are entitled to obtain from the appellate Court, its own decision on issues of fact as well as issues of law. See for example **Father Nanensio Begumisa & Ors Vrs Eric Tiberaga SCCA No. 17/2000** followed in **Omang Bakhait Vrs Abrasiela alias Daktari HCCA 5/2010 (Arua High Court)**. However in doing so, due respect must be 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**.

Suffice to say as pointed out by both counsel, the record was not correctly reproduced and certified. By inadvertent omission, the handwritten record did not in some places tally with the printed and certified version. I will cure that by reverting to the former whenever there is a discrepancy.

Ground 1:

This ground appears to be a point of law which ordinarily should have, but was not raised during the proceedings in the lower Court. It was raised at submissions stage. 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.

Appellant's counsel argued that according to the respondent's pleadings, Saulo Bwamiki (Bwamiki's father) and his family were in control of the suit land since 1958 on directions of the appellant (which was denied). In his view, that fact would mean that he is estopped by effluxion of time both under Section 5 of the Limitation Act and common law prescription, from asserting a claim thereto. That the suit being filed in 2009, he was 51 years late. In reply, respondent's counsel submitted that Balikamara remained in control of the suit land through his agents Saulo

Bwamiki and later Wilber Bwamiki and occasionally visited it until 2002 when he requested Nakisuyi to issue a notice against Bwamiki, which she did not do. That under such circumstances, the suit was not time barred and there was no need for Balikamara to plead disability.

5 **Section 5 of the Limitation Act Cap 80** provides that;

“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.”

Balikamara pleaded and testified that he bought the land in 1944 and entrusted it to Saulo Bwamiki in 1958 and later to Wilber Bwamiki in 1979 as caretakers. That he remained owner of the suit land and often visited it. That in 2002, Nakisuyi did not follow his instructions to issue a notice to Bwamiki to vacate and instead took over and begun renting it out to third parties who begun clearing and using it.

15 The facts show that as far as Balikamara was concerned, the suit land was his property since 1944 with Bwamiki and his son, only being successive caretakers thereof. That contention over that ownership arose in 2002 when Nakisuyi assumed ownership, issued a notice in her name against Bwamiki and then in 2008, rented out the suit land to third parties. The fact of whether the Bwamiki’s were mere caretakers and not owners was an issue in contention which was
20 eventually resolved by the Court against them. The fact remains that as far as Balikamara’s pleadings show, the cause of action arose in 2002, when Nakisuyi issued an unauthorised notice, and not 1958 as the appellant’s counsel claims.

Even if appellant counsel’s arguments were to be believed, the agreed fact was that when the
25 Court visited the locus, agents or tenants of Wilber Bwamiki as administrator of Nakisuyi’s estate were found to be in occupation. Bwamiki’s presence on the land would thereby be deemed to be a continuous trespass. The Court in **Abraham Kitumba Vrs Uganda Telecommunication Corporation 1994 Kalr 126** held that the tort of trespass could not be time barred because it is a continuing tort for which the injured party can sue from the date of cessation of the wrong. It was
30 also held in the decision in **Justine E.M.N. Lutaya Vrs Sterling Civil Engineering Company**

Ltd SCCA 11/2002 that subject to the law of limitation, the cause of action will arise immediately after the trespass commences or any time during its continuance or after it has ended and thus, the commencement date would be of little significance.

- 5 The suit would thus not be extinguished by time and the first ground thereby fails.

Grounds 2, 3 and 4:

In her decision, the trial Magistrate considered Balikamara's testimony that he purchased the suit land together with his mother Takani way back in 1944. Although no agreement of sale was adduced, she believed the person Balikamara presented as being present during the transaction and the fact that although Balikamara was only 14 years at the time, he made a contribution and also gave a cock to purchase the suit land. She also considered the evidence presented for Nakisuyi that she acquired the suit land from Saulo Bwamiki her father and the fact that when the Court visited the suit land, there was mature sugar cane on the land stated to belong to Nakisuyi's estate. Stating that she had weighted that conflicting evidence on a balance of probabilities, she chose to believe Balikamara's version as credible and decreed the suit land as property belonging to him and thus, declared Nakisuyi a trespasser thereon.

I would agree with appellant's counsel that there was no serious evaluation of the evidence. The Magistrate simply made a long narration of what was presented by either side and at the close of it, came to the conclusion that Balikamara and his witnesses were credible and Nakisuyi and her witnesses were not. Her decision was not substantiated or explained by any reasons for her conclusions. I also note that she did not consider any inconsistencies or contradictions that may have arisen in either testimony. I believe a decision on a balance of probabilities should be one reached after a careful evaluation of the evidence. It involves weighing one side against the other and with reason, determine why the facts and evidence of one party was most likely than not, to have been correct. See for example, **Miller Vs Minister of Pensions (1947) ALL ER 372**. It would therefore entail this Court to re-evaluates the evidence and comes to a reasoned and well balanced decision.

It was Balikamara's evidence that together with his mother the late Samari Takani, he purchased the suit land in 1944 from one Kezironi Tenywa the Kisoko chief for a sum of Shs. 16/- and a cock. No written agreement was made then because as he stated, it was not the custom to reduce agreements in writing. He occupied the land and utilized it with Takani for some years until he
5 relocated Takani to Buwagi in 1988 and took over ownership sole. He then entrusted the land to Saulo Bwamiki his step father in September 1958 and later in August 1979, upon Saulo's request, permitted Wilber Bwamiki to assume care taker role. That it was specifically agreed that neither Saulo nor Wilber assumed ownership and that at the end of Wilber's caretakership, Balikamara was free to reclaim control of the land, after having paid a kanzu to Wilber. Instead,
10 Nakisuyi his sister, declined to request Wilber to hand over the suit land and instead, paid him the kanzu and then assumed ownership by renting the land to third parties.

Balikamara's witnesses supported that evidence adding that they used to observe him on the land with Takani, and even after Takani was relocated, he would visit the land every year. PW2
15 claimed to have been present when Balikamara purchased the land and planted birowa with one Ngalawu Peter.

Wilber Bwamiki admitted that Balikamara and Nakisuyi were siblings sharing Takani as a mother. That Takani gave birth to Balikamara before she married and moved into the home of
20 Saulo Bamwiki, his father and the father of Nakisuyi. That Balikamara did not grow up in Saulo's home and returned to his father's land in Buwali village. That he learnt that Saulo gave the land to Nakisuyi in 1983, a transaction which was reduced into writing and witnessed by 17 people. DW2, 3 and 4 stated they were present when Saulo gave the land to Nakisuyi. That the gift was made after Takani had left her marriage to Saulo and returned to Buwali where she died.
25 That Saulo was also not buried on the suit land.

I note that there was no strong evidence showing how the suit land came into the hands of either Balikamara or Saulo Bamwiki. Both appear to have purchased the land from one source, Kezironi Tenywa who was never called as a witness. Also, neither had an agreement of sale to
30 prove their purchase. I will thus consider the evidence fronted for each of these two parties separately.

As pointed out by Bamwiki's counsel, there appeared to be some contradiction on who was actually present and planted boundary plants (birowa) at the time Balikamara allegedly purchased the suit land. In any case, most of the witnesses who claimed to be present were of such a tender age, for their memories to be trusted. It even appears that the birowa were no longer evident on the suit land for at locus, Balikamara commented that they had gone rotten in the heavy rains of the 1960s.

That aside, Balikamara admitted to have purchased the suit land with Takani at 14 years only, thus when still only a minor. According to his witnesses, he only made an unspecified contribution and a cock. The alleged transaction took place in 1944 when the Contract Act and common law were already in force in Uganda. A minor could not and still cannot transact in land. They can only do so through an adult who holds in trust for them. It would follow then that if there was any purchase in 1944, such purchase would have been by Takani alone. She was not present to confirm that fact or to show that she bought part of the suit land for herself and in trust for Balikamara. I am therefore not persuaded that the evidence available supports the fact that Balikamara ever purchased the suit land jointly with Takani in 1944.

Likewise, save for the oral testimonies of Balikamara and his witnesses, there was no evidence pointing to the fact that between 1958 and 2002, he entrusted the suit land to Saulo and Wilber Bwamiki as its caretakers. Nothing was reduced into writing and in the face of Wilber's strong denial of that fact, it would be fair for the Court to believe the latter's denial. The period under which the suit land was allegedly under care taker ship is about 44 years, quite a considerable period of time. In my view, more had to be shown by Balikamara that such a relationship existed. It is also unexplained why Balikamara sought out Nakisuyi who lived in Kampala to issue the notice to Wilber in light of the fact that she was never involved when Wilber was being appointed caretaker in 1979. Balikamara conceded that he had no problem with both Saulo and Wilber for all the time they were in occupation, and thus, he did not need a third party's intervention to ask Wilber to leave. Balikamara did mention that Nakisuyi fraudulently offered Wilber the promised 'kanzu' to secure release of the suit land to her. DW3 explained in his testimony that Nakisuyi handed over the kanzu to Saulo her father on his request as a filial gesture, as Saulo felt he was about to die.

On the other hand, the evidence advanced by the late Nakisuyi's witnesses is that the suit land had at some point been the property of Saulo Bwaniki who gave it to Nakisuyi in 1983. However, beyond that nothing was adduced to prove that Saulo Bwaniki purchased the land from Kezironi Tenywa. DW4 who claimed to have been present during the transaction in 1939, 5 conceded that he was only six years at the time and could not recall the purchase price. Also according to DW2 Munirwa, Saulo gave the suit land to Takani in 1948 and later gave it to Nakisuyi as the child born to Takani, after Takani left the home and returned to Buwagi to live with Balikamara. According to DW4 Wanume Saulo apportioned his land to his living children, each according to their mother.

10

From the above pieces of evidence it is not clear whether Balikamara and Takani or Saulo Bwaniki purchased the land from Kezironi Tenywa. What can be accepted is that both Saulo and Wilber Bwaniki were in long possession of the suit land, from 1958 until between 2002 and 2007 when Balikamara began to lay claim to it, resulting into court action. That long occupation 15 cannot be ignored because in law it creates particular rights in land.

Justice Stephen Mubiru in his decision in **Omang Bakhait Vrs Abrasiela alias Daktari** following the authority of **Perry Vrs Clissold (1907) AC 73** found that

“Uninterrupted and uncontested possession of land for over twelve years, hostile to the 20 rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land.....In respect of unregistered land, the adverse possessor acquires ownership when the right of action to terminate the adverse possession expires, under the concept of “extinctive prescription” reflected in sections 5 and 16 of The Limitation Act. In such cases, adverse possession has the effect of 25 terminating the title of the original owner of the land”

The locus visit was conducted on 25/11/2013 and it was evident that third parties were in occupation of the suit land. The court observed mature sugar cane (of about two years) growing on the suit land. All the witnesses including Balikamara agreed that it was planted from those 30 renting from Wilber Bwaniki, the latter who derived his interest from being administrator of Nakisuyi's estate.

There being a discrepancy on who actually purchased the suit land, and being a fair court, the trial magistrate should have given more weight to the fact that Bwamiki had, and subsequently, Nakisuyi and Wilber had had long occupation of the suit land, at least up to 2002 when Balikamara claims to have made his first attempts to reclaim it. Saulo Bwamiki would be
5 deemed as one who acquired ownership as a result of his long and uncontested occupation of it.

I am also not prepared to accept that Bwamiki gave Nakisuyi the suit land by way of a written and witnessed document because none was accepted in evidence. However, the strong evidence from Nakisuyi's witnesses is the fact that Saulo gave the suit land to Nakisuyi because it is land
10 that once belonged to her mother Takani. According to Wilber, each of Saulo's children was given land that had once belonged to their mother. According to Dw2 Munirwa, Saulo gave the land to Takani in 1948 and he in turn gave it to Nakisuyi in 1983 and according DW4, Takani ever used the suit land herself before she returned to Buwagi.

I have found that Balikamara at his age in 1944 could not purchase the suit land and did not
15 adduce evidence on a balance of probabilities to prove that he purchased it with his mother Takani. However, I am prepared to believe that Balikamara as son of Takani ever lived on the land with her or at least visited her on occasion. Two of Nakisuyi's witnesses admitted ever seeing him there during his teenage years. He must have returned to his father in Buwagi where
20 Takani followed him and was eventually buried.

I am also prepared to believe that at some point Takani owned the land, as a gift from Saulo Bwamiki her husband. It was admitted by Nakisuyi's witnesses that Saulo did give similar gifts of land to his other wives as well. There was evidence that Nakisuyi lived and utilized that land
25 at some point. I am persuaded that Takani left the marriage and the land before her death and returned to Buwagi where she died and was buried. That being so, the land remained her property and Saulo who had relinquished his claim to it, could not give it away as a gift to Nakisuyi or any other third party for that matter. In law, the suit land remained the property of Takani in life and upon her demise, devolved into her estate to be shared by all her beneficiaries
30 and not Nakisuyi alone.

Likewise, the suit land could not in its entirety devolve into Nakisuyi's estate for Wilber Bwamiki to administer in exclusion of all Takani's other lawful beneficiaries.

In conclusion of this point, the trial Magistrate made no attempt to evaluate the evidence on a
5 balance of probabilities or evaluated it improperly to arrive at a wrong and unfair decision that
Balikamara owned the suit land yet there was no proof he had purchased it or occupied it for
long. Thus grounds 2, 3 and 4 succeed.

Ground 5

10 No submissions were made on this ground by either counsel. However, the record disputes the
claim that proceedings at the locus in quo were irregular and that the evidence collected there
was not considered.

In David Acar & 3 Others Vs Alfred Acar Aliro (1982) HCB 60, Karoka J (as he then was)
15 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...”*

Court visited the locus on 25/11/13. The court recalled all the witnesses who had testified in
court and their examination and cross examination was allowed. That evidence was recorded and
20 briefly alluded to by the Magistrate in his judgment. I would agree although well recorded, the
Magistrate did not seriously consider the evidence collected at the locus. She treated it much the
same way as she treated the rest of the evidence adduced in court. That said, there was no
irregularity in the court proceedings at the locus in quo.

25 Thus, ground five only succeeds in part.

In conclusion, this appeal has substantially succeeded. On the whole, the evidence was not
evaluated at all and as a result, the trial Magistrate came to a wrong decision to declare the
respondent as owner of the suit land, and declaring Wilber Bwamiki a trespasser, with an
30 eviction order and general damages. I have re-evaluated the evidence to find that the suit land
does not belong to Eliab Balikamara, Wilber Bwamiki or the late Tereza Nakisuyi but to the late

Samari Takani's estate. That said, Wilber Bwamiki would not necessarily be a trespasser, because the estate he administers may have part claim to the suit land.

Thus this appeal has succeeded in part and in line with my powers under Section 80 of the Civil Procedure Act, I do set aside the decision of the Learned Magistrate and in its place substitute the following orders:-

- 10 a) Eliab Balikamara did not prove on a balance of probabilities that he owns the suit land
- b) The suit land is the property of the late Samari Takani which upon her death devolved into her estate to be managed by the lawfully appointed administrator or administrators of her estate
- 15 c) The lawful beneficiaries of Samari Takani once identified, will each take their lawful share of the suit land.
- d) Since both Eliab Balikamara and Tereza Bakisuyi were stated to be Samari Takani's lineal descendants and thus eventual beneficiaries to her estate, neither can evict the other
- 20 e) Eliab Balikamara is not entitled to costs of the lower Court because the entire judgment was an error.
- f) Each party shall bear their costs of this appeal and of the court below.

I so order.

25

.....

EVA K. LUSWATA

JUDGE

30 **19/08/2019**

