THR REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. 23 OF 2019

(ARISING FROM CIVIL SUIT NO. 0087/2012)

BAHEMUKA JOHN & 6 ORS :: APPELLANTS

VERSUS

ANGEI BEROCHAN :: RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

[1] This is an appeal from the judgment and orders of **H/W ABER IRENE** Magistrate Grade 1 dated 7/3/19 wherein the plaintiff/Respondent sued the Appellants for vacant possession of land estimated at 800 acres situated at **Kyarushesha L.CI, Butole Parish, Kyangwali Sub-county, Hoima (now Kikube district),** a declaration that plaintiff is the lawful owner of the suit land, that the defendants/Appellants are trespassers, a permanent injunction and costs of the suit.

[2] It is the plaintiff's case in the court below that she acquired the suit land measuring 800 acres by way of an offer to her as an employee, by Uganda Wildlife Authority in 1999 as a virgin land and that she formally registered her presence with the L.CI chairperson **Julius Barongo** on 23/3/2001.

[3] On the other hand, it is the 1st defendant's case that he acquired the suit land in 1998 when he identified it with the help of the same L.CI chairperson **Julius Barongo,** and fenced it off with a barbed wire fence. That later, he applied to the District Land Board which granted him a lease of 49 years on the land in 2001 upon which he sold to different

people including the 6 other defendants/appellants who are currently in occupation of the same.

[4] The trial magistrate decided the suit in favour of the plaintiff/Respondent and decreed that the suit land belonged to the plaintiff, and issued an eviction order and a permanent injunction against the defendants/Appellants. Being dissatisfied with the trial magistrate's decision, the defendants/Appellants appealed to this court on three grounds as per the memorandum of the appeal;

i) That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus leading her to reach a wrong decision.

ii) The learned trial Magistrate erred in law and fact when she held that the suit land belongs to the Respondent when there was no evidence to support her finding.

ii) The learned trial Magistrate erred in law and fact when she decided the case between the parties without first visiting locus in quo thus leading her to reach a wrong conclusion.

Legal Counsel Representation

[5] The appellants in this appeal were represented by **Counsel Baryabanza Aaron** of Ms Baryabanza & Co Advocates, Hoima. The Respondent was represented by Counsel **Komaketch** of Ms Ekirapa & Co Advocates, Kampala. Both counsel filed written submissions as directed by court.

Determination of the appeal

[6] It is the duty of a first appellate court to re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and

determine whether on the evidence, the decision of the trial court should stand; **PANDYA Vs R(1957) EA 336.**

[7] **Grounds 1&2** were argued together, and will be resolved in the same manner. The Appellants mainly complained that the trial magistrate failed to properly evaluate the evidence on record when she decided and ordered that the plaintiff/Respondent was the lawful owner of the suit land, that the plaintiff/Respondent's evidence was riddled with a lot of inconsistences which the trial magistrate ought to have rejected.

[8] That in paragraph 3 of the plaint, the plaintiff sought for a declaration that she was the owner of a piece of land estimated to be 800 acres but that during scheduling, the plaintiff/Respondent contended in her brief facts, that she was offered 20 acres of land for cultivation and settlement. In addition, that PW1 testified to had acquired the suit land in 1998 while working for Uganda Wildlife Authority (UWA), and used the land for five years until 2005 when she left for Zombo District in West Nile for treatment and returned after four months, that this contradicted PW2's evidence who testified that the Respondent went for treatment between 2004. That in the plaint, she stated to had left in 2001 which was also a departure from the pleadings. Counsel relied on the authorities of **O.6 r.7 CPR, MOHAN MUSISI KIWANUKA Vs ASHA CHAND SCCA 14/2002, SEBUGHINGIRIZA Vs ATTORNEY GENERAL H.C.C.S 251/2012** to support his submission and concluded that the plaintiff's/Respondent's evidence contradicted her pleadings in the plaint which ought not to have been allowed by the trial magistrate.

[9] Counsel for the appellant further submitted that the plaintiff/Respondent identified free land, occupied it and registered her presence with L.C1 who testified as PW2 yet **Section 59(1) (a) of the Land Act** vests powers of allocating public land in a district to the District Land Board and not the Chairperson L.C1 of the village. He

contended that it is the appellant who after identifying the suit land, applied for the same to the District Land Board which later granted him a lease offer. That the alleged acquisition of the suit land by the Respondent was illegal, contrary to the Land Act and the Constitution of Uganda.

[10] On the other hand, Counsel for the plaintiff/Respondent contended that in their view, the evidence of **PW1, PW2, PW3 & PW4** was credible, consistent, presented a true and reliable chronicle of events and ought to be relied upon by court as proving on a balance of probabilities that the Respondent acquired a piece of vacant land just as the **1st defendant/Appellant, Zeburoni** and others who found vacant land. That the Respondent was the first to acquire the suit land and the 1st Appellant forcefully grabbed the Respondent's land and used improper means to have the same registered with the District Land Board.

[11] Counsel concluded by inviting court to believe the plaintiff/Respondent evidence as truthful in absence of credible defence to rebut her version and take the Respondent's version on the basis of the settled principle of law that where a party fails to challenge evidence, that evidence, is accepted as true. He relied on the authority of **HABRE INTERNATIONAL CO.LTD Vs EBRAHIM ALARAKIA KASSAM & OTHERS CIVIL APPEAL No. 4 OF 1999 (SC).**

[12] After revisiting and perusing the lower court record, it is true that there inconsistences concerning the size of the land as contended by the appellants. The plaint refers to ***800 acres*** yet at scheduling, the record on page 4 reveals ***20 acres*** given to the plaintiff. On the same page, the plaintiff complained that the 1st defendant encroached on her land. She states that;

"I spent 4 months in West Nile. When I came back I found all my land was fenced off by the 1st defendant."

[13] PW2, **Mr. Barongo Julius** the L.CI who testified to participating in the identifying and showing land in Kyangwali Village to both the plaintiff and the 1st defendant, stated on page 6-7;

"...that by the time, she (the plaintiff) *came, the land was free. I was the one who showed her the land together with my committee members...**Bahemuka** also came in my office looking for land. I gave him another piece of land. It would start* (sic) *when the plaintiff was ending up to the East. Even when I was showing **Bahemuka** Defendant 1 land we passed by the home of the plaintiff."*

[14] On the other hand, DW1, **Mr. Bahemuka** at page 19 during cross examination, he stated that;

"The wire fence are mine. I put it there in 1998...I know Roswa, she is resident of Kibale, me (sic) *distance between her and the suit land is approximately 2km there were no people between Roswa and the suit land though they said there were some people who bought land in between though I did not ascertain...When I sued Machakado,* ***Barongo Julius and Sebastiano, Irumba were my witnesses and they are the ones who showed me the land that it was vacant and I fenced it immediately."***

[15] The law relating to contradictions and inconsistencies is well settled. When they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. See **MAKAU NAIRUBA MABEL V. CRANE BANK LTD., HCCS NO. 380 OF 2009 PER OBURA J.; OKECHO ALFRED Vs UGANDA,**

[16] From the evidence above, it appears that both the plaintiff and the defendant identified land in Kyangwali with the help of PW2, the L.C1 chairman **Barongo Julius**. Therefore, the chairman's evidence in this case is vital because both the Respondent and the **1st Appellant** testified to had identified land in Kyangwali village with his help.

[17] It also appears that neither the plaintiff/Respondent nor the 1st defendant/Appellant testified to the size of the land in issue. The same apply to the L.CI chairman. However, the plaintiff in her plaint indicated the size of the suit land as ***800 acres*** though the scheduling notes indicated ***20 acres***. The claim of the ***20 acres*** referred to by counsel for the Appellants, in my view, was never the plaintiff's case. The plaintiff's case as reflected in the pleadings as per paragraph 3 of the plaint is as follows;

> *"The claim against the defendants jointly and severally are for vacant possession of land estimated at **800 acres** situated at Kyarusisa L.CI, Butole Parish,Kyangwali sub-county, Hoima District."*

[18] Therefore, the mentioning of 20 acres during scheduling is inconsequential as it could have been a slip of pen or actually an error. There is no other evidence in the entire record recognizing the existence or referral of the 20 acres. In the evidence of the plaintiff/Respondent, I don't see any inconsistences/contradictions that can be treated as a departure by the plaintiff/Respondent from her pleadings.

[19] As regards the contradiction of PW1 and PW2's evidence as to the period when the plaintiff left and returned to the suit land, I find such contradiction minor. As correctly contended by the Respondent's counsel, the plaintiff's witnesses were credible. This is so, because whether or not the plaintiff/Respondent left the suit property and went to Zombo District for treatment and returned, is immaterial, since the **issue is ownership of the suit land**. What the trial magistrate ought to have done was to determine ownership. Grounds 1 and 2 of the appeal therefore, in the circumstances fail.

Ground 3; Whether the learned trial Magistrate erred in law and fact when she decided the case between the parties without first visiting locus.

[20] The **Appellants'** counsel on this ground submitted that whereas locus visit is not mandatory, the circumstances of the case required the learned trial magistrate to visit locus to ascertain the claims by the parties and he relied on the authorities of **PARAGRAPH 3 OF PRACTICE DIRECTION NO.1 OF 2007** and **KWEBIIHA EMMANUEL & ANOR Vs RWANGA FURUJENSIO & 2 ORS H.C.C.A No. 021 of 2011.** Counsel for the Appellants prayed that the honourable allows the appeal and set aside the judgment and orders of the trial magistrate and replace it with an order dismissing the Respondent's suit with costs here and in the court below.

[21] Counsel for the **Respondent** replied by submitting that the purpose of visiting the locus in quo is for witnesses who have already testified in court to clarify what they already stated in court. That the witnesses testified both in chief and were subsequently cross-examined by both counsel which procedure was sufficient enough.

[22] That in the alternative, if court were to accept the Appellants' criticism, there is overwhelming evidence as already established by the

plaintiff/Respondent on the balance of probabilities that she is the lawful owner of the suit land. Counsel relied on the case of **OKULLU FERDINANDO Vs ABOK DAVID H.C.C.A No.008 of 2003.** He concluded by praying this honourable court to uphold the findings of the trial magistrate and dismiss the appeal with costs here and in the court below.

[23] The locus visit is essentially for purposes of enabling the trial court understand evidence better, it is intended to harness the physical aspects in conveying and enhancing the meaning of the oral testimony; **LANYERO BETTY Vs OKENE RICHARD & ANOR CIVIL APPEAL NO 29 OF 2018.**

[24] It appears from the evidence of the plaintiff/Respondent that she did not lead any evidence as to the boundaries and description of the land that was given to her, before the trial magistrate declared her lawful occupant of the same. **I find that there is and or was the need** by the trial magistrate to visit locus so as to ascertain the actual boundaries and description of the parties' respective pieces of land. The circumstances of this case indeed necessitated a locus visit to the suit land before court could reach a just conclusion and decision. I find merit in this ground of appeal and it is therefore, allowed.

[25] In the premises therefore, this appeal succeeds with the following orders;

i) The decision and orders of the trial court are set aside.

ii) That **Civil Suit No. 0087/2012** is referred back to the trial court for retrial, to ascertain the boundaries and ownership of the **plaintiff's/Respondent's** and **1st defendant/Appellant's** pieces of land, with the view to make a finding as to who is the trespasser of the

other, and or, determine whether or not the 1st defendant encroached on the plaintiff's land.

iii) Each party to bear its costs in this appeal and in the court below.

I so order.

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Byaruhanga Jesse Rugyema

JUDGE.

17/05/2021.

28/5/21 Ruling read and sent to parties.

Mr. Komakech for the Resp.

Mr. Ahimbisibwe: Absent.

Court: Ruling delivered in the presence of the above.

28/5/21