

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. 0074 OF 2014

(Arising from Hoima Civil Suit No.073 of 2008)

1. MONICA BIRUNGI
2. KATUSABE GRACE
3. BIRUNGI JANET
4. MUGISA NAKATO SARAH ::::::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. KUSEMERERWA EVACE
2. AHEEBWA VINCENT
3. ASIRAFU S/O JANYONGO ::::::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

[1] This is an appeal from the judgment and orders of **H/W Ndagwa Richard**, Magistrate Grade 1, Chief magistrate's court of Hoima dated **12th September, 2012**.

[2] The facts of the appeal as found by the trial magistrate are that the plaintiffs claim to be beneficiaries of their parents' property i.e, the suit land at **Kyamutwe village, Bulindi Parish Kyabigambire sub county, Hoima District**. That the defendants without any lawful authority trespassed onto the suit land and have threatened the plaintiffs from utilizing the suit land. The defendants on the other hand averred that they were born on the suit land as it belonged to their father. That it was after the death of their father that the plaintiffs came up with the present claims over the suit land.

[3] The trial Magistrate on his part found that the plaintiffs failed to prove their case on a balance of probabilities that the suit land belongs to them while the defendants on the other hand, proved that the suit land belonged to their late father which they inherited. As a result, the plaintiffs' claims were dismissed with a declaration that the defendants are the rightful owners of the suit land and a permanent injunction was issued restraining the plaintiffs, their agents and servants from disturbing the defendants' quiet possession.

[4] The plaintiffs were dissatisfied with the decision of the trial Magistrate and as a result, they filed the present appeal on the following grounds as contained in their memorandum of appeal.

1. *That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion causing the Appellants to suffer injustice.*
2. *That the learned trial Magistrate erred in law and fact as regards the locus in quo proceedings thereby occasioning the Appellants further injustice.*
3. *That the trial learned Magistrate and or prior Counsel erred in law and fact by omitting the inclusion as evidence on the Appellants' freehold Certificate of Title for the disputed land issued on the 22nd day of January 2009 thereby occasioning further injustice.*

Counsel legal representation

[5] The Appellants were represented by **Counsel Musinguzi Ian of M/s Musinguzi & Co advocates, Masindi** while the Respondents were represented by **Counsel Kizito Deo of Legal aid project of Uganda Law Society**. Both counsel filed their respective written submissions in **October and November 2014** respectively, the

file however got irretrievably missing and as a result, a duplicate file had to be constituted for purposes of this appeal and its determination.

Duties of the 1st Appellate Court

- [6] This is a first appeal from the decision of the learned trial Magistrate Grade 1, Hoima Chief Magistrates Court. The duty of the 1st Appellate court was outlined by the Hon. Justice A. Karokora (J.S.C. as he then was) in the case of **SANYU LWANGA MUSOKE VS SAM GALIWANGO S.C.C.A No. 48/1995** as follows:

“...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...”

- [7] This court therefore, has a duty to evaluate the evidence as presented to the trial court and make its own conclusion so as to avoid any miscarriage of justice.

Resolution of the grounds of appeal

- 1st Ground of appeal: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion causing the Appellants to suffer injustice.**

- [8] Counsel for the Appellants submitted that the learned trial Magistrate erred in law and fact when he declared the Respondents as owners of the disputed land and yet no evidence

on record exists to prove or show the Respondents' ownership of the disputed land.

Counsel argued generally that the defendants/Respondents did not argue ownership of the disputed land but rather, that the land belonged to their late father **Rwabutema Nyansio** and that on the other hand, the plaintiffs'/Appellants' unchallenged evidence was to the effect that their mother, also mother to the defendants' father left a **WILL** and that they acquired the disputed land from her.

[9] I have critically perused the defendants/Respondents' evidence on record, it is true that the defendants/Respondents did not argue ownership and therefore recovery of land, and in any case, they did not raise any counter claim of any declaration regarding the suit land. They only argued their beneficial interest in the suit land.

[10] To put the defendants/Respondents' case into its proper perspective, one has to look at the evidence of **Kusemererwa Evace** (DW₁) as supported and corroborated by the evidence of **Eliphazi Bitama** aged 78 years (DW₇) and **Bikaranabyo Alidi** (DW₁₀) whose evidence generally is to the effect that the suit land belonged to the father of the defendants/Respondents a one the late **Rwabutema Nyansio**. That the late **Rwabutema** acquired it from his maternal uncle a one **Isingoma Ali** (father to DW₁₀) in the 1960s and built a house thereon. That when the late **Rwabutema's mother** (also mother to the plaintiffs) failed in her marriage, she came and stayed with her son, the late **Rwabutema** on the suit land where he built a house for her. Both the son and the mother passed on while on the suit land and were buried thereon. The plaintiffs were born from a different area and have different fathers from that of the late **Rwabutema**.

- [11] The above evidence appeared unchallenged by the plaintiffs/Appellants especially **Asaba Philemon** (PW₆) who tended to support the defendants/Respondents' case regarding how their mother **Mwajuma** came to stay with her son, the late **Rwabutema**, the father of the defendants/Respondents in the suit land.
- [12] On the other hand, it is the evidence of the plaintiffs/Appellants that the suit land was given to their mother, a one **Mwajuma** by their uncle **Isingoma Ali** and that this is further supported by their mothers **WILL** as she died testate.
- [13] The purported **WILL** was however neither properly pleaded with its particulars/attachments nor exhibited in court during trial. Indeed, the trial magistrate on his part correctly had this to say;
*“The plaintiffs claim that their mother died testate. However to the dismay of this court no **will** was tendered in this court as an exhibit. Though it is also mentioned in the plaint nothing was however tendered in court as an exhibit hence meaning it never existed. If thus it never existed, then where do the plaintiffs derive authority claiming that they own the said piece of land?”*
- [14] Upon the trial magistrate's further evaluation and analysis of the entire evidence before him, he correctly concluded that the suit land belonged to the defendants and not the plaintiffs. I am in agreement with that position because, in the circumstances where there is no evidence to support the plaintiffs' claim that their uncle **Isingoma Ali** gave out the suit land to their mother **Mwajuma** and not to her son **Rwabutema**, father to the defendants, it becomes apparent that the plaintiffs/Appellants will derive their beneficial interest in the estates of their

respective fathers elsewhere and not from their mother and mother to the defendants' father, **Rwabutema**.

[15] In the premises, this ground of appeal is found to lack merit and it therefore accordingly fails.

2nd Ground of Appeal: That the learned trial Magistrate erred in law and fact as regards the locus in quo proceedings thereby occasioning the Appellants further injustice.

[16] Counsel for the Appellants did not raise a definitive error allegedly made by the trial magistrate that occasioned the Appellants miscarriage of justice. He appeared to merely observe that the trial magistrate failed to properly evaluate the evidence at locus and as a result, made a finding that the plaintiffs were not in utilization of the suit land.

[17] A critical observation of the locus proceedings however, clearly show that all the parties were in attendance. The plaintiffs/Appellants' advocates **Mr. Mwebaza** was also in attendance and did cross-examine the defendants at locus. The plaintiffs did neither present nor show any evidence that they had either been in utilization or occupation of the suit land.

[18] Instead, the trial magistrate found at locus that the defendants had houses thereon and there was nothing for the plaintiffs. As a result, he could not find the defendants as trespassers as demanded by the plaintiffs because the defendants had inherited the suit land from their late father **Rwabutema Nyansio**.

[19] This is a case in my view where locus was not all that necessary since the plaintiffs had failed to establish that they are the lawful

beneficiaries of the suit land and therefore the issue of whether they were in utilization of the land or not would not change the outcome of the suit.

[20] In the premises, I find this ground of appeal also devoid of merit and it accordingly fails.

Ground 3 of appeal: That the learned trial Magistrate and or prior Counsel erred in law and fact by omitting the inclusion as evidence of the Appellants' Freehold Certificate of Title for the disputed land issued on the 22/1/2009 thereby occasioning further injustice.

[21] Counsel for the Appellants submitted that the Appellants obtained a certificate of title for the disputed land on the 22/1/2009 and that the process leading to the titling of the suit land commenced sometime back in 2006. During trial, **Monica Birungi** (PW₁) indicated that the Appellants had leased the land.

[22] As properly conceded by counsel for the Appellants in his submissions, the former counsel did not tender in or cause to tender the Appellants' certificate of title. Even if he did, it is clear that the said certificate of title was never pleaded. As a result, the trial magistrate also did not make any comment regarding the said certificate of title.

[23] In this case, the plaintiffs' case as per the pleadings and scheduling was that the plaintiffs are the direct beneficiaries of the parts of the suit land at **Kyamutwe village, Bulindi parish, Kyabigambire sub county, Hoima District**. It was not their case that they are the registered proprietors or owners of the suit land. For the plaintiffs' counsel therefore at this stage to bring or smuggle in the issue of the certificate of title that was neither

pleaded nor relied on and /or tendered in evidence as an exhibit in the lower court amount to complete departure from pleadings by the parties and thereby offending **O.6 r.7 CPR**. The said **O.6 r.7 CPR** is to the effect that;

“No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.”

[24] The position of the above provision was affirmed in the cases of **JANI PROPERTIES LTD VS DAR ES SALAAM CITY COUNCIL [1966] EA 281**; and **STRUGGLE (U) LTD VS PAN AFRICAN INSURANCE CO.LTD [1990] ALR 46-47**, that the parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

[25] In this case, it therefore follows that the plaintiffs/Appellants cannot be allowed to raise and or rely on the issue of the certificate of title they never pleaded in the first instance. This ground of appeal therefore, miserably fails.

[26] Though counsel for the defendant/ Respondents argued that the title to the suit land was procured fraudulently, in my view this was not the issue before court and as a result, fraud was never canvassed by any party and therefore court also never alluded to it. It follows therefore that whether the Appellants' certificate of title **FRV 616 Folio 21 Bugahya Block 24 at Kyamutwe Bulindi Hoima** was procured fraudulently or not, the proprietors

of such land will hold the land or estate or interest in land subject to the lawful interests of the defendants/Respondents.

[27] Otherwise, the defendants/Respondents have an option to impeach the certificate of title in question through another action in court but not through the present appeal. Likewise, although the defendants/Respondents were found to be the rightful beneficiaries of the suit land, in the absence of any counter claim on their part for any orders, the trial magistrate would not be entitled to make any declaratory orders of ownership in favour of the defendants/Respondents. As a result, the declaratory orders granted by the trial magistrate are accordingly set aside.

[28] In the result, I find that this appeal generally has no merit and it fails.

The trial magistrate's dismissal of the plaintiffs'/Appellants' suit with costs is upheld save for the declaratory orders that were made without any mandate.

The appeal is therefore dismissed with costs here and below in favour of the defendants/Respondents.

Dated at Masindi this 4th day of November,2021.

Byaruhanga Jesse Ruggyema

JUDGE