

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**  
**CIVIL APPEAL NO.0052 OF 2016**

(Arising From Civil Suit No.002/2015)

**OCHAYA MUGAYO LOUIS :::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**BAMBHIRIZA BIDINDWALE :::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA**

**JUDGMENT**

- [1] This is an appeal from the judgment and orders of **H/W Atim Harriet** Grade 1 Magistrate of Buliisa, at Buliisa, Masindi Chief Magistrate's court dated **20<sup>th</sup> October, 2016**.
- [2] The facts of the appeal are that the plaintiff/Respondent sued the defendant/Appellant in the lower court for trespass to land, land grabbing, order of permanent injunction, general damages and costs of the suit.
- [3] It was the plaintiff's/Respondent's case that the plaintiff was the lawful owner of the suit land situated at **Kasinyi L.C.1 village, Ngwedo sub county in Buliisa District** measuring **9 acres** which he inherited from his late father a one **Bidindwale** and that the defendant trespassed upon **2 acres** out of the **9 acres**.
- [4] The defendant on the other hand averred that he was the owner of land measuring approximately **100 acres** at **Kasinyi L.C.I** in which the **9 acres** (suit land) claimed by the plaintiff are located. He contended that the plaintiff's claim is fraudulent and calculated to grab the suit land from him.

[5] The trial Magistrate found that the plaintiff's witnesses were coherent and able to explain before court, the clear history of ownership and occupation of the suit land in favour of the plaintiff while the defendant's witnesses couldn't explain how the defendant came to own the land. She concluded that the disputed land belonged to the plaintiff and the defendant was found to be a trespasser on the suit land and as a result, gave judgment in favour of the plaintiff with the following orders;

- a) The defendant to vacate the suit land with immediate effect.
- b) The defendant to pay **Ugx 3,000,000/=** as general damages for the mental anguish and torture occasioned to the plaintiff by the defendant's reckless and dubious behavior of his trespass.

[6] The defendant/Appellant was not satisfied with the judgment/decision of the trial magistrate and decided to appeal to this court against the whole of the above said judgment on the following grounds as contained in his memorandum of appeal:

- 1. The learned trial magistrate erred in law and fact when she failed to properly evaluate evidence before her and came to a wrong conclusion that the land in dispute belongs to the Respondent.*
- 2. The learned trial magistrate erred in law and fact in holding that the Appellant was a trespasser on the suit land.*
- 3. The learned trial magistrate erred in law and fact when she failed to conduct the locus in quo properly thereby leading her to reach a wrong decision and a miscarriage of justice to the Appellant.*
- 4. The trial magistrate erred in law and fact in holding that the disputed land belonged to the Respondent whereas the evidence on record pointed to the contrary.*

## **Counsel legal representation**

- [7] In the lower court neither party was represented. On appeal, the Appellant was represented by **Counsel Lubega Willy of Ms Lubega, Babu & Co Advocates, Kampala** while the Respondent was represented by **Counsel Ian Musinguzi of M/s Musinguzi and Co Advocates, Masindi**. Both counsel filed their respective submissions as directed by court.

## **Duty of the Appellate court**

- [8] This is a first appeal from the decision of a Magistrate Grade 1. The duty of the first Appellate court was outlined by Hon. Justice A. Karokora (J.S.C as he then was) in the case of **SANYU LWANGA VS SAM GALIWANGO, S.C.C.A No.49/1995** 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.”*

The court therefore, has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion.

- [9] Counsel for the Appellant submitted that the Appellant raised 4 grounds of appeal and he opted to argue grounds **1** and **4** together and the rest separately.

## **Grounds 1 and 4**

- [10] Counsel for the Appellant submitted that the Appellant was the rightful customary owner of the suit land that he has been occupying since 1992

to date. That his father, the late **Muwala Muswa** was the 1<sup>st</sup> to stay on the suit land; evidence of **Ochaya Mugayo Louis** (DW2) **Mwakale Jonathan** (DW3) and **Korokoni Robert** (DW4).

- [10] On the other hand, counsel for the Respondent submitted that the Respondent owns the suit land which he inherited from his father, the late **Bidindwale**, who also inherited it from his father **Tundulu** but that the defendant claims to own about 100 acres inclusive of the suit land.
- [11] In their bid to prove ownership of the suit portion of land trespassed on measuring 2 cares, **Bambhilize Bidindwale** (PW1) and his sister **Kabawesa Jamal** (PW2) testified that the defendant trespassed on the portion of his father's land on **16/1/2013**, planted thereon sisal and constructed 2 houses/huts thereon. That it was upon the death of their father **Bidindwale** in 2008 that **PW1** assumed ownership of the land and started utilizing it. In cross examination, both **PW1** and **PW2** explained that they buried their relatives on the suit land and when their father died, he was also buried on the suit land. **PW2** went further to explain that the grave was even not cemented.
- [12] The above vital evidence of the plaintiffs regarding the burial of their relatives on the suit land was not challenged by the defendant either during hearing or at locus in quo. On the other hand, the defendant did not present any credible evidence apart from talking about certain trees as proof that he had been on the suit land, since 1992. Not even a single grave on the suit land was mentioned by the defendant to prove ownership and occupation by his ancestors including his father **Muwala Muswa**. Instead, the defendant's own witness **Mwakale Jonathan** (DW2) led evidence at **p.9 of the typed proceedings** which in my view supported the plaintiff's version which is as follows;

*"Defendant is my neighbor and plaintiff also my neighbor."*

*The parties are fighting over land. Their fathers were staying on the same. It was **Tundulu** and **Muwala**.”*

[13] **Tundulu** was the father of the plaintiff while **Muwala** was the father of the defendant. Both **Tundulu** and **Muwala** stayed or owned the land but each must have held and exclusively occupied their respective acreage of portions of their land. This explains why the plaintiff is pleading owning **9 acres** of land and that out of the **9 acres**, the defendant has trespassed upon **2 acres**. In brief, **DW2’s** testimony is consistent with the pleadings and the testimony of the plaintiff (**PW1**).

[14] As a result of the consistency of the plaintiff’s witnesses, the trial Magistrate was persuaded and convinced to consider the evidence adduced by the plaintiff’s witnesses as coherent and able to explain the clear history of ownership and occupation. I am unable to fault her on this aspect.

[15] Besides, for the defendant to testify that the suit land belongs to **Bewala clan** and at the same time that it belonged to his father **Muwala** is both contradictory and at the same time, amounted to the defendant’s departure from his pleadings which are to the effect that he is the owner of the suit land. **O.6 r.7 CPR** prohibits a party and therefore, the defendant/Appellant in this case, from departing from his pleadings. It provides thus;

***“7. Departure from previous pleadings***

*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.”*

- [14] The parties in civil matters are therefore from the foregoing, bound by what they plead and the court itself is also bound by what the parties have pleaded; **See JANI PROPERTIES LTD VS DAR ES SALAAM CITY COUNCIL [1966] E.A 281.**
- [15] In the instant case therefore, the suit land could not be for the **Bawala** clan and at the same time be owned by the defendant's grandfather or himself without any explanation.
- [16] In view of the above, I do find the trial Magistrate was entitled or justified to find the way she found that the disputed portion of land belonged to the plaintiff and since the defendant has admitted that he indeed constructed thereon 2 houses, which on locus in quo were found to be temporary grass thatched huts, the defendant was rightfully found to be a trespasser.

## **Ground 2**

- [17] This ground is disposed of by the fact that the defendant had constructed 2 temporary grass thatched huts on the suit land forcefully and amidst protests from the plaintiff as evidenced by the testimony of the plaintiff (PW1) and **Byarutu Christopher** (PW4). The defendant committed trespass to land within the meaning of **JUSTIN E.M.N LUTAAYA VS STIRLING CIVIL ENGINEERING CO. S.C.C.S No. 11 OF 2002** where it was held that;

*"Trespass to land occurs when a person directly enters upon another's land without permission or other lawful cause and remains upon the land, places or projects any object upon the land thereby portends to interfere, with another person's lawful possession of the land."*

[18] The defendant had in this case unlawfully grabbed the land of the plaintiff and his family and the act of the defendant to construct the 2 huts thereon, amounted to trespass. The 2<sup>nd</sup> ground of appeal is therefore, found to be devoid of merit and it accordingly fails.

### **Ground 3: locus in quo**

[19] Though the trial magistrate at **page 3 of the typed record of the judgment** hinted or alluded to the fact that *“locus visit also indicated that the defendant has constructed two temporary grass thatched huts”* implying that he visited locus, he did not record down the proceedings of locus. He only drew a sketch map of the suit land and indicated the 2 huts. This is definitely a dissatisfactory locus visit. The Appellant however failed to show how this has prejudiced his case since in evidence, he failed to establish ownership of the suit land. This ground of appeal is also found devoid of merit and it accordingly fails.

[20] Lastly, counsel for the Respondent submitted that judgment in this suit was delivered on the **20<sup>th</sup> of October 2016** and the Appellant filed this appeal **60 days** later on the **20<sup>th</sup> of December 2016**, without leave of court in contravention of **Section 79 CPA**. That the time specifications in **Section 79 CPA** are aimed at avoiding delays: **OGBUONYE VS KAWOOYA H.C.C.A No. 40 OF 2016 (COMMERCIAL COURT)**.

[21] I carefully perused the record, it is however not clear as to when the record of proceedings of the lower court were certified and released to the Appellant. In view of the fact that the certification date of the proceedings is not known, the Appellant may be excused that the proceedings were certified and availed to him out of the time within which he was allowed to appeal and as a result he could not file the appeal within time.

[22] On the whole the appeal is found to lack merit, the decision and orders of the lower court are upheld. Costs here and below are in favour of the Respondent.

**Dated at Masindi this 24<sup>th</sup> day of November, 2021.**

**Byaruhanga Jesse Rugyema**

**JUDGE.**