

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE**  
**CIVIL APPEAL NO. 0132 OF 2019**

**1. NACHERE ROBERT**  
**2. NAMULENI MARRIAM ::: APPELLANTS**

**VERSUS**

**1. OMODING ZUBAIR**  
**2. BAKULI YONASANI**  
**3.KEDI CLEMENT**  
**4.ASUMAN CHEPA**  
**5.MODING IBRAHIM ::: RESPONDENTS**

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

**JUDGMENT**

- [1] This is an appeal from the judgment and orders of **H/W Adong Molly Alice**, Magistrate Grade one Mbale, at Kibuku in **Kibuku Civil Suit No.06/2017** delivered on 29/8/2019.
- [2] In the lower court, the plaintiffs/Appellants filed the suit against the defendants/Respondents as administrators of the Estate of the late **Okia Gasta**, who was the lawful owner of the suit land measuring approximately 7 acres having acquired it by way of purchase from a one **Zabuloni Ndoboli**.
- [3] In their amended plaint, the plaintiffs’/Appellants’ claim against the defendants jointly and severally was inter alia for, a declaration that a portion of the suit land situate at **Bulalaka Zone, Lyama Parish, Kakutu**

**sub-county, Kibuku District, measuring 10ft x 20ft x 150ft** formed part of and parcel of the Estate of the late **Okia Gasta**, damages for trespass and costs of the suit.

- [4] That the part of the suit land encroached upon by the defendants/Respondents was used jointly by the family undisturbed, since 2000 after the death of the late **Okia Gasta** and the remaining part was and is still being used by the whole family commonly as their customary land.
- [5] Further that upon the death of the late **Okia Gasta**, the 2<sup>nd</sup> defendant was appointed heir and as administrator of the Estate of the late **Okia Gasta**, and he allocated part of the estate land to the 1<sup>st</sup> defendant and his sons; the 4<sup>th</sup> and 5<sup>th</sup> defendants, and then land at **Kabweri village** measuring approximately 1<sup>1/2</sup> acres to the 3<sup>rd</sup> defendant who is not a beneficiary to the Estate.
- [6] In their joint amended written statement of defence, the defendants/Respondents denied the plaintiffs' allegations. That the 1<sup>st</sup> defendant got the suit land measuring approximately 6 acres in 1957 from the late **Yombu Byasi**, in exchange of a cow while the 2<sup>nd</sup> defendant contended that as the heir, he had never allocated to any one land of the Estate but that he owned his own land given to him by his late father **Gasta Okia**.
- [7] For the 3<sup>rd</sup> defendant, he contended that he inherited the suit land from his late grandfather **Ogwang Elphaz** in 1992 and mortgaged part of it to the late **Gasta Okia** but that the late **Gasta Okia** died before he could redeem it.
- [8] As regards the 4<sup>th</sup> and 5<sup>th</sup> defendants, they contended that they were born on the suit land belonging to their father, the 1<sup>st</sup> defendant and

have been in occupation without any disturbance until when the plaintiffs sued them.

[9] The 3<sup>rd</sup> defendant filed a counter claim for vacant possession of the land measuring 1<sup>1</sup>/<sub>2</sub> acres located at Kabweri village, which he mortgaged to **Okia Gasta** in 1984, for he was ready and willing to redeem it as per the mortgage agreement.

[10] The trial magistrate, upon analyzing evidence of both parties and findings at locus visit, found the evidence of the defendants/ Respondents more convincing, reliable and consistent compared to that of the plaintiffs which had major contradictions, and concluded by giving judgment against the plaintiffs/Appellants that the suit land in “**Bunyekero**” village and that in “**Buyeria**” village, Lyama Parish, Kakutu sub-county in Kibuku district, did not form part of the Estate of the late **Okia Gasta** but belonged to the defendants as the rightful owners save for the land the 3<sup>rd</sup> defendant mortgaged to the late **Gasta Okia**, and would be subject to redemption at the option of the 3<sup>rd</sup> defendant.

[11] The plaintiffs/Appellants being dissatisfied with the judgment and orders of the trial magistrate, filed the present appeal to the High Court of Uganda at Mbale against the whole decision and orders on the following grounds as contained in the memorandum of appeal:

*1. That the learned trial magistrate erred in both law and fact when she failed to exhaustively, evaluate the evidence adduced by the Appellant hence arriving at a wrong decision.*

*2. That the decision of the trial magistrate was not based on the evidence adduced and the same has occasioned a miscarriage of justice.*

*3. That the decision and orders of the learned trial magistrate are based on misdirection and non-direction of law and fact leading to a wrong decision made in the main suit and the counter claim.*

### **Counsel legal representation**

[12] The plaintiff/Appellants were represented by counsel **Mooli Allan** of Mbale Law Chambers & Co Advocates, Mbale, while the defendants/Respondents were represented by counsel **Nicholas Agaba** of Mutembuli & Co Advocates, Mbale. Both counsel filed their respective submissions as permitted and directed by court.

### **Duty of the Appellate court.**

[13] This being the 1<sup>st</sup> Appellate court, its duty is to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate it and come to its own conclusion. This court has to bear in mind the fact that it neither had the opportunity to see or to hear the witnesses testify, and has to make due allowances for that; **FR. NARSENSIO BEGUMISA & ORS ORS Vs ERIC TIBEBAGA S.C.C.A.No.17/2002 and SELLE & ANOR Vs ASSOCIATED MOTOR BOAT CO.& ORS (1968) E.A 123.**

### **Grounds of Appeal:**

[14] Counsel for the Appellants opted to submit on grounds 1 and 2 of the appeal jointly because agreeably both relate to the evaluation of evidence.

Ground 3 was argued and submitted on separately. The determination of this appeal is also in accordance and order as to how the submissions were made.

## **Grounds 1 & 2:**

- [15] Counsel for the Appellant submitted on what he called the 1<sup>st</sup> piece of land found at **Bunyekero village** for which the 2<sup>nd</sup> plaintiff **Mariam Namuleni** (PW<sub>1</sub>) averred was purchased by her late husband **Okia Gasta** from **Ndoboli Zabuloni**. Then on the 2<sup>nd</sup> piece of land situate at **Kabweri village** measuring approximately 2<sup>1</sup>/<sub>2</sub> acres she claims was given to her late husband as refund to the equivalent of dowry and that it was never mortgaged to her late husband as alleged by the defendants.
- [16] The above trend of the Appellants' counsel submission followed the evidence of the 2<sup>nd</sup> plaintiff, **Mariam Namuleni** who testified that the 2<sup>nd</sup> defendant and heir to her late husband **Okia Gasta** was her biological son who together with the other defendants grabbed her land situate at **Bunyekero village** measuring approximately 2 acres which her late husband purchased from **Ndoboli Zabuloni** and another at **Kabweri village** measuring about 2<sup>1</sup>/<sub>2</sub> acres got from the 3<sup>rd</sup> defendant as refund of bride price. At the same time, the 1<sup>st</sup> plaintiff **Nachere Robert** (PW<sub>5</sub>) testified that the defendants were sued for land situate at **Bunyekero village** and another at **Buyeria village**.
- [17] I think there was confusion as to what actually constituted the portions of land in dispute. The plaintiffs'/Appellants' pleadings were very clear as regards the suit land. The suit land is that portion of land situate at **Bulalaka Zone, Lyama Parish, Kakuto sub-county, Kibuku District measuring 10ft x 20ft x 150ft** as per paragraph 3 of the plaint comprising of the plaintiffs' claim. The plaintiffs' claim was indeed followed by inter alia, a prayer for;
- “a) Declaration that the land situate at Bulaloka Zone, Lyamu Parish, Kakuto sub-county, Kibuku district measuring 10ft x 20ft x 150ft forms part and parcel of the Estate of the late Okia Gasta.”*

[18] It is trite that in civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities; **NSUBUGA Vs KAVUMA [1978] HCB 302**, see also **S.101 of the Evidence Act**. It was therefore the duty of the plaintiffs to prove their case as pleaded on the balance of probabilities. Whereas the plaintiffs' pleadings are referring to the suit land as "**land situate at Bulalaka village...measuring 10ft x 20ft x 150ft**", in evidence, the 2<sup>nd</sup> plaintiff **Mariam Namuleni (PW<sub>1</sub>)** testified about land situated at **Bunyekero village measuring approximately 2 acres** and the 2<sup>nd</sup> one as land at **Kabweri village measuring 2<sup>1</sup>/<sub>2</sub> acres**. Her evidence is contradicted further by the evidence of the 1<sup>st</sup> plaintiff **Nachere Robert (PW<sub>5</sub>)** who testified that the 1<sup>st</sup> suit land is situated at **Bunyekero village**, the other was at **Buyeria village measuring 1<sup>1</sup>/<sub>2</sub> acres**.

[19] Clearly, the above testimonies of the plaintiffs displayed the plaintiffs' case as being in shambles as regards which piece of land they were claiming. It was their duty to explain to court as to what actual name referred to the suit land and its size. The plaintiffs in this case, instead, departed from their pleadings and led contradictory evidence regarding what was the actual suit land. In **MOHAN MUSISI KIWANUKA Vs ASHA CHAND S.C.C.A No.14/2002**, it was observed that a party's departure from his/her pleadings is a ground for rejecting the evidence and such a litigant may be taken to be a liar; See also **A.N. BITEREMO Vs DAMASCUS MUNYANDA S.C.C.A.No.15/1991**.

[20] In the instant case, the learned trial magistrate also fell into the same error from the beginning by failing to first identify the actual suit land and as a result, at locus, she wrongly focused on lands at **Buyeria** and **Bunyekero village** which are distinct in terms of description by way of neighbours, size and names, from that indicated in the pleadings. The

plaintiffs' pleadings indicated the suit land as land at **Bulalaka Zone measuring 10ft x 20ft x 150ft.**

[21] The above omission notwithstanding, however, still the learned trial magistrate was able during the evaluation of evidence to identify the weaknesses and contradictions in the plaintiffs' case and with other reasons given to wit that "none of the plaintiffs' witnesses witnessed the exchange of the "suit land" for dowry by the 3<sup>rd</sup> defendant, or could tell the actual size and that the purchase of the "suit land" was not proved since the alleged purchase agreement was merely put on record for identification, correctly arrived at the decision that the plaintiffs had failed to prove their case on the balance of probabilities that the said "suit land" formed part and parcel of the estate of the late **Gasta Okia**. The decision of the learned trial magistrate was based on the evidence adduced and the same did not therefore occasion any miscarriage.

### **Ground 3**

[22] Counsel for the plaintiffs/Appellants submitted that the learned trial magistrate wrongly applied the principle of "once a mortgage always a mortgage" since the evidence on record, there was never a mortgage but rather the late **Okia Gasta** was permanently given the suit land as dowry refund.

[23] I agree that the trial magistrate wrongly applied the principle of "once a mortgage always a mortgage" because on record, though the 1<sup>st</sup> plaintiff **Nachere Robert** (PW<sub>5</sub>) conceded that 1<sup>1</sup>/<sub>2</sub> acres was given to his father by the 3<sup>rd</sup> defendant in lieu of bride price refund when the 3<sup>rd</sup> defendant's sister **Nasiyo** deserted her marriage with **Gasta Okia**, there is no evidence that it was a mortgage. Secondly, as already observed, this land in **Buyeria village** is not the suit land being claimed by the

plaintiffs as per their pleadings. It was therefore inconsequential for the trial magistrate to find that the late **Okia Gasta** was permanently given the suit land at **Buyeria village**. Thirdly, as to whether the land at **Buyeria village** was acquired by the late **Okia Gasta** as a mortgage or was given to him in lieu of bride price refund for his deserted wife **Nasiyo Jane** was not an issue properly before court for trial.

- [24] In my view, the learned trial magistrate actually lost it on 25/5/18, during trial when counsel for the plaintiffs **Mr. Obedo**, raised an objection under **O.8 r.12 CPR** for exclusion of the counter claim on the grounds that it raised a different cause of action and therefore, ought to had been filed as an independent suit.
- [25] The counter claim referred to land situate at **Kabweri village, Lyama Parish, Kakutu Sub-county, Kibuku district measuring 1<sup>1</sup>/<sub>2</sub> acres**. This again contradicted the counter defendant's (DW<sub>5</sub>) testimony which focused on land at **Buyeria Zone measuring 2<sup>1</sup>/<sub>2</sub> acres**. No evidence is available that **Buyeria Zone** refers at the same to **Kabweri village**. This again was also a departure by DW<sub>5</sub> from his pleadings which is not permitted.
- [26] As it were, the land at **Kabweri village** was being independently claimed by (DW<sub>5</sub>) who claimed to had mortgaged it to the late **Gasta Okia** and wanted to redeem it from the plaintiffs, **the administrators of the Estate of the late Gasta Okia**. It was a different piece of land, not related to the suit land as per the plaintiff's pleadings in para 3 and 9 (a) of the plaint which referred to land at **Bulalaka Zone measuring 10ft x 20ft x 20ft x 150ft**. Secondly, the cause of action in the counter claim was for redemption of the mortgaged land and not recovery of land or trespass to land as shown in the plaintiffs' pleadings. It follows therefore, the suit subject of the appeal and the 3<sup>rd</sup> counter claimant's



claim had completely distinct causes of action and the trial magistrate ought to have made an order then, excluding the counter claim on the grounds that it ought to be an independent suit. There was ample evidence upon which the trial magistrate would rely on to find that the 3<sup>rd</sup> defendant's counter claim as regards the alleged mortgaged land, had nothing to do with the suit land and therefore, it could not form a counter claim in the instant suit. There was clearly a misdirection and non-direction of law and fact leading to a wrong decision made in the counter claim. This ground succeeds.

[27] In conclusion, from the foregoing, I generally confirm the decision and orders of the learned trial magistrate to the effect that there was no trespass in respect of the land at **Bunyekero** and **Buyeria village** and at the same time, find that the plaintiffs/Appellants, adduced no sufficient evidence in support of any trespass on the suit land at **Bulalaka Zone**. As a result, I find the appeal lacking merit and it is accordingly dismissed. Similarly, the counter claim also lacked merit. The judgment and orders in respect to the counter claim are therefore accordingly set aside. Due to the fact that the parties in the appeal are close relatives, no order as to costs is made.

**Byaruhanga Jesse Rugyema**

**JUDGE**

**28<sup>th</sup>/07/2021.**