

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 117 OF 2017
(ARISING FROM CIVIL SUIT NO. 04 OF 2015)

1. KIZITO VICTOR
2. KYAKUWA GERALDINE
3. BAGAALA MOLLY
4. RUTH NAKYEYUNE
5. ROSEMARY TEBESIGWA
6. NAKINTU AGNES
7. NAKATE MALIGARITA ::: APPELLANTS

VERSUS

1. SERUWAGI FAISAL
2. KASIRIVU ABDULKADIR ::: RESPONDENTS

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Appellants/Plaintiffs instituted Civil Suit No. 04 of 2015 against the Respondents/Defendants seeking damages for trespass on a kibanja – Plot No. 315 Kimanya which belonged to the late Muleera Francis located at Kimanya `B` Village, Kigamba Parish, Masaka District (the suit land), an eviction order, permanent injunction and costs of the suit. The Appellants claim to be immediate beneficiaries to the suit kibanja and that the Respondents have trespassed by constructing a house thereon.

In their Written Statement of Defence, the Defendants/Respondents contended that they own a distinct Kibanja on Plot 317 Kimaanya `B` formerly of the late Anasi Mugaga which is different from the Appellants' Kibanja. The Kibanja belonged to their father Anasi Mugagga who used to pay Busuulu to Masaka Municipal Council and the 1st Defendant holds letters of administration for their father's estate.

The suit proceeded ex parte against the 2nd Defendant.

Plaintiff's case;

PW1 Maruz Rita testified that the Plaintiffs are her children. Her late husband Mulera Francis got the suit kibanja from the Council in 1948-9 and at the time of his death, he was paying Busuulu. The Kibanja borders Asuman Kimbugwe, Zaidi Kalemeko, a swamp, and the road to Kanoni and has sisal plant boundaries. She adduced Busuulu tickets for Plot 315 as PEX1. The Kibanja is about 700ft.

PW2 Kyakuwa Geraldine stated that the land was obtained by their father Falasiko Mwanke in 1949. The kibanja is about 518ft upper side, 655ft width, 367ft and 222ft, 1313ft, 400ft. the Plot is 315 and they are paying Busuulu.

That was the Plaintiffs' case.

DW1 Seruwaju Faizal the 1st Respondent/Defendant stated that they constructed a house in their own Kibanja which is 386 by 300 ft at Kimanya 'B' neighboring Kisarara road, late Abdi Kasirivu's farm, Kitabazi Sub-Parish Catholic Church, Mbeera Francis and a swamp. The kibanja belonged to their father Anasi Mugagga who used to pay Busuulu to the Municipal Council vide Busuulu tickets marked as DEX1. Their father died in 2011 and left a semi-permanent house which was destroyed by the Plaintiffs.

DW2 Kasirivu Abdu Kadir the 2nd Respondent testified that he acquired the suit kibanja from his late father Anasi Mugagga who died in November 2011 and had been in occupation of the kibanja since 1968. He has also been on the kibanja since 1968 and the Plaintiffs are their neighbors.

DW3 Benedicto Namudu stated that she lived on the suit kibanja for three years when she was 13 and it belonged to the Respondents' father.

DW4 testified that the late Anasi acquired the suit kibanja in 1962. Mulera's kibanja was bigger than Anasi's kibanja and Asuman Kimbugwe was not a neighbor to either of the kibanja.

DW5 Sande Nansumba stated that the late Anasi Mugagga informed her that he acquired the kibanja from the Twon Council.

That was the Respondents/Defendants' case.

The trial Court conducted a locus visit on the 23.10.2017 where the court found that the suit kibanja is approximately 24 meters' width by 65 meters' length. Its boundaries are ascertained; West with Rev. Father's kibanja, East is a kibanja in dispute between the Respondents and a one Asuman Kimbugwe, North with Kisalala-Kimanya Road, South Abdu Karim estate. The kibanja has a foundation of the house constructed by the Respondents, heap of murram, and not cultivated.

In his judgment, the trial Magistrate found that the Plaintiffs failed to prove their claim against the Defendants and dismissed the case.

Being dissatisfied with the judgment, the Appellants filed this appeal on the following grounds;

- 1) The Learned trial magistrate erred in law and fact when he failed to evaluate the evidence of PWI, Maligarita Nakate thereby reaching a wrong decision.
- 2) The Learned trial magistrate erred in law and fact when he failed to analyze and evaluate the evidence of the defendants' witnesses which was inconsistency thereby reaching a wrong decision.
- 3) The Learned trial magistrate erred in law and fact when he held that the Late Anasi Mugagga has a Kibanja in Kimanya B without mentioning the exact location and its area.

The appellants pray for the appeal to be allowed with costs and judgment of the trial Magistrate to be quashed.

Both Parties filed written submissions.

Counsel for the Appellants submitted that by the virtue of paying Busulu, the Appellants are lawful owners of the suit Kibanja. Further that since the Respondents were not in possession at the time of trespass and the Appellant were, the Respondents are trespassers. Counsel further argued that the issue of how the late Anasi acquired the suit kibanja was inconsistent among the defence witnesses and goes to the root of the case which ought to have been considered.

In their written submissions, the Respondents argued that the trial Magistrate rightly held that the Respondents are not trespassers and did not rely on evidence of PW1 which is being challenged. That the trial Magistrate considered the boundaries established at the locus visit.

Determination of the appeal;

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. *See: Fredrick Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997; Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998.* With this duty in mind, I proceed to consider the grounds of appeal.

I will consider the grounds of appeal concurrently as they all relate to evaluation of evidence.

Counsel for the Appellants relies on evidence of Busuulu tickets in consideration of Section 29 of the Land Act to argue that the Appellants are lawful owners of the suit kibanja.

Both Parties adduced Busuulu tickets in evidence to support their claims. The Busuulu tickets admitted in evidence are for different plots (315 & 317) and although the trial Magistrate ordered for opening boundaries, this was not done.

The evidence adduced by the Parties of the Busulu tickets shows that there are two different Plot numbers and the Plot claimed by the Respondents is different from what is claimed by the Appellants.

Both Parties' Busuulu tickets show that Busuulu was paid to Municipal Council which corroborates the Parties' evidence that the kibanja was acquired from Masaka Municipal Council. The Busuulu tickets were therefore unreliable in proving ownership of the kibanja but they substantiated the fact that the Parties derive interest from different Plots.

I therefore have to consider the evidence adduced by the Parties regarding the boundaries. PW1 testified that the Kibanja borders Asuman Kimbugwe, Zaidi Kalemeko, a swamp, and the road to Kanoni and has sisal plant boundaries. DW 1 on the other hand, stated that their kibanja borders Kisarara road, late Abdi Kasirivu's farm, Kitabazi Sub-Parish Catholic Church, Mbeera Francis and a swamp.

I have carefully perused the record and considered the evidence of both Parties. At locus, the trial Court established the boundaries of the kibanja are ascertained as; West with Rev. Father's kibanja, East is a kibanja in dispute between the Respondents and a one Asuman Kimbugwe, North with Kisalala-Kimanya Road, South Abdu Karim estate. This evidence established at locus is consistent with the Defendants' evidence as to the boundaries of the suit kibanja.

It was also the Respondents' case that their father purchased the land in 1986 and had a semi-permanent house which was destroyed by the Appellants. The court established at locus that there is a foundation, murrum sand and newly constructed demarcations. The Appellants testified that the kibanja was demarcated with sisal plants but this was not established at locus. The Appellants rather showed court newly erected demarcations which did not prove their allegations.

I therefore find that the trial Magistrate was right in holding that the Appellants did not establish sufficient evidence to prove their case.

Furthermore, the Appellants claim that the Respondents trespassed on the land in 2014 and yet do not state whether they were in possession or utilizing the suit kibanja. They stated that they use the kibanja for cultivation of coffee but no such plants were found on the kibanja at the locus visit.

The other argument is that the evidence of the respondents and their witnesses was full of contradictions which were not properly evaluated by the trial court. The trial court instead placed too much weight on the minor contradictions in the appellant's case. It is trite that there is no particular format required in the evaluation of evidence. The task may be carried out in different ways depending on the circumstances of each case since judgment writing is a matter of style by individual judicial officers. A Judgment will be valid once it is the court's final determination of the rights and obligations of the parties based on the evidence adduced and gives reasons or grounds for the decision (*see British American Tobacco (U) Ltd v. Mwijakubi and four others, S.C. Civil Appeal No. 1 of 2012; Bahemuka Patrick and another v. Uganda S.C. Criminal Appeal No. 1 of 1999 and Tumwine Enoch v. Uganda S.C. Criminal Appeal No. 11 of 2004*).

Counsel for the Respondent challenged evidence of DW4 regarding ownership of the kibanja. I find the testimony as to who owned the kibanja first immaterial as the Busuulu tickets clearly establish that both Parties' fathers had bibanga at Kimanya 'B' with distinct Plot numbers.

The question as to whether the plaintiff has discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and / or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. The enquiry is two-fold: there has to be a finding on credibility of the witnesses; and there has to be balancing of the probabilities. Application of judicial experience requires the court to reject factual allegations if the hypothesis put forward to account for the proved facts is in itself extremely improbable. The court may reject any hypothesis in the absence of evidence supporting it. When the law requires proof

of any fact, the court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality (*see Wigmore on Evidence (2nd ed. 1923) v, s. 2498*).

Section 101 of the Evidence Act is to the effect that a party seeking to rely on a fact has the obligation to prove that fact.

The Appellants claimed that the Respondents trespassed on their kibanja but failed to adduce evidence to prove that they utilized or occupied the said Kibanja. The Respondents adduced evidence to show that their father had a legitimate kibanja for which he was paying Busuulu and clearly established the boundaries for their kibanja.

I accordingly find that the trial Magistrate did not error in finding that the Defendants were not trespassers but rather occupied their late father's interest in the land.

This appeal bears no merit and is hereby dismissed.

No order is made as to costs.

I so order.

Dated at Masaka this 5th day of November, 2021

Signed; 

Victoria Nakintu Nkwanga Katamba

Judge