THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 12 OF 2019

(ARISING FROM CIVIL SUIT NO. 168 OF 2009)

1. **CHARLES SERUWU**
2. **GYAVIIRA MUTESASIRA :: APPELLANTS**

VERSUS

1. **NAMUDDU GRACE**
2. **NAJJUMBA ANGELLA (Administrators of the estate of the late Ssegawa Edward) :: RESPONDENTS**

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Respondents/Plaintiffs in their capacity as Administrators replaced the late Edward Ssegawa who had instituted Civil Suit No. 168 of 2009 against the Appellants/Defendants jointly and severally on a claim for trespass seeking an eviction order, permanent injunction, general damages and costs of the suit. The Respondents case was that they are beneficiaries and Administrators of the estate of the late Segawa Edward, who on the 31st day of 1992 bought a Kibanja (suit kibanja) from a one Angelo Mwanje who was the registered owner of land comprised in Block 733 Plot 57 vide sale agreement dated 31/08/92. The late Edward took immediate possession and enjoyed quiet possession until around January, 2009 when the Appellants/Defendants without a lawful claim or consent trespassed onto the kibanja. The late Edward and his wife were buried on the said kibanja.

The Appellants/Defendants denied the claim in their joint Written Statement of Defence and averred that they are grandsons of the late Angelo Mwanje and the 2nd Defendant is the Administrator of the late Angelo`s estate. The late Edward who was a nephew to the Appellants had all along connived fraudulently with a one Nannono who was looking after the land, in a bid to seize it. The alleged purchase agreement was forged and widow to the Appellant`s grandfather has no knowledge of it. The late Edward had requested the late

Angelo to sell to him a kibanja on his title to use it as a burial ground. The late Angelo in good faith sold part of a kibanja to him, where the late Edward buried his mother. The said kibanja has well defined boundaries and it was shown to the late Edward in the presence of the late Angelo`s grandchildren including the Appellants.

Three issues were raised for determination by the trial Court;

1. Who is the rightful owner of the disputed kibanja?
2. Whether the Defendants trespassed onto the kibanja belonging to the Plaintiff?
3. Remedies available to the parties.

The Plaintiffs` case opened for hearing on the 27/04/2015 with the testimony of Neriko Sali (PW1). He testified that the late Edward bought the kibanja in dispute from a one Mwanje. The kibanja is in Manyama and PW1 neighbors the said kibanja. He also witnessed the sale agreement. He identified the sale agreement dated 31/08/1992 and it was tendered into evidence as PID1. The kibanja was approximately 4 acres. The late Segawa`s mother took immediate possession and used the kibanja for cultivating but the Defendants stole and took away all the crops. The late Segawa`s wife and mother were buried on the said kibanja. The kibanja was bought at 1,600,000/= and the late Segawa paid the whole purchase price. The kibanja that has burial ground is not separate from what the Plaintiff bought.

PW2 Nanyondo Noelina testified that she knows the parties well. Edward Segawa was the son of her Aunt Naster Nalubowa and the Defendants are her nephews. The land (5 acres) was owned by her father Angello Mwanje who sold 1 acre of that land to the late Segawa. The late Angello Mwanje sold it because the late Segawa wanted to keep the grave of his mother in that part. Her Aunt Nakintu used to be in the kibanja. Her father gave part of the five acres measuring about 2 acres to the Defendants father and the Defendant sold part of it. PW2 was not present when the kibanja was sold to Segawa, has a grudge with the Defendants and was shown the boundary marks of the kibanja in dispute.

PW3 Namuddu Grace the 1st Respondent and administrator to the estate of the late Segawa, testified that the disputed kibanja neighbors a one Kasato on the upper side, above the grave

yard, lower part from the road to Eneriko Sali. Her father (the late Edward) bought the Kibanja from Angelo in 1992. Agreement for the sale dated 31/08/1992 was tendered in as PE2. She visited the land several times as the late Edward had a plantation on the kibanja. The defendants trespassed on the kibanja. She was told of the transaction by her father. Her father said that he bought 1 acre from Mwanje and paid the total consideration of 1,600,000/=.

PW4 Annet Nakidde testified that her father the late Mwanje sold a kibanja to the late Segawa. He told her that he sold the kibanja to Segawa because that is where the burial grounds were and Mwanje could take care of them. There were banana plants, maize, beans and graves on the kibanja which he sold. The whole land was 5 acres and he sold 1 acre to the late Segawa. She was not present at the sale. The Appellants never objected to Segawa being buried on the suit kibanja.

PW5 Mwahurwa Eric D/Cpl attached to Sanje Police Post, testified that in 2012 he was investigating a case where the accused were charged with removing boundary marks and the complainant was the late Segawa. He visited the scene and found that boundary marks had been uprooted.

PW6 Luyinda John testified that the disputed kibanja is about 1 acre, situate at Manyama village and it boarders the late Maria on the right, looking to the west, upper side is late Kisato`s land, on the left Eriko Sali, and Rujuna, Semambo and a road to Manyama. The kibanja belongs to the late Edward Segawa ad he showed it to him in 2000. He showed him the boundaries. PW6 care took the kibanja by planting crops thereon and in 2006, the defendants trespassed on the kibanja. There are no boundary marks on the kibanja now.

That was the Plaintiffs` case.

DW1 Mutesasira testified that the late Angello only sold the part that has the late Segawa`s mother`s grave at 600,000/= and no sale agreement was made. He was present at the sale and counted the money. The agreement adduced in court by the Plaintiffs is a forgery.

Segawa only used the portion he had bought which had the graves and he was also buried in that same portion.

DW2 Nabasenya Jane stated that she was present when Angello sold the kibanja to the late Segawa. The kibanja sold is the portion with the late Segawa`s mother`s grave. The late Angello did not sign the agreement as the handwriting in PEx2 is not his. He sold the portion at 60,000/= and she never saw a sale agreement.

DW3 Nabuto Maria stated that she was not present at the sale but was told about it. The late Angelo later wrote an agreement but the hand writing in PEx2 is not his.

DW4 Maurisia Nakigwanga stated that the late Segawa asked Angello to sell to him the piece where his mother was buried. Mwanje only sold the place where there were graves. She was not present at the time of the transaction. The kibanja sold to the late Segawa was about 10 metres by 100 metres.

That was the Defendants' case.

The trial Court visited locus in quo and observed that the disputed kibanja has banana plants. The learned trial magistrate observed that the new boundary marks between the two parts show that they were planted after a number of the years from the old ones indicating the kibanja was only divided into two by the 2nd Defendant who is said to have planted them but the kibanja was originally one.

The Defendants filed written submissions and considered two issues.

On the issue of trespass, they challenged the sale agreement adduced by the Plaintiffs as a forgery and relied on Section 45 of the Evidence Act to which they submitted that the handwriting in the said agreement was not for the late Angelo. The agreement shows that the purchase price was paid in installments amounting to 1,260,000/=. Therefore the entire purchase price was not paid.

The trial Magistrate entered judgment for the Plaintiffs and relied on the evidence of PW1 who testified that there were boundary marks indicating the part which was sold to the late Segawa and the same were seen at the locus in quo. The Defendants claim that the sale agreement was a forgery failed as they were not able to adduce sufficient evidence to support that allegation. The trial magistrate found that the Defendants are trespassers on the suit land and granted the orders sought by the Plaintiffs.

Being dissatisfied with her judgment, the Appellants/Defendants instituted this appeal on grounds that;

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
2. The learned trial Magistrate erred in law and fact when she ignored evidence of grave inconsistencies in the Respondent`s case as to the size, boundaries, neighbors of the kibanja claimed at locus in quo.
3. The learned trial Magistrate erred in law and fact when she held that the Appellants were trespassers on the suit kibanja.

Despite being given schedules to file written submissions, the Respondent's Counsel did not file submissions. Counsel for the Appellants filed written submissions and challenged the sale agreement relying on the evidence of the Appellants` witnesses who testified that the handwriting in the sale agreement was not for the late Anjero. Counsel further cited Section 45 of the Evidence Act on hand writing opinion evidence. There are discrepancies with the purchase price and the only evidence adduced was on PW1 who did not explain the discrepancies. The Plaintiffs` witnesses contradicted their evidence as to the size and neighbors of the kibanja. The trial Magistrate did not consider the contradictions in reaching her decision. Counsel prayed that this court finds for the Appellants and sets aside the judgment of the trial court.

Determination of the Appeal;

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion **(see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004]* *KALR 236*)**. In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

I will resolve the grounds of appeal concurrently because they all relate to the learned trial Magistrate's evaluation of evidence in as far as the alleged trespass is concerned.

Counsel for the Appellants submitted that the sale agreement adduced by the Respondents is a forgery as the Appellants testified that the handwriting therein was not that of the late Anjero.

PW1 testified that the sale agreement was drafted by the vendor (the late Anjero).

Section 45 of the Evidence Act as cited by Counsel for the Appellants states that, *"When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact."*

In the instant case, the Appellants tendered into evidence two agreements purportedly written by the late Anjero. However, when they were tasked with adducing original copies of the same, they never did. DW3 and DW2 testified that they were well acquainted with the hand writing of the late Anjero and that the handwriting in PE2 is not his.

The Respondents' evidence as contained in the testimony of PW1 who identified the sale agreement is in regards to the contents of the agreement. This is because PW1 was only able to identify the contents of the agreement as he could not see or read the document. He

was 80- years old and from his evidence seemed coherent regarding the content of the agreement. Like the trial magistrate, I am inclined to believe him. Nevertheless, I will consider evidence adduced as a whole, to the existence of the transaction and not rely only the sale agreement since its authenticity has been challenged. The discrepancies in the payment of the purchase price have not been explained sufficiently by either of the parties. PW1 stated that the whole purchase of 1,600,000/= price was paid. On the other hand, DW1 claims the purchase price to have been 600,000/= which he counted, yet his evidence was contradicted by DW2 who stated that the purchase price was 60,000/=. Therefore, that a kibanja was sold by Anjelo to Segawa is not in dispute. What is in dispute is the size of the kibanja that was sold.

I will therefore resolve the main contention regarding the size of land that was sold to the late Ssegawa. DW1 testified that he was present when the transaction was concluded and that he planted the boundary marks. He testified that the only portion that was sold, was that with the late Ssegawa's mother`s grave. DW1 however, stated that the late Segawa used his portion for cultivating coffee, matooke and seasonal crops. One would then wonder how he used such a small piece of land which he had bought only to preserve his mother's grave to carry out such crop farming that requires a more sizeable piece of land.

DW1 testified that he planted boundary marks as directed. It was established at locus in quo that there are two sets of boundary marks, the ones that looked young, and those that looked old covering the graves and the disputed kibanja. DW1 stated that he planted the boundary marks, and yet at locus in quo, he stated that he planted the boundary marks with his grandmother who showed him the demarcations.

In such disputes where the contention is focused on the size of the land in dispute, evidence established on locus is very substantial in confirming and supporting the testimonies of the witnesses. The purpose of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case ***(see Fernandes v. Noroniha [1969] EA 506, De Souza v.***

Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and Nsibambi v. Nankya [1980] HCB 81).

I find PW4`s evidence of the coffee plantations that he planted working for the late Ssegawa, was confirmed at locus when the court established that there were coffee plants seen in both parts on the disputed kibanja and the portion acknowledged to have been subject of the sale by the Appellants.

Counsel for the Appellant faults the trial Magistrate for failing to consider the inconsistencies in the Respondents' witnesses evidence.

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored ***(see Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F.***

PW1 testified that the late Ssegawa bought four acres, yet all the other Respondents' witnesses stated that he bought one acre. He however stated that the entire land was five acres which is true, and therefore considering his age, it would be that he confused the size of the kibanja to be four acres yet it was one acre. This is because the witnesses testified that out of the five acres, the late Ssegawa purchased one acre and the late Anjero remained with four acres. Such a contradiction therefore does not go to the root of the case.

Furthermore, evidence of DW1 at locus where he stated that Neriko's land is beyond the road after his kibanja clearly shows that the kibanja that he claims (the disputed kibanja) formed part of the Respondents' kibanja as it is within the old boundary marks that were seen at locus. The new boundary marks that were observed therefore, were erected to encroach on the Respondents' land. He who alleges must prove. It is the duty of a party who wants court to believe that certain facts exist to prove the same to court.

The old boundary marks correspond with the boundaries stated in PEX2 and the new ones evidence the actions of trespass by the defendants to divide the suit kibanja and reduce its size which is wrong.

Trespass is defined to mean in **Halsbury's Laws of England 3rd Edition Vol. 38** it was stated:

"**Trespass to land is unauthorized entry upon land. A trespasser gives the aggrieved party the right to bring a civil law suit and collect damages as compensation for the interference and for any harm suffered**."

In the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002** (SC) trespass to land was defined as follows:

"**Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land." *(emphasis mine)***

The actions of the defendants of planting boundary marks in the middle of the suit Kibanja and harvesting the plaintiff's crops amounted to trespass.

I entirely agree with the judgment and orders of the trial magistrate which I will uphold and dismiss this appeal with costs.

I will however award general damages of 1.000.000/= (One Million Shillings) for the crops harvested and inconvenience caused by the Appellants when they started dividing their Kibanja illegally.

I so order.

Dated at Masaka this 10th day of March, 2021

Victoria Nakintu Nkwanga Katamba
Judge