THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 14 OF 2019

(ARISING FROM CIVIL SUIT NO. 144 OF 2017)

1. NALONGO SIRAJJE
2. ISSA KIGONYA :: APPELLANTS

VERSUS

JULIUS BARNABAS KATEREGGA :: RESPONDENT

Before; Hon Justice Victoria Nakintu Nkwanga

JUDGMENT

The Respondent instituted Civil Suit No. 144 of 2017 against the Appellants for a declaration that they are trespassers on the suit land, an eviction order, permanent injunction, general damages and costs of the suit. The Plaintiffs claim is that the suit land located in Samaliya village, Mukungwe S/C, Masaka district belonged to the late Ssebandeke Joseph who was survived by among others, the Plaintiff who obtained latters of administration for the estate. The land remained in the hands of the family until 2015 when the Defendants/Appellants without any claim of right extended their boundaries and encroached on the suit land by approximately one acre. The Defendants destroyed the boundaries, the fence and stole fencing materials; crops planted by the family, and started cultivating on the suit land. The Defendants have prevented the Plaintiff and his family from utilizing the suit land for now over two years.

In their joint written statement of defence, the Defendants denied the claim and averred that they have been in occupation of the suit land for over 30 years unchallenged. The Defendants raised a counter claim in which they claim that the suit land was purchased from the late Serunjoji Ahamada in 1984, by the late Sirajje Ddamulira. Prior to the purchase, there was a Civil Suit No. 109 of 1981 involving the same property that was addressed by court making Civil Suit No. 144 of 2017 res judicata. After successfully winning the case, the late Serunjoji sold the suit land to the Sirajje Damulira father to the

2nd Defendant and husband to the 1st Defendant. The Defendants have been using the land since the purchase and continued using the same as well as developing it after the late Sirajje`s death in 1988. In April and May 2017, the Plaintiff without the consent of the Defendants trespassed on the suit land and maliciously destroyed the Defendant's crops.

The Plaintiff denied the counterclaim and stated that the Defendants are neighbors to the suit land and they have overtime encroached on the Plaintiff`s property.

When the matter came up for hearing on the 26.4.2018, the Plaintiff indicated to court that he intended to withdraw the suit. The suit was referred to mediation and on the 29.5.2018, it was submitted to court by the Plaintiff that he had withdrawn the suit. The counter-claim was however maintained and proceeded for hearing on the 12.7.2018.

The Counter-Claimant`s case opened with the testimony of PW1 Issa Kigongo who testified that on the 3/5/2017, he received a call from the 2nd Counter-Claimant informing him that their food was being damaged. He found five people (Walugembe John, Julius Barnabas, Kateregga Sserwada, Richard and Nantale). The Agricultural officer valued the damaged crops and the report dated 19/5/2017 was tendered into evidence as PEx1. The suit kibanja belonged to Ahmad Serunjoji who sold the same to Sirajje. He grew up using the suit kibanja. The Counter-Defendant removed the boundary marks. The suit kibanja is approximately 2 acres. Its boundaries are form the road up to Ssuna, Lyeza, down to Tarasisi and joining the road. No one has ever acquired letters of administration to his father`s estate.

PW2 Ddamulira Rehema (2nd Counter-claimant) testified that they are claiming for the crops which were destroyed. The Counter-Defendant trespassed on their land. Her late husband bought the suit kibanja from serunjogi in 1984. She remained on the land after her husband`s death in 1988, and recovered all documents pertaining to the suit kibanja (undated agreement PEx2, Judgment in Civil Suit No. 109 of 1991 PEx3, agreement dated 1/12/1959 Pex4, Busulu tickets PEx5. She saw the Counter-Defendant removing the

boundary mark and putting it in his car on the 3/5/2017. They removed the boundary marks and planted sweet potatoes and beans.

PW3 Ndugwa Isa testified that the Counter-Claimants bought the suit kibanja from his later father Serunjoji. He was about 13-14 yrs at the time. The Counter-Claimants own part of the kibanja and he occupies the remaining portion. He doesn`t know the counter-defendant. The Counter-Defendant removed the boundary marks. The kibanja was sold when he was very young. The kibanja has a mango tree.

PW4 Nyinawumuntu Asumpta testified that she first saw the Counter-Defendant when he came one evening in 2017 with his father and parked in PW4`s compound, borrowed a hoe from her neighbor and uprooted boundary marks from the suit kibanja. The second time he came with his father Walugembe, his brother Richard and his aunt Nantale. They cut the Counter-Claimant`s maize. The Counter-Defendant`s father was arrested.

PW5 Goowa Dirisa testified that he was informed by his grandson that the Counter-Claimant`s food crops had been cut. The kibanja was bought by his brother Sirajje Damulira. There was a boundary mark which was uprooted. The kibanja boarders Garabuzi on top, down from the Road to Suna, up to Lyeza and stops at school formerly Butalasisi. That was the Counter-Claimant`s case.

The Counter-Defendants case opened on the 25.9.2018 with DW1 Julius Barnabas (the Counter-defendant), stating that he went on the suit kibanja on 27/1/2017. He had been called by his family that the kibanja which belonged to his father Sebandeke Joseph had been occupied by other people. He instituted a suit after obtaining letters of administration. On 3/5/2017, there was supposed to be a meeting with local leaders on the suit kibanja but I didn’t happen. He informed people and left but did not cut the maize. The Counter-Claimants encroached on the kibanja he inherited when he was 3yrs old. It was handed over to him by Walugembe John and Namagembe Christine, in 2017. His late father had taken his sister Nantale Christine who knew the boundaries, to show DW1 the boundaries of the

kibanja. He never cut the maize, nor the boundary marks. The Counter-Claimants encroached on approximately one acre of his land.

DW2 Lusiba John testified that the suit kibanja belonged to the late Tarasisi Sebabai father of Sebandeke, the Counter-Defendant`s father. The kibanja was occupied by Sebabi`s brother Siperito who had a house thereon and lived alone. The Counter-Claimants exceeded their boundary and encroached on the lower part of Sebabi. He got to know of the boundaries from Namwandu Sirajje and Tarasis sedero. He used to see the boundaries since childhood. The Counter-Claimants encroached on approximately 50ft, in which area they planted maize. Esperito`s house was removed but the toilet is still on the suit kibanja.

DW3 Walugembe John testified that the Counter-Claimants are his neighbors. In May 2017, a meeting which was meant to take place regarding the kibanja dispute, did not take place. They were informed that the Counter-Claimant`s maize had been cut. He was arrested the following day allegedly to be the one who cut the maize. The suit kibanja belonged to his brother Sebandeke. After his brother`s death, DW3 looked after the kibanja until he handed it over to the Counter-Defendant having obtained letters of administration. The land belonged to his father who bequeathed the same to DW3`s young brother. He never uprooted the boundary marks. He had constructed a house and toilet on the suit kibanja. The house collapsed but the toilet is still there. The kibanja is approximately one acre, and it has coffee plants which were planted by the Counter-Claimants with resistance.

DW4 Lule Leonard testified that he got to know of the kibanja dispute in 2017. The Counter-Claimants informed him that the Counter-Defendant was taking away part of their kibanja. They had an agreement on which their father had bought the kibanja, although the agreement was not dated. He advised them to no put a date on the agreement. The Counter-Claimants told him that they got a legal person who had made a report on his findings but it was not in favour of their father.

DW5 Lukwago Derrick testified that the suit kibanja belongs to the Counter-Defendant. There was a big trench boundary mark but it was closed and the kibanja now has a straight

line space. He doesn`t know who cut the crops. The disputed portion belonged to Tarasis. The Counter-Claimants kibanja was for Tokere. He used to cut grass from the kibanja he had bought from Walugembe who was caretaker of the Counter-Defendant`s kibanja, and he was never stopped by the Counter-Claimants. That was the Counter-Defendant`s case.

The trial Court visited locus in quo and established that there was a hole of a toilet on the disputed kibanja. The disputed kibanja has a trench boundary and it is bordered by Tarasisi, a road…… The Counter-Claimant testified that the boundary luwanyi between the toilet of Busingye and Lweza separates them. The trench in the middle was found on the land. Court observed that the area alleged to have removed luwanyi was very fresh and developed. The Counter-Defendant objected to the evidence about the oundary marks and testified that, the luwanyi was separating Busingye and Lyeza. Their boundary is a lukoni. Court observed the Lukoni in place but very old. DW5 testified that he used to see the Lukoni. DW2 testified that the Lukoni was the boundary mark and it had a trench.

In his Judgment, the trial Magistrate raised three issues for determination;

1. Who is the rightful owner of the disputed kibanja
2. Whether the counter defendant is a trespasser on the disputed kibanja
3. What remedies are available

The trial Magistrate found that the Counter-Defendant`s evidence clearly corroborated with all the witnesses and DW5 was more reliable than all witnesses. Their evidence corroborated with what court found on locus. The court found that on a balance of probability, the Counter-Defendant proved that the disputed portion belonged to Tarasis from which his father derived ownership. The trial Magistrate also found that the acts of the Counter-Defendant of going on the disputed land twice, were unlawful but do not constitute the trespass since the disputed portion belongs to him. It was then resolved that the counter-defendant is the rightful owner of the suit kibanja.

Being dissatisfied with the judgment of the trial Magistrate, the Appellant/Counter-Claimant filed this appeal on grounds that;

1. The trial Magistrate erred in law and fact when he held that the Respondent is not a trespasser on the Appellant`s kibanja against the overwhelming evidence to the contrary;
2. The trial Magistrate erred in law and fact when he selectively evaluated evidence of the Respondent against that of the Appellants thereby arriving at a wrong conclusion.

Both parties filed written submissions;

Counsel for the Appellant submitted that the trial Magistrate`s finding that the suit kibanja belonged to Tarasis was an error in law and it was engineered by only relying on oral testimonies of the Respondent`s witnesses to conclude that the suit kibanja belongs to the Respondent. The Respondent did not adduce letters of administration into evidence and yet his claim stems from his right as a beneficiary to the estate of the late Sebandeke. Counsel invited this court to consider ***Section 191 of the Succession Act*** and find that the trial Magistrate misdirected himself to establish that the Respondent is the owner of the suit kibanja when he did not have letters of administration. It was erroneous for the trial Magistrate to determine a question of ownership which had already been determined in Civil Suit No. 109 of 1981. The acts of the Respondent of going onto the suit kibanja amount to trespass, and he would have been liable in trespass had the trial Magistrate not misdirected himself of the issue of ownership. The luganda agreement was erroneously interpreted by the trial Magistrate. The earned trial Magistrate disregarded the Appellant`s evidence and relied on conjectured evidence of the Respondent that was barely supported by any documentary evidence to hold that the suit kibanja belongs to the Respondent.

In response, counsel for the Respondent submitted that the Respondent proved his interest in the suit kibnanja since he is a biological son to Ssebandeke Joseph and hence entitled to the suit land as a beneficiary. The instant case between the two parties had not been adjudicated before and the suit land in civil suit No. 109/1981 is different from the suit kibanja in the instant case. The trial Magistrate was right in holding that the suit kibanja belonged to Tarasis from whom the Respondent father derived ownership. Counsel invited

this court to study the sketch map drawn by court indicating the features that were presented by the witnesses as to the boundaries of the land that originally belonged to Tarasis. The assertion by the Appellant that there was no curve in the original Luganda agreement is wrong and the trial Magistrate rightly interpreted the agreement.

In rejoinder, Counsel for the Appellants submitted that Section 191 of the Succession Act negates locus standi to claim for property of an intestate until letters of administration shall have been granted in respect of such estate. Section 7 of the Civil Procedure Act on res judicata is not limited to only suits between the same parties formerly adjudicated upon but it also covers issues in former suits between parties under which parties claim interest. The issue of ownership of the suit kibanja had been determined in Civil Suit No 109 of 1981 in favor of Ahamad Serunjoji, who then sold his interest to the late Siraje from whom the Appellants derive their claim of ownership. The issue of ownership of the suit kibanja is therefore affected by res judicata.

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 (**see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).**

Ground one; The trial Magistrate erred in law and fact when he held that the Respondent is not a trespasser on the Appellant`s kibanja against the overwhelming evidence to the contrary;

I find it important to first establish the status as to ownership of the suit Kibanja before addressing the issue of trespass. It is the Appellants' contention that the issue of ownership

of the suit kibanja had been determined in civil suit No. 109 of 1981 and therefore, the issue of ownership of the suit Kibanja as entertained by the trial Magistrate was res judicata.

According to ***Section 7 of The Civil Procedure Act,*** no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court. The plea of "*res judicata*" acts as an estoppel to prevent the losing party from instituting legal action for the same matter as against the same party, and raising the same issues already adjudicated upon.

For the doctrine of res judicata to apply, it must be shown that; a) there was a former suit between the same parties or their privies, b) a final decision on the merits was made in that suit, c) by a court of competent jurisdiction and, d) the fresh suit concerns the same subject matter and parties or their privies **(see *Ganatra v. Ganatra [2007] 1 EA 76* and *Karia and another v. Attorney-General and others [2005] 1 EA* 83 at 93 -94).**

The Supreme Court in ***Karia and another v. Attorney-General and others [2005] 1 EA 83,*** observed that the proper practice is for the trial Court to try that issue and receive some evidence to establish that the subject matter has been litigated upon between the same parties, or parties through whom they claim.

In the instant case, the Judgment in Civil Suit of 109 of 1981was adduced into evidence. It is clear therefrom that the Parties to the suit were Aquilino Ssenyondo and Ahamad Serunjoji, the action was for trespass of a kibanja and it was determined in favor of the defendant, Ahamad Serunjoji. The kibanja that Ahamad Serunjoji claimed in the suit was subject of the purchase agreement Pex4 dated 1st December, 1959, sharing demarcations on the upper side with Mulagwe, Mukasa of Kutimba at the back, Ssuna down to Elyeza, then to Semulangwa and hitting the road from the Sub County headquarters towards the steep

valley. The land has a house, and he purchased it from a one Kato, there was a squatter on the land called Tokere.

It is the Appellants' submission that the suit kibanja in Civil Suit No. 109 of 1959 which had been declared to be duly owned by Ahamad Serunjoji is the same land that was sold to the Appellants' husband and father respectively, and therefore determining the issue of ownership over the same land would be res judicata.

It is also the Appellants 'evidence that the late Siraje Ddamulira purchased part of the kibanja that was owned by Ahamad Serunjoji. This evidence is contained in Pex2 undated agreement between Ahamad serunjoji and Siraje Ddamulira. This evidence therefore shows that the portion of land claimed by the Appellants is a portion of the land that was subject Civil Suit No. 109 of 1981. This makes the kibanja in the instant suit distinct from the kibanja in Civil Suit No. 109 of 198. I therefore find that since, the subject matter of this suit is different from the subject matter in civil Suit No. 109 of 1981, the parties are also different, determining ownership of the suit kibanja in the instant case would not be barred by res judicata following the guidelines laid out in ***Ganatra v. Ganatra [2007] 1 EA 76*** **and** ***Karia and another v. Attorney-General and others [2005] 1 EA*** **83 at 93 -94).**

Ownership of the Suit Kibanja;

Counsel for the Appellant submitted that the trial Magistrate`s finding that the suit kibanja belonged to Tarasis was an error in law and it was engineered by only relying on oral testimonies of the Respondent`s witnesses to conclude that the suit kibanja belongs to the Respondent. The Respondent did not adduce Letters of Administration into evidence and yet his claim stems from his right as a beneficiary to the estate of the late Sebandeke.

It is the Respondent's claim that the suit Kibanja belonged to his father Sebandeke Joseph who inherited the same from his father Tarasis.

Section 191 of the Succession Act Cap 126 establishes the right to an intestate's property. It provides that, "***Except as hereafter provided, but subject to section 4 of the***

Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction."

I have carefully perused the record of proceedings and pleadings in the trial Court, and the Respondent appended a copy of the letters of administration for the estate of the late Ssebandeke Joseph which he obtained vide Administration cause No 216 of 2017. In his testimony, DW1 stated that he was advised by HW Adam, to get letters of administration, and that after obtaining the letters of administration, he instituted the suit. I have taken notice of the fact that the Respondent was not represented and he was not guided by the trial Magistrate on the procedural requirement of tendering in evidence.

Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995 enjoins Courts to do substantive justice without undue regard to technicalities. It would be unfair and absurd for this court to dismiss the letters of administration annexed to the Respondent's Plaint on the ground that they were not tendered into evidence. I find that the failure to tender in to evidence the letters of administration by a litigant who was not represented should not be used against him to advance the claim by the Appellants that he had no letters of administration.

In that regard and in due consideration of ***Section 191 of the Succession Act***, I find no merit in the Appellant's submission that the trial Magistrate misdirected himself to establish that the Respondent is the owner of the suit kibanja when he did not tender in court the letters of administration. In the instant case, failure to tender in the letters of administration by an unrepresented litigant, does not negate the fact that he had obtained the letters of administration and therefore would have the power to exercise the rights guaranteed under ***Section 191 of the Succession Act***.

The Appellants' further submitted that the luganda agreement was erroneously interpreted by the trial Magistrate. The earned trial Magistrate disregarded the Appellant`s evidence

and relied on conjectured evidence of the Respondent that was barely supported by any documentary evidence to hold that the suit kibanja belongs to the Respondent.

It was PW1's testimony that the suit kibanja is approximately two acres, its boundaries are from the road, to Ssuna, up to Lyeza, and down to Tarasisi and ten joining the road again. It is the Respondent's evidence that the suit kibanja belonged to the late Tarasis, who gave the same to the respondent's father, and it later passed down to the Respondent. It is clear from PEx2 that the suit kibanja that was sold to the Appellants' husband and father, neighbors the kibanja that belonged to the late Tarasis which is being claimed by the Respondent. DW3 testified that the suit kibanja neighbors the counter-claimants' kibanja. The Respondent's kibanja had clear boundaries, neighboring the Appellants to the top side, ssenyondo on the lower side, Eliaza on the left and the road on the left.

It is the Appellant's claim that the suit kibanja was purchased by the late Siraje thereby giving them a right of ownership. PEx2 shows that the suit kibanja bought by the late Siraje was part of the kibanja described in Pex4. The boundaries of the kibanja in PEx2 were described as, from the mango tree which is on the road (Bulungibwansi) straight to Ssuna's boundary where there is a pit made with bricks, passing by Elyeza on the lower side passing Tarasis and hitting the road (Bulungibwansi).

At the locus visit, the Respondent testified that his claim starts from the school, behind the school building and the Musasa tree is supposed to be the boundary mark. DW 5 testified that the toilet area belonged to Tarasis. DW2 testified that there was a toilet on the suit kibanja that belonged to Tarasis and this was confirmed at the locus visit.

The sketch map as drawn from the locus in quo conducted by the trial court shows the Musasa tree which the Respondent testified that it is supposed to be the boundary between him and the counter-claimants, a bricks ditch is also shown on the map towards the boundary mark that reaches Suuna's land, then heads to Lweza's land back to the school area. I find that these boundaries almost align with the boundaries as contained in PEx2,

which were described to move from the road to Ssuna's boundary where the is a bricks pit, then to Elyeza on the lower side and back to the road.

DW3 testified that the suit kibanja was passed down from Tarasis, to the Respondent's father then to the Respondent. The evidence of DW2 and DW5 that there was a toilet on the suit kibanja was confirmed at the locus visit. I find this evidence compelling as it was corroborated by what was observed at the locus visit.

The Appellants' claim is mainly founded on the claim that the suit kibanja was owned by the late Ahamad whose ownership was confirmed by the determination of civil Suit No. 109 of 1981, and that since the late Siraje bought his kibanja from the late Ahamad, then the suit kibanja belongs to the Appellants. However, it has been clearly stated herein that the portion bought by the Appellants' husband and father was only part of the suit land in Civil suit no. 109 of 1981. The Appellants' evidence in Pex2 corroborates the evidence of the Respondent that the Appelants neighbor the Respondent's kibanja and that the Respondent's kibanja/interest which was initially owned by Tarasis was in existence before the Appellants obtained their interest.

I therefore find that the suit kibanja belongs to the respondent and the trial Magistrate was right in holding the same.

The law on trespass to land was clearly stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**. In that case, Mulenga JSC held:

"***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."*** The act of trespass is committed as against the person in possession of the land.

It is the Appellants' claim that the Respondent destroyed their crops and uprooted the boundary mark from the suit kibanja. PW4 testified that she saw the Respondent when he borrowed a hoe from the neighbor and proceeded to destroy the Appellants' crops.

Dw1 testified that he went on the disputed kibanja when he was being shown the boundaries and another time when they meant to have a meeting regarding the dispute. This clearly shows that he entered onto the suit kibanja while the Appellants were using the same. However, I resolved above that the Respondent is the rightful owner of the suit kibanja and for that reason, the Appellants were using the suit kibanja yet they had no interest in the same. Since the Appellant's were not in lawful possession of the suit kibanja, the Appellant was not a trespasser. The trial magistrate was therefore right to hold that the Respondent was not a trespasser on the suit kibanja.

Ground two; The trial Magistrate erred in law and fact when he selectively evaluated evidence of the Respondent against that of the Appellants thereby arriving at a wrong conclusion.

Counsel for the Appellants submitted that the trial Magistrate incongruously evaluated the Appellant's documentary evidence on record when he stated that the English translation of the Luganda purchase agreement did not bring out the proper description of the boundaries. The luganda agreement was erroneously interpreted by the trial Magistrate as there was never a curve mentioned in the Luganda agreement.

I have carefully perused the agreement in PEx4 and there was a curve in Pex4 paragraph 3 as noted by the trial Magistrate. I find no substance in Counsel for the Appellant's claim as Pex4 is clear as to the boundaries of the kibanja which the trial Magistrate tried to illustrate following what was found on ground at locus.

It's the Appellant's submission that the learned trial Magistrate disregarded the Appellant`s evidence and relied on conjectured evidence of the Respondent that was barely supported by any documentary evidence to hold that the suit kibanja belongs to the Respondent.

It is true that the Appellant adduced documentary evidence of a sale agreement and judgment of court in Civil Suit No 109 of 1981, to prove their ownership of the suit land. However, it has already been determined that the agreement did not prove that they owned the kibanja as was in Civil Suit No 109 of 1981. That evidence does not prove that they

own the suit kibanja. The documentary evidence adduced by the Appellants on the other hand supported the Respondent's evidence that the Appellants own he kibanja bordering his kibanja which was passed down to him from his great grandfather Tarasis, who is mentioned in PEx2.

It is my opinion that the Respondent adduced sufficient evidence to prove that he is the rightful owner of the suit kibanja and the evidence adduced by the Appellant was sufficient to prove that their ownership is not derived from the decision in Civil Suit No 109 of 1981, and therefore they do not own the suit kibanja as alleged. The trial magistrate evaluated the evidence on record as a whole taking into consideration the documentary evidence adduced by the Appellants and the oral evidence of the Respondents. I do not find any fault in how the evidence on record was evaluated.

In the result, there is no merit to the appeal. It is hereby dismissed and the costs of the appeal and of the court below are awarded to the Respondent.

I so order.

Dated at Masaka this 24th day of March, 2021

Victoria Nakintu Nkwanga Katamba

Judge