THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA AT MPIGI

CIVIL APPEAL NO. 9 OF 2019

[Arising from Civil Suit No. 12 of 2017]

BINTUBIZIBU SAM ……..……APPELLANT

VERSUS

JUMA SEKIBAMU…….……RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE.

Judgment

This is an Appeal arising from the decision of Her Worship Nambozo Nusula Magistrate Grade one,at Buwama, delivered on the 20th day of February, 2019 in Civil Suit No. 12 of 2017. The grounds of appeal as per the amended memorandum of the appeal are as follows;

1. That the Learned Magistrate erred in law and fact when she held that the Respondent was the owner of the suit land and the Appellant was a trespasser.
2. That the learned trial magistrate erred in law and fact when she failed to consider the overwhelming and unchallenged evidence that the Appellant had been in occupation of the land and had planted a Coffee plantation and a Banana plantation without challenge from the Respondent and/or member of his family.
3. That the Learned Magistrate erred in law and fact when she did not find any inconsistencies in the Respondent's witnesses' evidence.
4. That the Learned Magistrate erred in law and fact when she held that the Respondent had never occupied the suit land since 2002 but was the owner of the suit land when the suit land was occupied by the Appellant.
5. That the Learned Magistrate erred in law when she held that the Respondent's witnesses correctly identified the boundaries and Appellant's witnesses failed to identify the boundaries of the suit kibanja at locus.
6. That the Learned Magistrate erred in law and fact when she held that DE1 and PID 6 were not genuine.
7. That the Learned magistrate erred in law and fact when she failed to subject all the evidence on record to thorough scrutiny thereby arriving at a wrong conclusion.

Brief facts:

The respondent brought a civil suit against the appellant for allegedly trespassing on his kibanja situate at Kalagala Kitutuzi Village, Nkozi Sub-County, Mpigi District. The respondent claimed to have purchased the suit kibanja from the Administrators of the estate of Deo Sewabuga on 24th/02/2002. The respondent claimed that the appellant had trespassed on his kibanja by uprooting his eucalyptus trees and planting coffee and matooke thereon.

It was the appellant's case on the other hand that he bought the suit kibanja on the 6th day of October, 1977 from the late Sebugwawo Denis and he had been in possession of the same since 1998. That he utilized his kibanja by growing seasonal crops, coffee and a banana Plantation with a house. That in 2017 the Respondent instituted civil suit No. 12 of 2017 claiming ownership though he had been a neighbor residing in the same Parish. Thatthe respondent divided his kibanja into plots and sold them to different persons since Appellant's time of occupation. The appellant denied trespassing on the respondent's land and uprooting eucalyptus trees.

Representation:

M/s Nabukenya Mulalira & Co. Advocates represented the Appellant whereas M/s Muslim Centre for Justice and Law represented the respondent. Both parties filed written submissions.

The law:

Section 80 of the Civil Procedure Act gives the appellate court its powers. The appellate court has the same powers and performs nearly as may be the same duties as those conferred upon the court of original jurisdiction in respect of the suits instituted in it.

The first appellate court therefore has a duty to subject the evidence at the trial to a fresh review and draw its own conclusions. **(See: Tibarumu v. Bangumya (Civil Appeal No. 70 of 1971) [1975] EACA p.1).**

The Appellate Court has a duty to review the decisions of the lower Court and determine if the court applied the law correctly. The Appellate Court thus, re-evaluates the evidence on record and arrives at its own independent conclusion keeping in mind that it did not have an opportunity to study the demeanor of the witnesses in the trial court. **(See: Henry Kifamunte v. Uganda, Criminal Appeal No. 10/97).**

Resolution:

Ground 2:

That the learned trial magistrate erred in law and fact when she failed to consider the overwhelming and unchallenged evidence that the Appellant had been in occupation of the land and had planted a Coffee plantation and a Banana plantation without challenge from the Respondent and/or member of his family.

Counsel for the Appellant submitted that the Respondent stated thatin 2016, the suit land was vacant, therefore at locus, court should have observed the nature, height, thickness (how big) the size of banana plantation, coffee plantation and Lukoni plantswere to determine how long they had been in existence.That the suit land to date is covered by a banana plantation, which was not indicated on the sketch map.

Counsel for the appellant added that the trial magistrate neglected some evidence at the locus in quo such as where DW2 was making bricks and other people before the Respondent sold his kibanja to different people.

Counsel for the appellant quoted the case of Oryema Mark v. Ojok Robert, H.C.C.A. No. 13 of 1998, whereJ. MUBIRU STEPHEN held that; unlike oral testimony, physical evidence does not lie, does not forget, does not pursue self-interest. Unless manipulated or staged, physical evidence sits there and waits to be detected, evaluated, explained… the court looks at the physical evidence and attempts to determine how it fits into the overall scenario as presented in the contending versions.

Counsel for the appellant in line with the above authority concluded that had the trial court considered the evidence at the locus in quo, and applied it to the two cases, it would have found that the evidence was supportive of the Appellant rather than Respondent's version.

Counsel for the respondent on the other hand submitted that the evidence indicating that the appellant was a trespasser was overwhelming and substantial. That it was the respondent's testimony that he bought and cleared the suit land in 2015 and planted eucalyptus trees thereafter on half of the suit land. That after knowing about the appellant's trespass, he took 6 months before reporting the matter to the local authorities because he was busy at work. That while at the LC2's the appellant brought two agreements, one where he bought from Sebugwawo Denis and another where Sebugwawo Denis was given the kibanja by Kimanje and that the two agreements were found contradictory.

I have carefully looked at the submissions of the two parties and the evidence on record.

It was the evidence of the respondent that he bought the suit land in 2002 and the appellant started trespassing thereon in 2013 and then stopped only to resume trespassing again in 2016. That by then the appellant had planted coffee and banana plantations. The respondent also told court that he had sold land off his kibanja to a group of brick layers and Sekibaamu Charles.

The respondent particularlytold court that he bought the suit land from Kawuma, Musoke Richard and Sebugwawo, all Administrators of the estate of Sewabuga. That at the time of purchase he paid the money to Musoke Richard and an agreement was executed to that effect. The respondent contended that the agreements of the appellant were forged and that was why he had brought them to court because apparently the boundaries in the said agreements were different. That the boundaries in the 1997 agreement under which the appellant bought the land from Sebugwawo were said to **end at the cow's path and also at Abdu Ndaluzaniye** and yet the 1985 agreement under which Sebugwawo got his land the boundaries were; **Luutu, Nassaka, Ssali Moses, in the east Ssonko, and below it ended at Muwaya.**

PW2 on cross examination stated that he did not know if the respondent purchased the suit land but then went on to say that the respondent bought the same. He further stated that he did not know what transpired after the inspection of the land because he was only present during the inspection and not involved in any transactions after.

DW2 told court that he bought from the respondent and the respondent had never used the suit land and it had always been the appellant using the same. And that there were no eucalyptus trees.

DW3 told court that the appellant bought land in 1997 while the respondent bought in 2002 and the appellant has always used the suit land whereas the respondent sold off all his land.

In my view it was the evidence of the appellant's witnesses that the appellant was the one using the suit land and this was also confirmed by PW5 who mentioned seeing water melons being planted there on and this was a crop the appellant admitted to planting on the suit land. On the otherhand, the respondent's witnesses told court that the respondent cleared the land after purchase but only came to plant trees on the suit land 2015.

The sketch map was lacking in many aspects as to the features that were stated in court, such as eucalyptus trees, coffee plantation, banana plantation, seasonal

crops. The only features that were indicated on the sketch map was the appellant's house on the suit land, lukoni as a boundary, paths to the river, the river and a foot path.

The sketch map also showed that the suit land measured 4 acres while the respondent mentioned that the suit property was 4 acres and later on $3^{1}/_{2}$ acres, does that mean that the appellant was occupying entirely what belonged to the respondent? Not to mention that the respondent had sold plots off his kibanja and admitted so in cross examination as having sold off his entire land.

I find and hold that the learned trial magistrate indeed erred in law and fact when she failed to consider the overwhelming and unchallenged evidence that the Appellant had been in occupation of the land and had planted a Coffee plantation and a Banana plantation without challenge from the Respondent and/or member of his family.

This ground is hereby allowed.

Grounds 3 and 4:

3.That the Learned Magistrate erred in law and fact when she did not find any inconsistencies in the Respondent's witnesses' evidence.

4.That the Learned Magistrate erred in law and fact when she held that the Respondent had never occupied the suit land since 2002 but was the owner of the suit land when the suit land was occupied by the Appellant.

Counsel for the appellant submitted that the trial magistrate held that the Respondent proved that after he had bought the suit land he cleared it and planted eucalyptus trees and again also held that there wasno sufficient evidence on record that there was any planting of eucalyptus trees on the suit land. Although PW1 with contradictory evidence as to the capacity of the trees and PW3 testified that trees were planted. PW2 and PW4 who were neighbors never mentioned of any trees planted. PW4 stated that they had never seen any eucalyptus trees for the Respondent on the suit land.

Further that, PW3 testified that after the Respondent bought the kibanja he brought prisoners who cleared the bush and planted eucalyptus on half of the kibanja. That this was contrary to the evidence of the Respondent who stated that he cleared the bush with PW3.

Counsel for the appellant went on to submit that PW2's evidence was untruthful, that he sold his kibanja and left the village in 2011 and did not know what happened after. He also testified that in 2013 he saw the Respondent clearing the bush later changed to forest contrary to the evidence of Respondent who stated

that he cleared the bush upon purchase in 2002. The respondent stated that he got to know of the trespass in 2013 yet he had been selling pieces of land since 2002 and the appellant had been on the suit land since 1998. That the respondent only got to report about the trespass to the local leaders in 2018 which was also not true given the inconsistencies in the respondent's evidence.

Furthermore, that it was the evidence of DW2 that he was making bricks on Respondent's kibanja with his permission whereof he later bought the land. Thatthe Respondent had never even occupied the suit land.

Counsel for the appellant went on to submit that for one to succeed in trespass they must prove possessory rights that is; by evidence establishing physical control and where a party has never been in possession they cannot succeed in trespass. That the Respondent had never been in possession of the suit land and could only sue for recovery of land and not trespass which is subject to the limitation Act.

Counsel for the respondent submitted that it was indeed true that the evidence of DW1 and DW3 were contradictory. And to make matters worse DW3 contradicted his own evidence while at locus in regard to the boundaries of the suit land. That on the other hand the respondent's evidence was consistent and well corroborated in regard to the boundaries. Counsel relied on the case of **Oryem David v. Omory Phillip, H.C.C.S No. 100 of 2018,** where it was held that;

> *"It is trite 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."*

Further,

> *"What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e "essential" to the determination of the case. Material aspects of evidence vary from case to case but generally in a trial, materiality is determined on the basis of the relative importance between the point being offered by the contradictory evidence and its consequences to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case."*

I have carefully read the submission of both sides and the evidence on record. The respondent in his evidence described the suit land as stretching from **Nkasi River ending at Sebugwawo Denis' kibanja, and had a feeder road going through**. Later the respondent described the suit land as; **on the upper side neighboring with**

Denis Sebugwawo, lower side River Nkasi, east slope to Nkasi river, west Abdu Ndaluzeniya and a cow path in the middle.

The respondent in cross examination contradicted himself by stating that at the time he bought the suit land only Denis Sebugwawo who had died was the neighbor to the suit land. Yet in examination in chief he gave Adbu Ndaluzeniya as the other neighbor together with Denis Sebugwawo. The respondent also told court in cross examination that he sold all his land.

The respondent during cross examination also admitted to not knowing the measurements of his land and estimated the same at $3^{1}/_{2}$ acres after stating in examination in chief that it was 4 acres.

PW2 on the other hand testified that it was not until 2013 that the respondent cleared the suit land and started cultivating on the same. That he used a panga to clear the bush. That the appellant trespassed on the suit land in 2015. He added that the suit land was $2^{1}/_{2}$ acres. And that he was present when the respondent was inspecting the land before purchase. He gave the boundaries of the suit land as on the upper side – Sebugwawo Denis, below – Nkasi river; side – path going to the well; other side – Ssonko's kibanja.

PW3 who was the middle man in the transaction stated the boundaries as; on the upper side – Late Sebugwawo; below – path; one side – Ssali and could not remember the person on the other side. PW3 told Court that after the respondent bought the suit land he brought prisoners to clear the bush and planted eucalyptus trees on half of the kibanja but did not know how big the land was. PW3 went on to give hearsay evidence as to how the appellant was using Wavamuno's land.

PW4 told court that the respondent bought the suit land in the 1990s and he was present when the respondent was buying the land that measured 10 acres. And the boundaries were; on the upper side – Mzee Sebugwawo; bottom – river; side – mzee Ssonko and the other side – Mzee Sebugwawo.

On the other hand, the appellant gave his boundaries as;on the upper side – Sebugwawo; right – a path to the river; left –Ndaluzeniye; bottom – respondent. The appellant told court that at the time he bought, the respondent had not yet bought and there was a path for cattle to go drink water at river Nkasi. That the path was removed and is now a path for cars and that is where his land stops. He added that the respondent had since sold off all his land in the area. The respondent also confirmed the same during cross examination.

The appellant also told court that his land had a boundary of lukoni and the respondent had separated between them with cement boundary marks. The lukoni

boundary was observed during the locus visit as one of the boundaries of the suit land.

DW3 testified to the effect that him and other administrators of the late Sewabuga sold to the respondent. That the boundaries to the suit land are;**on the upper side –Sebugwawo; bottom – river; left – path sloping to the river; right – no neigbour**. DW3 added that the appellant bought from Sebugwawo who brought the appellant to him and gave him a kanzu because he was the one who was taking care of the suit land. The witness later told court that the boundaries of the suit land were;**on the left – Ndaluzaniye; right – path sloping to the river, upper side – late Sebugwawo; bottom – path of cattle now turned into a road**.

DW3 clarified that the neighbor who was indicated as Sebugwawo on the respondent's agreement should have been the appellant and the author of the agreement made a mistake.

It is my observation that respondent's witnesses all gave contradictory evidence as to what transpired after the purchase of the suit land. Some stated that he cleared the land immediately after purchase and started using it where as others stated that the land was cleared much later. Whereas others stated that the respondent cleared the suit land himself PW3 stated that he brought prisoners.

The respondent's witnesses could also not tell the exact measurements of the suit land. In their evidence it was ranging from $2^{1}/_{2}$ to $3^{1}/_{2}$ to 4 to 10 acres. As if that was not enough PW4 told court that the suit land was purchased in the 1990s contrary to the respondent's evidence that he bought in 2002. There were also contradictions as to the boundaries of the respondent's land.

The appellant on the hand gave boundaries that were in consonant with his sale agreement and much as the magistrate found that DW3 did not give the exact boundaries of the suit land, I find that the contradictions in this evidence were minor.

The respondent at locus continued to mention Sebugwawo as a neigbour yet he died long time and no longer had land in the area or rather was no longer a resident in the area. The respondent who was saying that the appellant's two agreements were contradictory because the neighbours were not the same is the same person who told court at locus that Ssonko sold off to Ndaluzariye who is one of the neighbours to the suit land.Ssonko was on the 1985 agreement. This can only mean that neigbours have since changed and could not have been the same as they were in 1985 at the time the appellant purchased if at all that was the basis of saying that the two agreements were contradictory.

I find that the trial Magistrate only majorly based on the minor contradictions of the appellant's evidence and neglected the major contradictions in the respondents not forgetting the evidence of the witnesses who stated that the respondent had sold off all his land and this was also mentioned by the respondent in cross examination.

According to the sketch map the suit land borders with lukoni at the bottom with Wavamuno over the lukoni, paths to the river on the east and the west however, over the paths are Ndaluzariye on the west and Wavamuno on the east, and a cow path on the upper side. The suit land had a newly created foot path contrary to what the respondent told court that the suit land had a cow path going through. The respondent told court that he neighboured with river Nkasi and indeed the sketch map shows that from the part the respondent sold to DW2 there was a cow path where the appellant said his land ended and a river above it where the respondent said he borders.

I find that the appellant consistently and ably proved his usage of the suit land and the inconsistencies in his evidence were minor as compared to those of the respondent which were major and the trial magistrate ignored.

This ground is therefore also allowed.

Ground 6:

That the Learned Magistrate erred in law and fact when she held that DE1 and PID 6 were not genuine.

Counsel for the appellant submitted that the trial magistrate held that it was Musoke who wrote the agreement for Kimanje (dated 15/10/1985) who was very sick at the time and he could not write himself. However, court did not determine why both agreements for Defendant authored by different people were similar in handwriting. That the trial magistrate concluded that by quick sight of these two agreements by comparison anybody would say that these two agreements were written by the same persons because the handwritings were the same and similar in all ways.

Counsel for the appellant argued that it was wrong for the court to find that these two documents were written by the same person and which was not possible since the Defendant told court that it was Sebugwawo who wrote his agreement as he bought from him. And in the one of Kimanje it was DW3 Musoke who wrote the agreement. That at a closer look of the two agreements the handwritings are totally different i.e. agreement between Kimanje and Sebugwawo (PID6) and agreement between Sebugwawo and Bintubizibu Sam (DE1).

Counsel for the appellant noted that the trial magistrate should have subjected the documents to a handwriting expert if she had wanted an expert opinion or to put questions to DW3 who witnessed one agreement to find out the truth but not come to a wrong conclusion without evidence. That in absence of any evidence to discredit DE1 and PID6 the trial magistrate erred when she concluded that they were not genuine and refused to rely on them.

Counsel for the appellant concluded that the Appellant acquired the kibanja interest first which superseded that of the Respondent as per the case of **Musogo Fred v. Kasagalya Fred and Another, H.C.C.A No. 88 of 20011.**

Counsel for the respondent on the other hand submitted that it was clear from the agreement dated 15/10/1985 in the last paragraph that Kimanje stated that he was the author of the agreement and he was the one that gave a kibanja to Sebugwawo who also sold to the appellant in 1997. However, during cross examination the appellant stated that it was Musoke who wrote the agreement for Kimanje dated 15/10/1985.

Counsel for the respondent added that it was true that court found that the two agreements had the same handwriting and had been a creation of DW3 and the similarities in handwriting were obvious at a quick glance.

It is my view that the trial magistrate made herself a witness in this case in as far as the agreements were concerned. The trial magistrate ought to have sought expert evidence in regard to the handwritings in the two agreements.

Secondly, the magistrate ought to have found out the circumstances under which both agreements for Defendant authored by different people were written in similar handwritings.

Court should have also put questions to DW3 who witnessed the second agreement to find out what exactly transpired. Discrediting DE1 and PID6 by the trial magistrate was error and so was concluding that they were not genuine without any contingent evidence.The trial magistrate concluding that the agreements were a master mind of the appellant and DW3 without any supporting evidence was wrong. The trial magistrate ought to have used her discretion to find out more in regard to the form of the agreements as opposed to acting on speculation.

The appellant in the instant case also obtained his interest in the suit land earlier than the respondent and that means that his interest supersedes that of the respondent.

This ground accordingly succeeds.

Ground 5:

That the Learned Magistrate erred in law when she held that the Respondent's witnesses correctly identified the boundaries and Appellant's witnesses failed to identify the boundaries of the suit kibanja at locus.

Counsel for the appellant submitted that the kibanja sale agreement between Sebugwawo and the Appellant stipulated the boundaries. That this was corroborated by Appellant in his evidence where he stated that his kibanja hada lukoni boundary and this was depicted on the sketch map. That on the other hand Respondent's agreement did not indicate the boundaries of the kibanja that he bought. That DW3 clarified that the secretary who wrote the agreement made a mistake to indicate Sebugwawo as a neighbor that it should have indicated the Appellant as a neighbor because he bought the suit kibanja before Respondent.

That the trial Magistrate therefore erred when she held that there was no way three sellers could forget that the Respondent's kibanja bordered with Appellant. That the Respondent in court and at locus did not indicate or even talk about the cattle path that used to take the cows to the dam that was later changed into a road from its original position as described by the Appellant and DW3. That the cow path or the said road was well indicated on court's sketch map.

I do concur with the submissions for the appellant. I find that the appellant consistently stated the boundaries of the suit land and these were corroborated by the sale agreement that was presented in court by the respondent.

It is my observation however, that the save for the appellant most of the witnesses and especially those of the respondent and the respondent himself continued to mention persons who were not neighours to the suit land; some who had long died or sold off their portions. This made the evidence of the respondent less credible because the witnesses should have been in the know of what was on the ground since some were present when the land was being sold or participated in the inspection of the same or were neigbours.

I accordingly allow this ground.

Grounds 1 and 7:

1. That the Learned Magistrate erred in law and fact when she held that the Respondent was the owner of the suit land and the Appellant was a trespasser.

7. That the Learned magistrate erred in law and fact when she failed to subject all the evidence on record to thorough scrutiny thereby arriving at a wrong conclusion.

Counsel for the appellant submitted that the respondenttestified that he bought the kibanja from Musoke Richard, madam Sewabuga, Pricilla and Paul Kawuma at Ug. Shs. 1,100,000/= administrators of the estate of the late Sewabuga but the letters of administration were not produced in court to prove the said allegations that indeed the said persons obtained the letters of administration. Or that the late Deo Sewabuga obtained the letters of administration of the estate of the late Kimanje Yowana. Counsel quoted the case of**Doreen Otto Aya and Others v. Okwera William, H.C.C.A No. 0036 of 2013**, where it was held that sale of property of the deceased without letters of administration is null and void.

Counsel for the respondent on the other submitted that the trial court found that the respondent bought the suit land from the late Sewabuga's estate or Administrators of which included DW3. That the respondent testified that he bought from Mr. Musoke Richard, Madam Sewabuga, Priscilla and Mr. Paul Kawuma the owner of the land and also their secretary of the family since they were Administrators of Sewabuga's estate. That the respondent also did confirm the boundaries of the suit land that was his land stretched from Nkasi river or swamp and ended at Sebugwawo Denis' kibanja and that it had a feeder road cutting through it. That even the respondent's sale agreement was never challenged dated 24/02/2002. That at the time of purchase only Denis Sebugwawo was the neighbour to the suit land and had already died. That this was corroborated by PW2 who stated that the neighbours were on the upper side Sebugwawo Denis who died and sold to Wavamuno Gordon, below was Nkasi river on the side, a path to the well and other side Ssonko's kibanja.

Counsel for the respondent further submitted that PW3 stated that he heard about the appellant's usage of the land on Sebugwawo's side.

Counsel for the respondent went on to rely on the hearsay evidence in his submissions that the appellant had never bought the suit land but was cultivating on the land belonging to Sebugwawo and when Wavamuno bought he fenced it with barbed wire and chased the appellant away. That the evidence of the respondent indicates that the suit land was not registered and there was no need to present a certificate of title. That the appellant departed from his pleadings when he stated that there was no proof of Letters of Administration presented by the respondent.

It is my considered opinion that the suit land is indeed unregistered land otherwise the parties involved would have presented court with a certificate of title. However, I am not in agreement with the submissions that the appellant was a trespasser as discussed earlier. The respondent could not certainly tell the measurements of his land, the sketch map indicated the suit land as 4 acres which is more than what

the respondent stated. The respondent was also said to have sold off all his land and this was also admitted by him in cross examination. I accordingly find that the appellant was not a trespasser basing on all the discussions above.

This ground is also allowed.

I accordingly allow this appeal on all grounds with costs to the appellant. I so orders.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

22/07/2021