

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO.08 OF 2017
(Arising Out Of Civil Suit No.025 of 2011)

1. MBABAZI EVERCE
2. IRUMBA BONIFACE :: APPELLANTS

VERSUS

1. ZAHURA TEMITEO
2. KABALIMU FRED
3. KALIBAGWA DEO
4. KAAHWA TEGRAS
5. BIRENGESO :: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment of the Magistrate of the Grade 1 Hoima Magistrate’s court, H/W Aber Irene delivered on 17th February, 2017.

Facts of the Appeal

[2] The Appellants/plaintiffs sued the Respondents/defendants for trespass to land, general damages and costs of the suit.

[3] It was the plaintiffs’ case that they were beneficial and rightful owners of land comprised in **Kijura village, Mutiba II, Kiziranfumbi sub county in Hoima District** (herein referred to as the suit land) which they inherited from their late father **Erisa Balyesiima** who died intestate in 1950’s.

That sometime in August 2010, the defendants forcefully and without any color of right entered into the suit land, slashed it, removed boundary marks from their original position and caused wanton

destruction of the plaintiffs' property upon which the plaintiffs suffered loss and damage.

- [4] As a result, the plaintiffs sought for a declaration that the defendants were trespassers on the suit land, eviction order against the defendants, permanent injunction restraining the defendants and/or their agents from further trespassing on the suit property, general damage and costs of the suit.
- [5] The defendants' case on the other hand was that they were the rightful owners of the suit land, their grandfather a one **Kosia Bisangangumu** having acquired it from Bunyoro Kitara Kingdom as per the certificate of land ownership from Bunyoro Kitara Kingdom dated 1946.
- [6] The trial Magistrate on her part found from the parties' evidence and evidence at locus, that the parties were neighbours to each other, their respective lands being separated by a trench. The plaintiffs' land neighbours the disputed land which she found that belonged to the defendants. She therefore found the defendants to be the rightful owners of the suit land who could not be trespassers on their own land.
- [7] Judgment was given in favour of the defendants with consequential orders that the suit property/land belonged to the defendants, a permanent injunction was issued against the plaintiff, their successors in title, their agents or legal representative from trespassing onto the defendants' land and costs of the suit.
- [8] The plaintiffs/Appellants were aggrieved and dissatisfied with the decision of the trial Magistrate and filed the present appeal on the following grounds as contained in their memorandum of appeal;
1. *The learned trial Magistrate erred in law and fact when she based her decision solely on the testimonies of the respondents without putting into consideration the documentary evidence adduced by the Appellant thereby arriving at a wrong decision.*
 2. *The learned trial Magistrate erred in law and fact when she failed to consider properly and adequately scrutinize and evaluate the evidence of the Appellants and in so failing thereby came to a wrong conclusion.*
 3. *The learned trial Magistrate erred in law and in fact when she failed to address her mind on the contradictions and inconsistencies*

by the defendant's witnesses thereby arriving at a wrong conclusion.

4. *The learned trial Magistrate erred in fact and in law when she failed to properly evaluate the evidence adduced by both parties and therefore coming to a wrong conclusion.*

Counsel legal representation

- [9] The Appellants were represented by **Mr. Irumba Robert** of **M/s Tumusiime, Irumba & Co Advocates & Solicitors, Kampala** while the Respondents were represented by **Mr. Aaron Baryabanza** of **M/s Baryabanza & Co. Advocates, Hoima**. Both counsel filed their respective written submissions for consideration of this appeal as permitted by this court.

Duty of the 1st Appellate court

- [10] The duty of the first Appellate court as laid down in the case of **Fr. Narsensio Begumisa & 3 Ors Vs Eric Tibebaga S.C.C.A No.17/2002 [2004] 2 E.A 17** is as follows;

“It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the Appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses.”

This court is in the premises duty bound to exhaustively scrutinize and re-evaluate the evidence on record in order to reach its conclusion.

- [11] I have perused the grounds of appeal as argued by counsel for the Appellants, I have found that they all revolve around evaluation of evidence and as argued by counsel for the Respondents, I shall resolve them jointly.

Grounds 1, 2, 3 and 4: Evaluation of evidence

- [12] It is trite and an established principle that in civil cases, the burden of proof lies on the plaintiff to prove his/her case on the balance of probabilities. Therefore a party can only be called to dispute or rebut that which has been proved by the other side; **Lugazi Progressive**

School & Anor Vs Serunjogi & Ors (2001-2005) 2 HCB 12. This is so because the person who asserts must prove; **S.101 of the Evidence Act.**

[13] In the instant case, it is therefore the duty of the Appellants to prove that they were the lawful owners of the suit land and the defendants were trespassers. During scheduling, the following issues were framed for the determination of the suit:

1. *Whether the suit land belongs to the plaintiff or defendant.*
2. *Whether the defendants are trespassers on the suit land.*
3. *What remedies are available to the parties.*

[14] In the bid to prove their case, the plaintiffs led the following evidence; At **page 8** of the typed proceedings; **Boniface Irumba** (2nd plaintiff/PW1) testified as follows;

*“I sued the defendants for recovery of land which was bought by my father **Erisa Balyesiima** the late. He died in 1952. The suit land is located in **Kincunda, Kiziranfumbi...** my father bought it from Bunyoro Kitara Kingdom in 1944... My father was given a letter showing that he had bought the land from the kingdom...This is the document showing that my father bought the land from the Kingdom. It shows the boundaries. It has a **muko tree** as border on the west. It also had a **mukindo** on the East which is still there. **Omukyora** on the south but no longer there.”*

The document referred to by the witness is a certificate No.2129 of land ownership issued by the kingdom of Bunyoro. It was in the names of **Erisa Balyesiima**, the father of the 2nd plaintiff/PW1. It is **P.E.xh.1**

[15] **PW1** continues;

“The defendants entered this land in 2011.”

During cross examination, **PW1** revealed thus:

*“I do not know **Kabusomba...**The defendants... they are my neighbours. My father had given land to the defendant’s father.”*

[16] **Sarah Kahwa** (PW2), a sister to **PW1**, at **page 9** of the proceedings testified supporting the claims of her brother **Boniface Irumba** (PW1) but during cross examination, conceded that she knew **Kabusomba Tobi**. She also affirmed that their father had given the defendants land

in 1946 to cultivate (for a short time) but they have encroached upon their land.

[17] **Abi T.K Hairora** (PW3), a Commissioner for land and Chairman Bunyoro Kitara Land Board testified as follows;

*“I know the plaintiffs...They brought me a certificate which was issued by Bunyoro Kingdom sometime back. The certificate was in the names of **Kosiya Bisangangumu Kaboha**. I did not see the records of the Kingdom confirming that **Elisa Baryasima** was given land...I confirmed that the land belonged to the late **Erisa Balyesima**.”*

[18] There was, I think some confusion on the part of the trial Magistrate during the recording of the evidence of **PW4**. This is so because there is no way **PW4** would be shown a certificate of land ownership from Bunyoro Kingdom in the names of **Kosiya Bisangangumu Kaboha** and at the same time refer to certificate of land ownership issued in 1994 (**P.Exh.1**) which is in the names of **Erisa Balyesima**, and then conclude by confirming that the land belonged to the late **Erisa Balyesiima**. I think his evidence from proper recording point of view was to the effect that the plaintiffs brought to him a certificate in the names of **Erisa Balyesiima** issued in 1944 (**P.Exh.1**) which was to the effect that the owner of the land was the late **Erisa Balyesiima**.

[19] The defendants on the other hand did not dispute the certificate of land ownership issued by the Bunyoro Kitara Kingdom (**P.Exh.1**) in favour of **PW1's** father, the late **Erisa Balyesiima** but contended that it was not, referring to the suit land, the defendants inherited from their grandfather **Kosia Bisangangumu Kaboha** which they have occupied and developed with homes, various trees and crops since 1946 though later unsuccessfully interrupted by **Tobi Kabusomba** on the suit land. Further, that the plaintiffs have nothing at all on the suit land. The land of the plaintiffs neighbours that of the defendants.

[20] **Irumba Jessy** (DW4) in **paragraph 9 and 10** of his witness statement in particular stated as follows;

*“9. That the plaintiffs have nothing on the suit land...
the plaintiffs have never used the suit land.*

*10. That the suit land is separated from the land of the plaintiffs
by a trench which was created as a result of the long use of the*

land by the respective side by way of digging without crossing the line that separated the two sides.”

Locus in quo proceedings

- [21] When court visited the locus in quo, as guided by various authorities, the purpose was to clarify on evidence already given in court thereby enable court understand the evidence better; See **Fernandes Vs Noroniha [1969] EA 506, Nsibambi Vs Nankya [1980] HCB 28** and **Yeseri Waini Vs Edisa Byandala [1982] HCB 28**.
- [22] At locus, the defendants’ evidence in court was confirmed as follows: The homes, gardens, the various trees and other developments of the defendants, the trench that marked the boundary between the plaintiffs’ land and the suit land or, that separated the plaintiffs’ grandfather and the grandfather of the defendants were visible.
- [23] The trial Magistrate on her part, though she first confused the burden of proof in criminal cases Vis-à-vis in civil suits, she rightfully concluded that under **SS.101 and 102 of the Evidence Act**, the burden of proof in civil cases is lower than that in criminal cases and the standard of proof is on a balance of probabilities.
- [24] The trial Magistrate found that the certificate of land ownership issued by the Bunyoro Kitara Kingdom in favour of the late **Erisa Balyesiima (P.Exh.1)** from whom the plaintiffs derive their inheritance interest, it only mentioned the location of the land. Indeed on the scrutiny of **P.Exh.1**, though it mentioned boundary marks as “**muko**”, “**Mukindo**”, “**Mukoko**” and “**Muyora**” boundaries, the plaintiffs at locus failed to demonstrate to court these boundaries, or at least show court the “**muko**” and “**mukindo trees**” marks on the west and on the east which in evidence **PW1** claimed that they still existed.
- [25] On the other hand, the trial Magistrate was satisfied with the demonstration by the defendant at locus who identified for her the trench that separated the plaintiffs’ suit land from the defendants’ suit land which she found had existed for quite some time.
- [25] The trial Magistrate rightly concluded that the entire evidence on record favoured the defendants as the rightful owners of the suit land.

They were not trespassers. The claim by counsel for the Appellants that the trial Magistrate ignored the certificate of ownership documentary evidence issued by the kingdom (**P.Exh.1**) is not correct. The trial Magistrate considered it with an observation that it only mentioned the location of the land in the area but as this court also found, the Appellant/plaintiffs failed to prove that it referred to the suit land. The claim that whoever possessed such certificate from the kingdom of Bunyoro Kitara was and is the owner of the land in question is hypothetical. The burden was on the plaintiffs to prove that it referred to the suit land and they failed to discharge that onus.

[26] As regards the alleged contradictions and inconsistencies in the evidence of **Irumba Jessy** (DW4) in court and at locus, I have not been able to find them, in any case as counsel for the Respondents rightly submitted, **DW4** never led any evidence at locus in quo. In court, he only led the evidence he knew and could not be made to lead evidence regarding events that occurred before he was either born or before he was of age to understand. The other alleged inconsistencies and contradictions of **Barongo Kosia** (DW2) and **Solomon Kisuhura** (DW3) are not feasible and where they are, I find them too minor to warrant consideration because the witnesses were relating to what they knew and what came to their knowledge by virtue of their stay on the suit land, and or heard from their predecessors in occupation. There is no evidence that the alleged inconsistencies and contradictions if any, were intended to mislead court, they are capable of innocent explanation; **Adam Bale & Ors Vs Willy Okumu H.C.C.A No.21 of 2015**. I accordingly ignore them.

[27] All in all, I find that all the 4 grounds of appeal lack merit and they fail. In the final result, there is no merit in the entire appeal. The trial Magistrate's decision and orders are upheld. The appeal is accordingly dismissed with costs.

Signed, dated and delivered at Masindi this 26th day of August, 2022.

Byaruhanga Jesse Ruyema
JUDGE.