

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**  
**CIVIL APPEAL NO.022 OF 2013**

(Arising from Hoima Chief Magistrate's Court in Civil Suit No.12 of  
2008)

1. GRACE TINKA
2. KARUBANGA PATRICK
3. ISINGOMA JUSTUS
4. YEDIDA KABEZERE ::::::::::::::::::::::::::::::::::::::: APPELLANTS

**VERSUS**

1. BASEMERA BEATRICE
2. KISEMBO GLORIA
3. KISEMBO BRIAN
4. KISEMBO VIOLET ::::::::::::::::::::::::::::::::::::::: RESPONDENTS

(Suing through Basemera Beatrice as next of Kin)

**Before: Hon. Justice Byaruhanga Jesse Rugyema**

**JUDGMENT**

- [1] This is an appeal from the judgment and orders of the Magistrate Grade 1 Hoima at Hoima dated 4<sup>th</sup> June, 2014.

**Facts of the Appeal**

- [2] As per the amended statement of claim dated 21/10/2015, the plaintiffs/Respondents brought this action from which the appeal arises, for recovery of land located at Kirama L.C1, Buhimba sub county Hoima District, seeking declarations that the suit land belonged to them, that the defendants/Appellants were trespassers, an eviction order and an order restraining the defendants/Appellants from trespassing on the suit land, general damages and costs of the suit.

[3] It was the plaintiffs/Respondents' case that the 1<sup>st</sup> plaintiff's husband and father to the rest of the plaintiffs, the late **Kisembo Vicent** acquired the suit land by way of purchase. That upon the death of the late **Kisembo Vicent** in 1994, the 1<sup>st</sup> defendant who was the Auntie of the late **Kisembo Vicent** chased away the 1<sup>st</sup> plaintiff and remained with the rest of the plaintiffs save for the 4<sup>th</sup> plaintiff who was still breast feeding. That however, the 1<sup>st</sup> defendant mistreated the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> plaintiffs who had to run away and join the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs at the 1<sup>st</sup> plaintiff's parents' home. In 2004 when the plaintiff came to occupy her husband's land, she found when the defendants had assumed ownership and were in occupation of the suit land.

[4] The defendants/Appellants on the other hand, in their amended Joint Written Statement of Defence (W.S.D) dated 4/11/2008 denied the plaintiffs' allegations and contended that they were the owners of the suit land of which they had powers to utilize and therefore, they could not be trespassers thereto.

[5] Upon evaluation of evidence before him, the trial Magistrate found that the suit land belonged to the plaintiffs/Respondents as an inheritance from the late **Kisembo** and that the 1<sup>st</sup> defendant and **Bonabaisi** (Kisembos's mother) had no capacity to sell the suit land and could not pass title to the purchaser and therefore the buyers did not acquire good title. Judgment was therefore given in favour of the plaintiffs/Respondents with declaration that the suit land belonged to the plaintiffs and the defendants were trespassers thereon.

[6] The Defendants/Appellants were dissatisfied with the judgment and orders of the trial Magistrate and filed an appeal in the High Court on the following grounds as contained in the Memorandum of appeal:

1. *The learned trial Magistrate erred in law and in fact when he proceeded to hear and determine a matter filed by the 2<sup>nd</sup> - 5<sup>th</sup> respondents as minors without proof of minority on record.*
2. *The learned trial Magistrate erred in law and in fact when he totally disregarded the Appellants' evidence on ownership of land thereby wrongly finding that the same belonged to the Respondents.*
3. *The learned trial Magistrate erred in law and in fact when he found for the Respondents when their cause was time barred.*

4. *The learned trial Magistrate erred in law and fact when he heard and decided the cause in the lower court without visiting the locus in quo thereby occasioning a miscarriage of justice to the Appellants.*

### **Counsel legal representation**

- [7] On Appeal, the Appellants were represented by **Mr. Kasangaki Simon of M/s Kasangaki & Co. Advocates, Masindi** while the Respondents were represented by **Ms. Zemei Susan of M/s Zemei Aber Law Chambers, Masindi**. Both counsel filed their respective written submissions as permitted by this court for consideration in the determination of this appeal.

### **Note and clarification**

- [8] On perusal of the submissions of counsel for the Appellants, it is apparent that they are based on the plaintiffs' pleadings filed on **11/3/2008** and the defendants' pleadings filed on **7/8/2008**. The trial Magistrate also appear to had based his findings on the same pleadings. I think this was a misdirection on both the Appellants' counsel and the trial Magistrate. This is so because on record, there is a **consent order** dated **22/10/2008** where it was agreed that the plaintiffs amend their plaint and serve it on the defendants who were also to file their amended W.S.D consequent of the said consent order, the plaintiffs filed an **amended statement of claim** (plaint) on **21/10/2008** and the defendants filed their **amended joint Written Statement of Defense** on **4/11/2008**. The trial Magistrate's decision and the Appellants' submissions therefore ought to have been based on the parties' amended pleadings dated **21/10/2008** and **4/11/2008** respectively.
- [9] The above notwithstanding, counsel for the Respondents in her submissions raised a preliminary point of law as to the competence of the appeal. It being a preliminary point of law, this court is mandated to first dispose it off.

### **Preliminary point of law**

- [10] The Appellant filed the appeal outside the time frames required by **S.79 CPA** and **O.43 r.1 CPR**, that is within 30 days upon obtaining the record

of proceedings. That in the instant case, judgment was made on the 4/6/2013 and on the 27/8/2013, court certified the record of proceedings and judgment. That it is 4 years after certification that the Appellants filed the memorandum of Appeal on the 25/8/2017.

- [11] As correctly put by counsel for the Appellants, the instant appeal was validated with leave of court vide Masindi **H.C.M.A No.19 of 2017** when the then counsel for the Respondents raised a similar objection and court on the other hand, granted the application extending time within which the Appellants were to lodge their Memorandum of appeal against the judgment and orders of the Chief Magistrate's court of Hoima at Hoima vide **C.S No.12 of 2008** delivered on 4/6/2013 with costs to the Respondent.
- [12] The objection to the competence of this appeal was therefore conclusively handled in **H.C.M.A No.19/17** and the preliminary objection is in the premises misconceived and it is accordingly overruled.

**Issue No.1: The learned trial Magistrate erred in law and fact when he proceeded to hear and determine a matter filed by the 2<sup>nd</sup> - 5<sup>th</sup> Respondent as minor without proof of minority on record.**

- [13] Counsel for the Appellants submitted that whereas it is not in dispute that the Respondents herein sued as minors through a one **Basemera Beatrice**, the 1<sup>st</sup> Respondent as their next of kin, and that indeed, it is not disputed that the 2<sup>nd</sup> - 4<sup>th</sup> Respondents were minors at the time of institution of **C.S No.12 of 2008**, they did not file any proof of minority or authority to that effect which is a pre-condition to the procedure they adopted. He relied on the authorities of **Jingo Vs Kabingiza (1974) HCB at 294** and **Kabatoro Vs Namatovu (1975) HCB 159**.
- [14] In the lower court, this objection was never raised to enable the trial court canvass it and as a result, in my view, it is not a ground of appeal since it was never raised in the lower court. It doesn't form part of the decision of the trial Magistrate for this court to adjudicate upon on appeal.

- [15] 2ndly, since it is not disputed that the 2<sup>nd</sup> - 4<sup>th</sup> Respondents were minors at the time of the institution of **C.S No.12 of 2008**, there is no miscarriage of justice or any prejudice that occurred to the defendants/Appellants as a result of the plaintiffs' failure to file any proof of minority. I was not availed both the authorities of **Jingo Vs Kabingiza and Kabatoro Vs Namatovu (supra)** and I was not able to access them elsewhere. The 2 authorities however, are apparently prior to the **1995 Constitution** which under **Article 126(2)(e)** commands courts to administer substantive ~~in~~justice without undue regard to technicalities.
- [16] In view of the fact that it is not disputed that indeed the 2<sup>nd</sup> - 4<sup>th</sup> Respondents were minors and that they sued through the 1<sup>st</sup> plaintiff **Basemera Beatrice**, their mother as their next of kin, to nullify the suit on the ground that the plaintiffs failed to file any proof of minority would be acting contrary to the spirit of **Article 126(2) (e) of the 1995 Constitution of Uganda** as the requirement is a mere technicality that does not go to the root of the suit.
- [17] Therefore the trial Magistrate's failure to declare the Respondents' suit as a nullity was not an error and he rightly proceeded to determine the suit on merit.  
The 1<sup>st</sup> ground of appeal is therefore in the premises found to be devoid of any merit and it accordingly fails.

**Ground 2: The learned trial Magistrate erred in law and fact when he totally disregarded the Appellants' evidence on ownership of land thereby wrongly finding that the same belonged to the Respondents.**

- [18] Counsel for the Appellants submitted that the trial Magistrate did not consider the Appellants' evidence to the effect that **Grace Tinka (DW1)** was given part of the suit land by the late **Kisembo** in the presence of the L.C1 Chairperson and their mother and that thereafter, an agreement was reached and the other Appellants therein acquired their different portions of land by way of purchase, for example; **Kabezere Yedida (DW2)** occupies the land that was purchased by her late son **Alex Karungi** from **Serina Bonabaisi**, the mother of the late **Kisembo** in 1995 and **Isingoma Justus (DW3)** occupies the land he bought from **Serina Bonabaisi** in 1997.

- [19] As correctly found by the trial Magistrate, the defendants/Respondents admit that the suit land belonged to the 1<sup>st</sup> plaintiff's husband, the late **Kisembo Vicent Asaheri** who acquired it by way of purchase from a one **Nasuru Kyamanywa** (PW2). It is also not in dispute that actually, the 1<sup>st</sup> plaintiff/Respondent is the widow of the late **Kisembo** and the 2<sup>nd</sup> - 5<sup>th</sup> plaintiffs/Respondents as their children.
- [20] The plaintiffs having proved that the suit land belongs to the 1<sup>st</sup> plaintiff's husband and father of the 2<sup>nd</sup> - 5<sup>th</sup> plaintiffs, the burden of proof shifted to the defendants/Appellants to prove their respective claims over the suit land.

### **Claim of Grace Tinka (1<sup>st</sup> Appellant)**

- [21] The 1<sup>st</sup> defendant/Appellant testified as **DW1**. She claimed to have acquired part of the suit land from the late **Kisembo**, her brother and husband to the 1<sup>st</sup> plaintiff/Respondent as per **D.Exh.1** dated 5/8/1992.
- [22] During cross examination, **DW1** stated as follows;
- "My brother gave me that land...The agreement was authored by **Kisembo**. The L.C1 Chairperson signed the document. Present was **Kabezere Yedida**. **Bonabaisi** was present and she thumb printed the document. **Ruth** was present by then and she thumb printed. **Yosia Kyakurugaha** knew so well how to write."*

In the same breath, during cross examination, **DW1** made a turn around and stated thus:

*"**Bonabaisi** and **Ruth** never thumb printed but people wrote for them."*

However, on perusal of the said agreement, **D.Exh.1**, it does not bear either the signature of **Kisembo**, who purportedly gave out the land or that of the beneficiary, the 1<sup>st</sup> Defendant/Appellant (**DW1**). The witnesses to the agreement (**D.Exh.1**) mentioned by the Defendant/Appellant (**DW1**), i.e **Bonabaisi**, **Kabezire Yedida**, **Ruth Kabagahya** and **Yosia Kyakurugaha**, none of them either thumb printed or signed it. **Serina Bonabaisi** testified as **PW2**. She denied knowledge of her son **Kisembo** ever giving out part of the suit land to the 1<sup>st</sup> defendant/Appellant (**DW1**), thus distanced herself from **D.Exh.1**. The R.C1 Chairperson **Barongo Serwano** admitted during

cross examination that **D.E xh.1** does not bear his signature and he did not offer any explanation as to why he neither signed or thumb printed as a witness, nor placed thereon the R.C official stamp as a means of authenticating the agreement.

[23] The trial Magistrate on his part, while evaluating the evidence and examining **D.Exh.1**, he found and I think correctly, that DW1 contradicted herself as to whether **Bonabaisi** and **Ruth** thumb printed the document or merely had their names written on. He found the document "plain" with neither signatures of the parties and the witnesses and therefore concluded that the document **D.Exch.1** must have not been written by the said **Kisembo** and was therefore a forgery.

[24] On my part, I have no reason to depart from the trial Magistrate on this finding. There is no evidence at all on record that the 1<sup>st</sup> Defendant/Appellant ever acquired any part of the suit land from her brother **Kisembo**.

#### **Claim of Karubanga Patrick (2<sup>nd</sup> Appellant)**

[25] **Karubanga Patrick** never testified to explain his interest in the suit property and how he acquired it. However, since it has been found that the 1<sup>st</sup> defendant/Appellant never acquired any interest in the suit land from the owner, the late **Kisembo**, it follows that the 1<sup>st</sup> defendant/Appellant had neither interest nor title to sell and or pass to the 2<sup>nd</sup> Appellant.

#### **Claim of Isingoma Justus (3<sup>rd</sup> Appellant)**

[26] **Isingoma Justus** (DW3) testified that he purchased part of the suit land from **Serina Bonabaisi** (PW3). She (PW3) however admitted selling 4 acres of **Kisembo's** land to **Isingoma** (DW3) to raise fees for one of the children of **Kisembo** who<sup>w</sup>are in Senior Secondary School. As admitted by **Isingoma Justus** (DW3) himself, neither the purported vendor (PW3) nor the purchaser (DW3) endorsed on the purported sale agreement (**D.Exh.3**) by way of a thumb print or signature. It was only signed by the Secretary, its author a one **Zahura Fred**.

[27] From the foregoing, it is apparent that upon the 1<sup>st</sup> defendant/Appellant succeeding in chasing away the 1<sup>st</sup> plaintiff/Respondent, she and those

who purported to purchase the suit land, took advantage of the 1<sup>st</sup> plaintiff/Respondent's absence and death of her husband **Kisembo** to fraudulently dispose of the suit land. **Serina Bonabaisi**, the aged mother of **Kisembo** was taken advantage of her old age and was used to legitimize the disposal of the suit land.

[28] The trial Magistrate proceeded alive of the foregoing and concluded that the sale of **Kisembo's** land to **Isingoma Justus** (DW3) was illegal for the vendor **Serina Bonabaisi** had no powers or lacked capacity to sell it since she was not an administrator of the estate of the **Kisembo**. He relied on **Streams of Life Giving Water Ministeries Vs Agnes Ocheng & 3 Ors H.C.C.S No. 1088 of 1998**.

[29] In view of the fact that the purported sale agreement of the portion of land of the late **Kisembo** by **Serina Bonabaisi** (PW2) to **Isingoma Justus** (DW3), **D. Exh. 3** having neither been endorsed by the vendor nor the purchaser, coupled with the fact that the purported vendor **Serina Bonabaisi** was not an administrator of the estate of **Kisembo**, I find no reason to fault the trial Magistrate in his findings that the seller **Serina Bonabaisi** had no capacity and therefore, could not pass good title to the purchaser. He, DW3 could not even claim to be a bonafide purchaser for value when the chairman **Serwano Barongo** (DW4), during cross examination revealed that **Bonabaisi** sale of the property of **Kisembo** was against elders' decision. The implication here is that the elders, the chairman and the purchaser **Isingoma Justus** knew about the plaintiffs' interest in the suit land.

#### **Claim of Yedida Kabezere (4<sup>th</sup> Appellant)**

[30] **Yedida Kabezere** testified as DW2. According to her, the portion of the suit land was purchased by her son, the late **Kirungi Alex** from **Serina Bonabaisi** (PW2) as per the sale agreement dated 3/6/1995 (**D.Exh.2**).

[31] Again, the perusal of **D.Exh.2** show that neither the purported vendor **Serina Bonabaisi** nor the purchaser **Kirungi Alex** endorsed the agreement by way of signatures or thumb print. 2ndly, as already observed, the vendor had no capacity to sell any portion of the suit land and therefore she could not pass good title to the purchaser. It was also not shown by **Yedida Kabezere** (DW2) that her son **Kirungi Alex** was a bonafide purchaser.



[32] In conclusion, I find that the trial Magistrate rightly found and concluded that the 1<sup>st</sup> defendant/Appellant and Bonabaisi (Kisembo's mother) had not acquired any interest in the suit property and did not have capacity to sell the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' predecessor. As a result, the defendants/Appellants were rightly found to be trespassers on the suit land.

**Issue No.3: The learned trial Magistrate erred in law and in fact when he found for the Respondents when their cause was time barred.**

[33] Counsel for the Appellants submitted that S.5 of the Limitation Act provides that:

*"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some person through whom he or she claims, to that person."*

It was counsel's contention that the Respondents' claim was time barred as the same was filed on 11/3/2008 after a period of 13 years. On this aspect the trial Magistrate found and in my view correctly, thus at **page 6 of the judgment;**

*"In her plaint she learnt of the trespass in 2004 when she came to occupy her land with her children, para.4(d) of the plaint... she knew of the trespass in 2004."*

That if she knew of the trespass in 2004 and filed the suit in 2008, the plaintiffs were within the limitation period.

[34] I cannot find otherwise. This ground of appeal is also devoid of merit and it accordingly fails.

**Ground 4: The learned trial Magistrate erred in law and fact when he decided the case in the lower court without visiting locus in quo thereby occasioning a miscarriage of justice to the Appellants.**

[35] Counsel for the Appellants submitted that the trial Magistrate's failure to visit locus in quo in the instant matter was an error which greatly prejudiced the Appellants as their dispute does not only revolve around ownership but also boundaries between the different pieces of land, which issues could not be decided without a visit on locus.

[36] I agree with the proposition that,  
*"The usual practice of visits to locus in quo is to check the evidence given by the witnesses"* ;

**Yeseri Waibi Vs Elisa Lusi Byandala [1982] HCB 28.**


It is however also trite that it is not mandatory in all cases for court to visit locus in quo during the hearing of land disputes; **Fernades Vs Noraniha [1969] E.A 506, Nsibambi Vs Nankya, [1980] HCB 81 and Uzia Bweya Vs Baghenzi Zimonia, H.C.C.A No.65 of 2017 [2018] UGH CLD 54.** It is apparent in this case that the parties were not disputing over boundary conflicts but actual ownership and user rights. I have not been able to see any prejudice therefore that has occasioned the Appellants by the trial Magistrate's failure to visit locus.

[37] An appellate court will set aside a judgment on grounds of misdirection or improper admission or rejection of evidence, or for any errors as to any matter of pleading or for any error as to any matter of procedure unless the court is of the opinion that the error complained of has resulted in a miscarriage of justice; **Odongo Kresenysio & Anor Vs Ojera Cipiriano H.C.C.A.No.53 of 2017.**

[38] In the premises, the failure by the trial Magistrate to visit locus in quo did not lead to any miscarriage of justice to the Appellants because it was not necessary since this was a case for ownership of the suit land which could be determined without the confirmatory evidence of locus in quo. This ground of appeal is therefore also found devoid of merit and it accordingly fails.

[39] All in all, this appeal fails. Judgment and order of the learned trial Magistrate are upheld. The suit land belong to the plaintiffs/Respondents. The defendants/Appellants are trespassers thereto and the plaintiffs/Respondents are entitled to eviction orders. The Appeal is dismissed with costs to the Respondents.

Dated at Masindi this <sup>14<sup>th</sup></sup>..... day of **July, 2022.**

  
.....  
**Byaruhanga Jesse Rugyema**  
**JUDGE.**