THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO.22 OF 2019

(Arising from Masindi Land Civil Suit No.022 OF 2007)

YOSAM KASIGWA :: APPELLANT

VERSUS

1. JOSEPH BANURA KAJUNJUBE

2. JUSTUS BAGUMA KAJUNJUBE :::::::::::::::::::::::::::::::: RESPONDENTS

3. JOHNSON KAMURASI KAJUNJUBE

4. JENIFER BASEMERA KAJUNJUBE

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and decree of the Grade 1 Magistrate, Masindi Chief Magistrate's court dated 11/4/2019.

Appeal background

[2] The Respondents/plaintiffs sued the Appellant/defendant in the lower court vide **C.S No. 22/2007** for trespass to land, described as customary land located at **Kyaswete village, Masindi** and for the following declarations and orders:

a) That the suit land belongs to the Respondents/plaintiffs.
b) That the Appellant/defendant is a trespasser on the suit land.
c) A permanent injunction restraining the defendant, his agents, assignees and legal representatives from trespassing on the suit land.
d) General damages for trespass and costs of the suit.

[3] It was the Respondent/plaintiffs' case that they inherited the suit land from their father, the late **John Kijunjube** who died in 1979. That before the late **John Kijunjube's** death, he had appointed the late

Matayo, husband to the Appellant/defendant's mother, to look after the suit land. However, the Respondents further averred that later, the said **Matayo** with his wife left the suit land and went to his acquired personal land but left the Appellant/defendant on the suit land. That the Respondents/plaintiffs stayed peacefully with the Appellant/defendant whom they knew as a squatter on the suit land until 2005 when he started to chase away his fellow squatters and the Respondents/plaintiffs from the land claiming that it belonged to him.

[4] On the other hand, the Appellant/defendant contended that the suit land is his customary land having been born thereon and has since being of age, been cultivating land with the developments thereon to date. He denied being or knowing squatters on the suit land.

[5] The trial Magistrate on her part, upon evaluation and analysis of the evidence before her stated that the Appellant/defendant testified that he got the suit land as a gift from his paternal Auntie **Zeridah Kaheeru** who had given it to his mother to care take on behalf of the defendant. That when his Auntie **Zeridah,** father and grandfather died, they were buried on the disputed land. That however at locus, the alleged grave yards of the Appellant's father, grandfather or Auntie could not be identified save for the graves of his children. As a result, the trial Magistrate entered judgment for the Respondents/plaintiffs.

[6] The Appellant/defendant being dissatisfied with the whole decision of the trial Magistrate filed an appeal to this court on the following grounds as contained in the memorandum of appeal:

1. *That the Learned trial Magistrate erred in law and fact when she entertained a suit that was time barred and delivered judgment in favour of the plaintiffs thus occasioning a miscarriage of justice.*
2. *That the Learned trial Magistrate erred in law and fact when she relied on hearsay evidence to find in favour of the plaintiffs which occasioned a miscarriage of justice.*
3. *That the Learned trial Magistrate erred in law and fact when she relied on evidence marred with inconsistencies and contradictions to arrive at erroneous decisions which occasioned a miscarriage of justice.*
4. *That the Learned trial Magistrate erred in law and fact when she went ahead to conclude the suit before disposing off Miscellaneous*

Application No.007 of 2019 which sought to recall P.W.6 for cross examination and without expunging his evidence from the record.

5. *The Learned trial Magistrate erred in law and fact when she conducted the visit to the locus in quo in contravention of the law and the procedure governing such visits thus occasioning a miscarriage of justice.*
6. *The Learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thus arriving at a wrong conclusion that the plaintiffs were the owners of the suit land in the ratio of 75% to 25%.*
7. *That the Learned trial Magistrate erred in law and fact when she exhibited bias against the Appellant during the trial and in the judgement which occasioned a miscarriage of justice to the Appellant.*
8. *That the Learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on the record thus arriving at an erroneous conclusion which occasioned a miscarriage of justice.*
9. *The Learned trial Magistrate erred in law and fact when she relied on conjecture, speculation and fanciful reasoning that the suit land belonged to the Plaintiffs in total disregard of the evidence on record.*
10. *That the Learned trial Magistrate erred in law and fact in awarding general damages of Ugx 8,000,000/- which were excessive and exorbitant.*
11. *That the Learned trial Magistrate erred in law when she made a contradictory judgment by awarding interest on costs only at court rate and also at 18% per annum on general damages and costs.*

Duty of the first Appellate court

[7] This is an appeal from the decision of the Magistrate Grade 1. This court being 1st appellate court is duty bound to review the record of evidence for itself in order to determine whether the decision of the trial court should stand. In doing so, the court must bear in mind that an appellate court should not interfere with the discretion of the trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifested from the case as a whole that the court has been clearly wrong in the exercise of the discretion and that as a result, there has been a miscarriage of justice; **Stewards of Gospel**

Talents Ltd Vs Nelson Onyango H.C.C.A No.14/2002 and **NIC Vs Mygenyi [1978] HCB 28.**

[8] It is therefore the duty of this court to re-evaluate all the evidence adduced before the trial court as whole by giving it a fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence the decision of the trial court should stand.

Counsel legal representation

[9] On appeal, the Appellant was represented by Counsel **Tugume Moses** of **M/s Tugume Byensi & Co. Advocates, Kampala** while the Respondents were represented by Counsel **Kabigumira Innocent** of M/s Legal Aid Project of the Uganda Law Society Masindi. Both counsel filed their respective written submissions as permitted by court for consideration in this appeal.

Preliminary objection

[10] Counsel for the Respondents raised a preliminary objection to the effect that the appeal is incompetent for having been filed out of time. That the judgment that is sought to be appealed from was passed on 11/4/2019 and the memorandum of appeal was filed on the 9/7/2019 after a period of almost 3 months which contravened **S.79 (1) (a) CPA** which requires every appeal to be entered within 30 days of the date of the decree or order of court.

[11] This being a preliminary objection, this court is duty bound to first dispose it off. Counsel for the Appellant submitted in rejoinder that this appeal is competent as it has been brought within the 30 days limitation rule. That **S.79 (2) CPA** provides that in computing time for the filing of an appeal, the time taken by court in making a copy of the decree or order appealed against or the proceedings upon which it is founded shall be excluded.

[12] In **Godfrey Tuwangye Kazzora Vs Georgina Katarikwenda [1992-93] HCB 145**, Justice Karokora J (RIP, as he was then) considered the issue of whether an appeal to the High Court from Magistrate Grade 1 was time barred and held that the time for lodgement of appeal does not begin to run against the intended Appellant until the party receives a

copy of the proceedings against which he intends to appeal; See also **Buso Foundation Ltd Vs Bob Male Ltd H.C.C.A No.40 of 2009.**

[13] In the instant case, the judgment intended to be appealed from was delivered on 11/4/2019 and on that very day, the Appellant filed a Notice of Appeal to this hounourable court. A notice of appeal has been found to be a mere sufficient expression of the intention to file an appeal; **Equity Bank (U) Ltd Vs Nicholas Were H.C.M.A No.604/2013**. **O.43 r.1 CPR** provides that an appeal to the High Court shall be instituted by a memorandum of appeal. According to **S.79 (1) (a) CPA** every appeal must be entered within 30 days of the date of the decree or order of court. It suffices to note that the 30 days period is exclusive of the time taken by the lower court in preparing the record of appeal under **S.79 (2) CPA**. It is therefore crucial to determine when the record of proceedings was made available for collection in determining whether or not the appeal was lodged in time.

[14] On the lower court record, there are 2 letters of counsel for the Appellant dated **11/4/2019,** the very date the lower court judgment was delivered and **12/6/2019** seeking for the typed and certified record of proceedings for purposes of appeal i.e enable counsel formulate his grounds of appeal and file a memorandum of appeal. The record of proceedings were certified on **11/10/2019.** The memorandum of Appeal was filed in this honourable court on **9/7/2019.** The Appeal therefore having been lodged on **9/7/2019** when the record of proceedings were certified on **17/10/19,** in my view, was well within time when computation of time within which to appeal is to run from when the party was availed certified proceedings to be appealed against.

[15] In this case, the appellant has demonstrated that he actively took the necessary steps to prosecute his appeal as it is apparent that he formulated his grounds of appeal from the judgment without certified copies of the proceedings. In the premises, I reject the preliminary objection and proceed to consider the appeal on its merits.

[16] As regards late or out of time service of the memorandum of Appeal upon the Respondent, there is no evidence on record showing when the Respondent received the memorandum of Appeal to enable court ascertain whether it was served out of time or not.

Resolution of grounds of Appeal

Ground 1: That the learned trial Magistrate erred in law and fact when she entertained a suit that was time barred and delivered judgment in favour of the plaintiffs thus occasioning a miscarriage of justice.

[17] Counsel for the Appellant submitted that according to **Para.4 (a) of the plaint,** the plaintiffs claim to have inherited the suit land from their late father **John Kajunjube** who died in 1979 and that **Kajunjube Joseph** (PW1) testified that they brought this suit against the defendant to recover their land from him. That according to the evidence on record therefore, the plaintiffs' interest became due in 1979 when they allegedly inherited their father's land and since the plaintiffs were of minority age, they ought to have brought the action within 6 years after ceasing to be under the disability.

[18] Counsel argued that in the instant case, **John Kajunjube** (PW2) ceased to be a minor in 1990 and yet the suit was filed in 2007 which was after the expiration of 6 years. He contended that the trial Magistrate erred in law and fact when she entertained a suit that was time barred.

[19] Counsel for the Respondents on the other hand submitted that **S.5 of the Limitation Act** is to the effect that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action arose. He argued that in the instant case, the Respondent's right of action arose in 2005 when the Appellant started claiming ownership of the land and started chasing them away.

[20] In the case of **Madhvan International S.A Vs A.G C.A.C.A No.48 of 2004**, it was held, inter alia, that court looks at only the pleadings and not evidence when it is determining whether an action is time barred or caught up by the statute of limitation.

[21] In the instant case, in paragraph 4(a), (b) and (d) the Respondents/plaintiffs' pleadings are as follows;

a) The land is customary the plaintiff inherited from their late father, the late John Kajunjube who died in the year 1979.

b) In this land there are squatters whom the plaintiffs' grandfather had left when he died: and these are

Aberi Ndyanabo, Adoniya
Kaahwa son of Ndyanabo.

c) ...

*d) ... just in **2005** the defendant rose and began to chase away his fellow squatters claiming that the said land belongs to him."*

[22] The foregoing pleadings in my view disclose that the cause of action of the Respondents/plaintiffs arose in **2005** when the Appellant/defendant allegedly started claiming ownership and chasing away his fellow "squatters". This suit having been filed in 2007 which is 2 years thereafter, it is in the premises not caught up by the limitation period of 12 years or 6 years as the case may be.

[23] I in the premises find this ground without merit and it accordingly fails.

Grounds 2, 3, 6, 7, 8 & 9; Evaluation of evidence.

[24] The above grounds rotate around how the trial Magistrate evaluated the evidence before her and I do resolve them together.

[25] As regards whether **Johnson Kamurasi Kajunjube** (PW2) and **Jennifer Basemera Kajunjube's** (PW3) evidence is hearsay as counsel for the Appellant submitted, upon perusal of their evidence, I have not been able to find any hearsay in their evidence. "Hearsay evidence" is that evidence based not on a witness's personal knowledge but on another's statement not made under oath; **Merrian-Webster .Com Dictionary.** Such evidence is not admissible in law, **S.59 U.E.A.**

[26] At **page 22 of the typed proceedings**, **PW2** stated thus;

"I first came on the land in 1996... I saw some crops (maize and beans), there were no matooke...when I asked who the owner, was I was told that one Kasigwa owned those crops."

At **page 24 of the typed proceedings, PW3** stated thus;

"Apart from what my father told me that I have stated in court I don't know how Kasigwa (Defendant) got the land."

[27] The above statements are not hearsay pieces of evidence. They are statements regarding what the witnesses knew personally and reports confirming what they knew. They do form part of res gestae evidence

as statements that are incidental to the facts of a litigated matter which are admissible as evidence; **Adrian Keane, Modern Law of evidence, 5th Edition, page 285.**

[28] As regards the inconsistences and contradictions in the evidence of **Joseph Kajunjube** (PW1) and **Johnson Kajunjube** (PW2) regarding as to who frustrated the Appellant/defendant's contract of growing sugar canes with Kinyara, and whether the plaintiffs' land is 20 acres or 50 acres, are found to be minor and counsel for the appellant has not shown that they are such, that were intended to mislead court since the alleged frustration of the Appellant's contract with Kinyara was not going to the root of the case of ownership of the suit land and trespass. The suit land being customary, is essentially un surveyed and therefore, acreage given by the parties here is mere estimation.

[29] However, according to **S.101 of the Evidence Act,**

"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

[30] In the instant case, the burden of proof was on the Respondents/plaintiffs to prove the alleged ownership and possession of the suit land and that the Appellant/defendant was a trespasser. The proof is on the balance of probabilities; **Nsubuga Vs Kavuma [1978] HCB 307.**

[31] In the instant case, a part from the Respondents/plaintiffs claiming that they inherited the suit land from their father the late **John Kajunjube** and that before the demise of their father, **Matayo Tibenderana**, the husband to the Appellant's mother was care taking the land until 2005 when the Appellant started chasing away the squatters from the suit land and prohibiting the Respondents from accessing it. They did not present anything or attempt to discharge the onus on them that either the suit land belonged to them or that they have ever been in occupation. No witness testified as to how their father allegedly acquired the suit land and why they have never acquired occupation of it.

[32] None of the existing "squatters" on the suit land whom the Respondents purport to protect from the Appellant appeared in court to testify on his /her own behalf and on behalf of the Respondents. Lastly, at locus, none of the Respondents pointed to the trial Magistrate any of their developments on the suit land.

[33] **William Kaheru** (PW6) testified that the Respondents/plaintiffs' father got the suit land from his father who was a Muluka Chief though it was not shown as to what kind of interest the said Muluka Chief had in the land (if at all it was there) and how he passed it on to the plaintiffs/Respondents' father and or whether he had powers or authority to give out/allocate land to anybody.

[34] On the other hand, as found by the trial Magistrate at **page 4 of the judgment,** there were graves of the children of the Appellant and as conceded by the Respondents, and the home of the Appellant. He has been carrying out cultivation of food crops thereon. All the Respondents proved themselves to be strangers on the suit land. **Kajunjube Joseph** (PW1) revealed that he came to know of the Alur people on the suit land about 15 years ago and the Appellant 18 years ago. None of them knew or could reveal when and under what terms **Matayo Tibenderena,** step father of the Appellant, came to care take the suit land and how big it is.

[35] However, it is a fact that the Appellant came on the suit land with his mother when he was breast feeding as per the evidence of **Agnes Kabasumba Byembamdwa** (PW5) aged 82 years, a neighbor to the suit land. The fact that by 2014 when the Appellant filed his witness statement he was 66 years, then by 2007 when this suit was filed, he must have been 59 years. The implication is that he had been on the suit land for the last 59 years or thereabout.

[36] It is my view that in the absence of a definite proof of how the Respondents' alleged interest or that of their father in the suit land came to exist, this court would be entitled to interfere with the trial Magistrate's findings as regards the Respondents' ownership of the suit land for she failed to take into account of the fact that the Respondents had not presented or shown anything in support of their claims.

[37] The Appellant's failure to locate the grave of his father **Rwakaikara** who died before he was born and his Auntie **Zeridah Kaheeru** who he did not know when she died since he was barely 9 years, could not be used against him in favour of the Respondents when he had been in occupation of the suit land since childhood. It is possible as argued by counsel for the Appellant that if the 'graves were not set up in a permanent form with cement, there could no longer be visible because of weather erosion.

[38] In fact, the Appellant is protected by the doctrine of prescription against all the other un registered purported competing interests. The doctrine confers upon him ownership rights by virtue of his long possessory rights; **Perry Vs Clissold [1907] A.C 73 at 79.**

[39] It is not clear as to where the trial Magistrate formed the idea that the Respondents/plaintiffs were entitled to 75% and the Appellant/defendant to 25% of the suit land when the plaintiffs/Respondents could not tell what acreage belonged to them and or without evidence as to what acreage the Appellant's stepfather **Matayo** occupied. This was mere conjecture on the part of the trial Magistrate.

[40] In conclusion, I find that the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on the record and instead relied on conjecture, speculation and fanciful reasoning to hold that the suit land belonged to the Respondents/plaintiffs in total disregard of the evidence on record which pointed at otherwise. Even if one is to assume that the Respondents' father had any interest in the suit land, then he abandoned it in favour of the Appellant's family and the Respondents cannot appear now to claim it.

Ground 4: That the learned trial Magistrate erred in law and fact when she went ahead to conclude the suit before disposing off Misc. Appln. No. 07/2019 which sought to recall PW6 for cross examination and without expunging his evidence from the record.

[41] Counsel for the Appellant complain that he was not given an opportunity to cross examine **William Kaheru** (PW6). The record however shows that he was given an opportunity to cross examine him on **5/6/2013** and the **11/9/2013** but on both dates, counsel for the Appellant did not avail himself for the same. Eventually counsel for the Respondents proposed that **PW6** be cross examined at locus. Before the

locus date, counsel for the Appellant addressed court that he was dispensing with cross examination.

[42] I find that this ground of Appeal is devoid of merit, failure to cross examine **PW6** occasioned the Appellant a miscarriage of justice in view of the finding of this court that the trial Magistrate erred in law and fact when she found that the suit land belonged to the Respondents/plaintiffs.

Ground 5: That the learned trial Magistrate erred in law and fact when she conducted the visit to the locus in contravention of law and the procedure governing such visits thus occasioning a miscarriage of justice.

[43] Counsel for the Appellant criticized the trial Magistrate's obtaining the evidence of **Isingoma Aloziyo**, a court witness at locus yet he never gave evidence while in court. He relied on the authority of **Emmanuel Kwebiiha & Anor Vs Rwanga Furujensio & Ors H.C.C.A No.21/2011**.

[44] As was held in **Odyek Alex & Anor Vs Gena Yokonani H.C.C.A No. 9/2017 [2018] UG HCCD 50** and **Nsibanbi Vs Nankya [1980] HCB 81,** the purpose of court's visit to a locus in quo is to check on the evidence by the witnesses and not to fill gaps in their evidence for them or lest court may run the risk of making itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in court, visits to a locus in quo must be limited to inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The visit is essentially for purposes of enabling the trial court to understand the evidence better.

[45] Though court has wide discretionary powers to summon material witnesses or examine a person present or in attendance though not summoned as a witness, this must be if that person's evidence appears to be essential to the just decision of the case, provided that the parties are allowed to exercise their right to cross examine any such person. In this case, it was erroneous for the trial Magistrate while at the locus in quo to have recorded evidence from **Isingoma Aloziyo** who had not testified in court without first finding that his evidence would be essential to the just determination of the case.

[46] In view of the above, I disregard the evidence of **Isingoma Aloziyo,** the so called court locus witness. In the premises, this ground of appeal accordingly succeeds.

Grounds 10 & 11: That the learned trial Magistrate erred on law and fact when she was awarded General damages of Ugx 8,000,000/= with interest of 18% per annum which were excessive and interest on costs at court rate and at the same time at 18% per annum.

[47] In this appeal, this court having found that the trial Magistrate erred on law and fact when she found that the suit land belongs to the Respondents/plaintiffs, it follows that the Respondents would not be entitled to general damages and costs of the suit. The 18% per annum interest awarded on costs was inadvertently included in the typed record. In the hand written script of the proceedings, it is evident that the trial Magistrate crossed it.

[48] As a result of the foregoing, the appeal is generally allowed. The entire judgment and decree of the lower court is set aside and the Appellant is declared the owner of the suit land.
Costs of this appeal and in the court below are to be borne by the Respondent,

Dated at Masindi this **14th** day of **June, 2022**.

.....
Byaruhanga Jesse Rugyema
JUDGE.