

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**CIVIL APPEAL NO. 005 OF 2021**

**[ARISING FPT-16-CV-CS-LD-051-2009]**

**BIINGI RICHARD ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**MRS. EFULAZIO KASORO ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO**

**JUDGMENT**

**Introduction.**

This is an appeal against the judgment and orders of His Worship Muhumuza Asuman, Magistrate Grade one sitting at Kyenjojo Magistrate’s court in **FPT-16-CV-CS-LD-051-2009**. Judgment is dated 29<sup>th</sup> January 2020. The appellant sued the respondent in the magistrate’s court to recover land approximately 3 acres located at Rwemyongo Mabona, Kabira parish, Kyenjojo district. He prayed for order of eviction, permanent injunction and costs.

In her written statement of defence, the respondent stated the suit land belongs to her having acquired the same customarily by inheritance and partly by outright purchase and utilized the same for over 20 years uninterrupted. After trial, the trial magistrate found that the suit land belonged to the respondent and dismissed the suit with costs. The appellant was dissatisfied with the judgment of the trial magistrate, hence this appeal.

The appellant appeals against the said decision on the following grounds;

1. The learned trial magistrate failed to and did not properly evaluate the evidence on record and as a result came to an erroneous decision.

2. The learned trial magistrate erred in law in finding and holding that the appellant failed to prove to the required standard that the suit land belonged to him and therefore erroneously dismissed the suit.
3. The learned trial magistrate caused a miscarriage of justice in so far as he deprived the appellant of land of his inheritance.

### **Representation and hearing**

The appellant is represented by Mr. Cosma A. Kateeba of KRK Advocates. The respondent is unrepresented. No response was filed by the respondent to this appeal. When the matter came for hearing, court was satisfied that service was effected on the respondent. The hearing proceeded by way of written submissions filed by the appellant's counsel.

### **Role of the first appellate court.**

The duty of a first appellate court was laid out in the case of **Fr. Narsensio Bugumisa & 3 others versus Eric Tiberaga SCCA NO. 17 of 2004) KALR236** this;

*“The legal obligation of the 1<sup>st</sup> appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principal that on a 1<sup>st</sup> appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make the allowance for the fact that it has neither seen nor heard the witnesses”*

In case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witness, it must weigh the conflicting evidence and draw its own inference and conclusions(See **Lovinsa Nankya Vs Nsibambi(1980) HCB81**).

### **Consideration of the appeal**

The gist of all the grounds of appeal is the alleged improper evaluation of evidence by the trial magistrate which led him to an erroneous decision. In accordance with the obligation of this court, I will reevaluate the evidence on record.

At the trial, the appellant (PW1) testified that the suit land is about one and a half acres. It neighbours with the respondent's husband in the East, borders with a *Munyinya* tree in the West, a swamp in the south and the respondent's husband in the north. The land in dispute is in the north of the road to Mukunyu and Butiiti. The portion in dispute together with the undisputed part belonged to the appellant's father who was a brother to the respondent's husband. The two brothers acquired the different portions of the land from their late father, Kalangizi. He further stated that there is a big *Munyinya* tree that separates the appellant's land and that of the respondent.

Doris Matama is the appellant's mother. She testified as PW3 that the suit land was part of the land formerly owned by her late husband, the late Giroli Kabirigo. That there was a *Munyinya* tree separating the suit land from that owned by the respondent's husband. The same land was given to the appellant as a son to the former owner. Her husband used to cultivate the suit land to grow food crops.

Kiiza James testified as PW2 that the boundary dividing the appellant's land from that of the respondent was a *Munyinya* tree which was destroyed and now there is an anthill. He stated that the suit land belongs to the plaintiff who inherited the same from his late father. During cross examination, he stated that he was not present when the appellant's father acquired the suit land.

The respondent testified as DW1 that the suit land is part of the land the late Dulenti Karangizi (appellant's grandfather) gave to her and her

husband Santo Kasoro. She described the boundaries of the land bordering Kakira-Kikonda road in the south, Ruhweza Martin in the West, Barora Sele in the East. During Cross examination, she stated that the suit land is currently vacant. At locus, she stated that she acquired the suit land as first settlers in 1963. It was vacant without an owner.

Barora Sele is the respondent's daughter. She testified as DW2 that the suit land is part of the land that the late Dulenti Karangizi gave to her father, Kasoro Santo in 1962. Mugisa Akiiki Henry also testified as DW3 stating that the suit land belongs to the respondent's husband, who acquired the same as a gift *inter vivos* from his late father Dulente. But he later stated that he was not present when the respondent's husband acquired the suit land.

From the evidence of PW2, the late Dulente Karangizi's land had the Mabona-Rwemyongo road cutting through it. The late Dulente had two children. Kasoro Santo (husband to the respondent) and Girogoli Kabiringo (the appellant's father). Kasoro is still alive. PW2 testified that the boundary mark that divided the late Dulente's land into equal shares between his children was the *Munyinya* tree, which was burnt and there is now an anthill in its place. It also appears from the evidence that the respondent's husband owns land from the swamp, across the road to the hill. His house is on the portion below the road and he gave his daughter DW2 the portion above the road to stay on and she currently occupies the same. This is not in dispute.

It is also not in dispute that the appellant owns the land on the left/west of the respondent's husband's land below the road. What is in dispute is the portion across the road above the appellant's land. PW3 testified that she had her house on the part below the road and used to cultivate the portion above the road, which is now in dispute. The appellant claims that

his land goes from the swamp, across the road to the hill. This is the land that was given to him by his late father.

There were inconsistencies in the evidence of the respondent especially on how she became owner of the suit land. In her written statement of defence, she stated that she acquired the suit land from inheritance and purchase. It did not come out in the evidence on which part of the suit land she bought and which one she inherited and from whom. Secondly, during cross examination, she stated that she and her husband occupied the suit land as first settlers when it had no owner in 1963. That is to say, she acquired the suit land as *terra nullius* (belonging to no one or no man's land) in 1963. In another instance, she stated that she and her husband acquired the suit land as a gift from her father in law in 1962.

Could she have possibly inherited the suit land from her father in law? Evidence was required to point to the fact that the respondent was a person in the lineage of her father in law for her to inherit land from him. Could she have acquired it *terra nullius* in 1963? At that time, it was the Public Lands Act of 1962 in force. Occupation of land then required that such occupation was either in accordance with the customs of the area or that it had been offered by the existing authorities at that time. Did she then acquire it as a gift from her father in law in 1962? Her own witnesses testify that the land was instead given to her husband by his late father.

The total effect of the above is that the evidence of the appellant would be more believable than that of the respondent. If her husband was given land from the swamp across the road to the hill, it needed to be showed that the appellant's share would end only below the road and that the respondent's husband was more entitle for him to get the land across the road from the appellant's share.

The respondent's evidence did not show any interest in the suit land which would leave the appellant's claim as the only one to uphold.

At the trial, it appears that each party accused the other of trespass. In ***Hajji Bumbakali Vs Peter Muhairwe & Ors; Civil Suit No. 036 of 1999***, citing ***Justine E M N Lutaaya versus Sterling; Civil Eng. Appeal No.11 of 2002***; it was held that;

*“Trespass to land occurs when a person makes an unauthorised entry upon another's land and thereby interfering with another's person lawful possession of the land”.*

It is trite that possession may be physical or constructive. In the present case, is the respondent who stated that she had allowed the plaintiff's father to cultivate the suit land. PW3 also testified that she had sorghum on the suit land and that she would go there to harvest the same. To determine whether there was a trespass, it needed to be shown that one of the parties moved and interfered with the lawful possession of the other. In the absence of such evidence, it could be impossible to determine that there was interference that would amount to trespass.

This appeal succeeds. The remedy available to the appellant is that he is declared the rightful owner of the suit land. The judgment and orders of the trial magistrate are set aside. The respondent is directed to give vacant possession to the appellant. Costs of the appeal and of the suit in court below are awarded to the appellant.

It is so ordered

Dated at Fort Portal this 28<sup>th</sup> day of April 2023. .



**Vincent Emmy Mugabo**

**Judge**

The Assistant Registrar will deliver the judgment to the parties

A handwritten signature in black ink, appearing to read 'Mugabo', written in a cursive style.

**Vincent Emmy Mugabo**

**Judge**

28<sup>th</sup> April 2023.