

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 005 OF 2022

[ARISING FPT-16-CV-LD-CS-114-2011]

BYOMUHANGI CHRISTOPHER ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

TWESIIME GLORIA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

Introduction.

This is an appeal against the judgment and orders of Her Worship Ayebare Daphine, Magistrate Grade one sitting at Fort Portal in **FPT-16-CV-LD-CS-114-2011**. Judgment is dated 8th February 2022. The respondent sued the appellant in the magistrate's court to recover land approximately 1 acre located at Rwendongo Nyaruzigati village, Rurama parish, Ruteete Sub County in Kabarole district (the suit land). She prayed for order of eviction, permanent injunction and costs. The respondent contended that the suit land belonged to her late father Cosma Bazimbwa who acquired the same by purchase from one U. Murekezi in October 1981. That after the death of the respondent's mother and father in 2010, the appellant took possession of the suit land illegally.

In his written statement of defence, the appellant averred that he was not a trespasser on the suit land because it belonged to him having acquired by inheritance from his late father, Aloysious Besigye who had also bought it from Erineriko Gakyaro in October 1982. After trial, the trial magistrate found that the suit land belonged to the respondent as the only surviving beneficiary of the late Cosma Bazimbwa, issued an eviction order, an

injunction and costs of the suit against the appellant. 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 erred in law and in fact when she declared the respondent the lawful owner of the suit land as the only surviving beneficiary of the late Cosma Bazimbwa
2. The learned trial magistrate erred in law and in fact when she ordered for the appellant's eviction from the suit land
3. The learned trial magistrate erred in law and in fact when she ordered that a permanent injunction issues against the appellant and his agents or anyone claiming under him from any other trespass on the suit land
4. The learned trial magistrate erred in law and in fact when she ordered the appellant to pay general damages for trespass of Ug Shs. 2,000,000/= (Two Million Shillings)

Representation and hearing

The appellant is represented by Ms. Angella Bahenzire of Bahenzire, Kwikiriza & Co. The respondent is represented by Mr. Wahinda Enock of Ahabwe James & Co. Advocates. Both counsel filed written submissions that have been considered herein.

Preliminary matters

In his submissions, counsel for the respondent argued that the grounds of appeal are defective as they contravene provisions of **Order 43 rule 1(2) of the Civil Procedure Rules** which states that the memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree appealed from without argument or narrative. Counsel relied on the case of ***Nyero Jema Vs Olweny Jacob & 4 others HCCA No. 50 of***

2018 where court while citing **Attorney General Vs Florence Baliraine CACA No. 79 of 2003** stated that grounds of appeal which offend Order 43 of the Civil Procedure Rules must always be struck out.

Counsel for the appellant in her submissions rejoinder argued that the memorandum of appeal is drawn in accordance with the Civil Procedure rules. She also states that counsel for the respondent has not pointed out the grounds that are argumentative and as such, he has not extinguished his burden to prove his allegations.

Order 43 rule 1(2) of the Civil Procedure Rules deals with the form of the memorandum of appeal. It states as follows;

1. Form of appeal.

(1)...

(2) *The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.* (Underlining for emphasis)

It is true that in the case of **Isharaza Mathew Vs Beyunga Deusdedit HCCA No. 5 of 2004** and in many others like **Moro Okolla Vs John Lalobo 119791 HCB 54**, the memorandum of appeal was struck out for failure to comply with the provisions of **Order 43 Rule 1** of the Civil Procedure Rules. In the instant case, I have examined the memorandum of appeal and it contains narrations and so to say, arguments in support of the grounds of appeal.

It is understood that each case should be determined on its own merits and circumstances. However, this is not the first time counsel for the appellant has filed a memorandum of appeal that offends the provisions of **Order 43 rule 1 of the Civil Procedure Rules**. She did the same in **Katusabe Margaret Vs Kaboyo Paddy HCCA No. 07 of 2021**, she did the same in **Banjo**

Masereka Vs Zeresi Biira Baluku & another HCCA No. 023 of 2020 and in all those appeals, court afforded the appellant a benefit of doubt and overlooked the breach.

The grounds of appeal as framed above do not even meet the test of grounds of appeal in the opinion of this court. They are merely restating the decision and orders of the trial magistrate but do not highlight what error it was that the trial magistrate is guilty of. To say the least, they are no grounds at all.

The appellant's memorandum of appeal would therefore be struck out. However, for purposes of completeness, I will consider the merits of the appeal.

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 1st 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 1st 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) HCB 81**).

Consideration of the appeal

I will re-evaluate the evidence on the record as required of this court and make independent findings on the same.

At the trial, the respondent (**PW1**) testified that the suit land initially belonged to her late father Coma Bazimbwa who purchased the same from Murekezi in 1981. She relied on **PE1**, which is the purchase agreement dated 20/10/1981. She also stated that she is the only surviving beneficiary of the late Coma Bazimbwa and therefore entitled to the land. There were several inconsistencies in her evidence. For instance, she stated that after the death of her mother in 2010, she continued to use the suit land. She later stated that she attended the appellant's wedding reception on the suit land and the appellant wedded in 2008 when the respondent's mother was still alive. She stated that after her mother's death, she went to Kampala to look for employment and came back in 2011 and found that the appellant had occupied the land.

PW2 Namanya Sarah is a sister to the appellant. She testified that the suit land belongs to the respondent. She noted that after the death of her father (also father to the appellant) the clan leaders divided the property of their late father and distributed it among his children including the appellant. Further that around 2010 when the respondent was in use of the land, the respondent went to Kampala to seek for employment whereupon the appellant entered upon the land. During cross examination, **PW2** insisted that the appellant entered upon the suit land in 2010. She also stated that the property of her late father that was distributed did not include the suit land and as such, the appellant, (her brother) could not have acquired the suit land as part of his inheritance from their late father.

John Kashumba (**PW3**) testified for the respondent that he was around when the respondent's father bought the suit land in 1981 but did not sign on the agreement as a witness. Paul Rujabuka (**PW4**) a neighbour to the

land testified that the suit land initially belonged to Harubano Mulekyezi who late sold it to the respondent's father in 1981 and he has been sharing a boundary with the suit land since 1964.

The appellant led the evidence of two witnesses. He testified as **DW1** that the respondent is his aunt, a sister to his late father. He stated that the suit land was bought by his late father Aloysius Besigye from Neriko Gakyaro in October 1982. He exhibited **DE2**, the purchase agreement and that the said purchase was witnessed by the respondent's father Cosma Bazimbwa. That he entered upon the land in 2000 following his desire to start a home. He wedded his wife in 2008 and had their reception on the suit land where his home was and the respondent and her mother attended the wedding. He exhibited a photo **DE1** of the wedding showing attendance of the respondent and her mother. His father died in 1995 and between then and the year 2000, the suit land was being used as a grazing area by the residents.

During cross examination, he testified that he was present when his father bought the suit land. However, his name does not appear on the said agreement as a person who was present. He also stated that he constructed the house on the land across the road when his family became big.

Kamanyire Zakayo testified as **DW2** for the appellant. He stated that he has been LC1 chairperson of Rwendongo village where the suit land is located since 2001 when the appellant was already in occupation of the suit land. Further that the land belonged to the appellant's father Aloysius Besigye who bought the same from Neriko Gakyalo and that it belongs to the appellant as a beneficiary to the estate of the late Aloysius Besigye.

It appears that both the appellant and the respondent derive their respective claims from the purchase agreements executed by their respective late fathers. The one from which the respondent claims (**PE1**) is

dated 20th October 1981. The one from which the appellant claims (**PE1**) is dated 20th October 1982. Exactly a year apart. Both agreements refer to the same piece of land and the boundaries are well spelled out in both. None of the parties is accusing the other of forgery or fraud in respect to either agreement.

The above situation poses the difficulty that both parties are claiming competing interests in the same piece of land acquired the same way but at different times. One is in possession and the other is not. The High Court is enjoined with jurisdiction under **section 14 (2) (b) (i) of the Judicature Act**, to apply doctrines of equity. The lawful and equitable position that both parties having purchased the suit property and holding no registered title, are regarded as equitable and competing owners of the suit property. However, equity dictates that the respondent would have a superior title in such circumstances, founded on the maxim of equity that where there are two equal equities, the first in time prevails. Courts in Uganda are enjoined to protect and enforce rights in equity and in the instant case, equity favours the respondent. Her late father bought the suit land in October 1981. The appellant's late father bought it in 1982 and without looking at the authority of the latter seller which was not challenged in evidence, the respondent would have a better title.

I note that there were several inconsistencies and contradictions in the evidence of the parties at trial as earlier discussed. Most of them relate to the timing of when the appellant is said to have entered upon the land. The appellant and his witnesses stated that he entered upon it in the year 2000. The respondent's witnesses at one time stated that he entered about three years before 2010, and at another time stated that he entered in 2010 after the death of the respondent's mother. The appellant conducted his wedding reception in 2008 in the house on the suit land.

The effect of the above inconsistencies is relevant in as far as determining entry on the land is concerned and for purposes of determining the period of limitation. These are not very relevant in as far as this appeal are concerned. Even if the appellant were to be believed that he entered upon the land in 2000, the suit against him in the lower court was filed in 2011 within the time set by law. Additionally, he was also inconsistent when at one time he stated that between 1995 when his father died and 2000 when he entered upon the land, the land was being used as a grazing area by the residents. At another time he stated that the land had a plantation. Could it be possible that the residents were grazing in a banana plantation? Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see ***Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009.***

Some other circumstances make it unlikely that the land belonged to the appellant's father. His sister, PW2 testified that when their late father died, the clan leaders divided the property of their late father and distributed it among his children including the appellant. The suit property was not among the properties believed to belong to the late Aloysius Besigye. The document evidencing the distribution was only available for identification. Secondly, it appeared from the appellant's evidence that he had a separate house across a certain road from the suit land. In both agreements, it was never stated that there was a road going through the suit land. Thirdly, the agreement **DE2** that the appellant relied on refers to a sale of a banana plantation rather than land. Equally, **PE1** that the respondent relied on clearly stated that the gardens on the suit land did not go with the land. Could it be said that the two agreements sought to create a distinction between the land that was actually sold from the gardens on the land? The

ultimate effect of all these is that it would be easier to believe the evidence of the respondent and not that of the appellant.

From the re-evaluation of the evidence above, I can confirm that it was more probable than not that the respondent had a better title to the suit land than the appellant. The land across the road from the suit land where the appellant has his 2nd house is maintained for the appellant. This appeal fails and is hereby dismissed with costs to the respondent.

It is so ordered

Dated at Fort Portal this 28th day of April 2023. .



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties



Vincent Emmy Mugabo

Judge

28th April 2023.