THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0051 OF 2013

UGANDA :::::::::::::::::::::::: APPELLANT

VERSUS

NAKIBI ZERUBABERI :::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

The appellant being dissatisfied with the judgment of Her Worship **Nanteza Zurah** Grade 1 of 10/10/2013, acquitting the respondent filed this appeal.

The memorandum of appeal raised 4 grounds of appeal that;

1. The learned trial Magistrate did not properly evaluate the evidence on record hence reaching a wrong conclusion on the matter.
2. That the learned trial Magistrate erred in law and fact when she held that in a case of criminal tress pass, ownership (and not possession) must be proved.

3. That the learned trial Magistrate erred in law and fact when she referred the parties to a civil court yet she had on record facts to show that a civil dispute had been resolved and execution proceedings completed against Respondent's claim.
4. That the learned trial Magistrate erred in law and fact in failing to hold the respondent a serial offender who had been convicted several times and showed neither remorse nor respect for court orders.

The duty of a first appellate court is to re-evaluate the evidence and subject it to a fresh appraisal so as to reach fresh findings thereon see *PANDYA V. R (1957) EA 336.*

I have gone through the lower court record. I have also read and internalized the submissions as presented by each party. I will now determine the grounds of appeal as here below;

Ground 1: Evaluation of evidence

Appellant argued that the Magistrate failed to evaluate the evidence and therefore reached a wrong conclusion.

The appellant referred to the evidence of the 4 prosecution witnesses and the exhibits tendered in court, to back up her submissions. She also referred to page 2

of the court's judgment paragraph 5 to conclude that the Magistrate's failure to find the respondent a tresspasser was wrong.

In reply respondent submitted that all witnesses for defence and plaintiff were in agreement that respondent was cultivating land belonging to all of them as a clan, and not for the appellant, personally.

My assessment of the evidence indicates that, PW1 (**Kalandi Gizamba**) told the court that the land was family land and for their burial grounds. The land belonged to their father who had two wives. The respondent had sued the rest of the family members, he lost the suit and the land was handed over to them (appellant and other family members).

Later the respondent went and removed the boundary marks and was charged in court. He was convicted and fined. Inspite of that he still went ahead and dug the land. A copy of judgment exhibited as PE1 on record shows that respondent **Nakibi Zerubaberi** was the accused in criminal case 398/2011 UGANDA VS. NAKIBI ZERUBABERI of Mbale. He was accused of removing boundary marks with intent to defraud C/S 338 Penal Code Act. He was convicted and fined 250,000/=. However in the judgment it was noted that court had been informed in evidence by **PW1 Gizamba Thomas** that earlier on **Tito Mukwana** had sued **Nabugwere Janet** over the family land and lost (**Mukwana** is a brother of **Nakibi**

Zerubaberi). The court had directed that boundary marks be erected. They were erected but accused removed them. He was charged and convicted and he paid a fine of shs 200,000/= (Two Hundred thousands only).

PW2- Kigona , PW3, Wedaira Nelson, PW4 all confirmed the above position.

In defence **DW1 Nakibi Zerubaberi** denied the allegations claiming that he was the owner of the lands. DW2 confirmed that he received court orders as LC1 Chairman to witness the handing over of land and planting of boundary marks. The land was handed over to **Nabugwere**.

DW3- said he was present when the boundary marks were planted.

When reviewing the above evidence the trial Magistrate reasoned that "this was not a case of trespass. It was a case of removing boundary marks which does not confer ownership of the land to either of the parties. Ownership is a very important aspect before a claim of criminal trespass can be sustained. However in this case before court both parties are claiming ownership of the land which dispute cannot be resolved in a case of this nature (criminal matter).

I find that type of analysis of evidence and the law is very flawed. For the Magistrate to find that the conflict is a land dispute, but then attempt to separate "Ownership" from the issue of "removing boundary marks" is not comprehensible.

If someone moves to another man's land and starts digging it, yet it had been shown that the same party had twice before been convicted over trespassing thereon and for removing boundary marks thereon as per PE1; I do not understand what type of assessment of evidence that the Magistrate employed. It was obviously flawed. The evidence on record shows very clearly that appellant and other family members had been sued by respondent's brother. He lost the case and that the same land was decreed to them in the presence of respondent. Boundary marks were erected and twice the respondent removed them. Twice he was convicted (see evidence of PW1, PW2, and DW2 and PE1). This evidence which was collaborated by the exhibit showed that the Respondent well aware that the land in question had been decreed to appellant, unlawfully entered thereon with intent to intimidate or annoy the complainant. The trial Magistrate ought to have found that this ingredient had been proved by the prosecution beyond doubt. I therefore uphold this ground of appeal as proved.

Ground 2: Interpretation of section 302 Penal Code Act.

The trial Magistrate did not properly evaluate the evidence. If she had done so as shown under Ground 1, she would not have digressed into issues of ownership and possession, which in my view had been properly proved in evidence. The evidence clearly showed that the respondent had already been convicted twice for attempting

to take possession of land, which had been decreed to the appellant and other family members. Could he have been found guilty of removing boundary marks from the land which belongs to himself? The trial Magistrate in attempting to isolate the ingredients of section 302 Penal Code Act, from the facts before her which revolved around ownership, failed to evaluate the evidence and hence reached a wrong conclusion. This ground succeeds as well.

Grounds 3 and 4

I agree with both the arguments forwarded that evidence on record shows that a civil dispute had already been resolved and concluded between the parties. The respondent paid fines under Criminal case No. 395/2011, and Criminal case No. 441/2002 over the same piece of land and same parties. I reject the submission by respondent that PE1 was just a case of removing boundary marks. PE1 contains references to a history of how that particular case arose from a finding of court that land belongs to the family represented by appellant. The respondent in total abuse of orders of court went ahead and removed the erected boundaries. There is no need for another civil trial to determine the civil rights of these parties on this land as ordered by the learned trial Magistrate. I therefore find both grounds 3 and 4 proved. I therefore find both grounds 3 and 4 proved.

In all this appeal succeeds on all grounds as prayed. This court hereby allows the appeal. The orders of the learned trial Magistrate acquitting the respondent are set aside and replaced with an order of conviction as charged. I so order.

Henry I. Kawesa

JUDGE

28.01.2015