

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 056 OF 2011
(Arising from Mukono Civil suit No. 054 of 2007)
(Arising from Mukono Land Tribunal Claim No. 110 of 2003)**

EDWARD F. KISITU

(Administrator of the estate

of the late KAGOMBE SEPURIYA.....APPELLANT

VERSUS

SAM BATEESA MAKABUGU.....RESPONDENT

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

JUDGMENT

This Appeal arises out of the Judgment and Orders of the Magistrate Grade 1 sitting at Mukono where in the claim by the Plaintiff (Edward F. Kisitu – Administrator of the Estate of the original Plaintiff KagombeSeperiya) was dismissed with costs.

The Plaintiff first filed his claim before the then District Land Tribunal where he claimed that the Defendant/Respondent Sam BateesaMakabugu had trespassed on his land, cut down trees worth Shs.3 million. He sought an Injunction restraining the Defendant from using the land, and to pay damages and costs.

The Defendant in his defence denied the claim on grounds that he is not a trespasser having inherited the land from his father YokanaKakandeMakabugu who died in 1998.

As stated before, the trial Court dismissed the claim and hence this Appeal.

The Appellant has raised 2 grounds of Appeal namely:

1. That the trial magistrate erred in fact and law when he failed to make proper evaluation of the evidence and/or disregarded valid evidence and thus came to a wrong decision that the Respondent is a bona fide or lawful occupant on land comprised in Block 195 Plot 33 at Bukasa, Mukono District.
2. That the trial magistrate erred in law when he relied on extraneous and other evidence that was never put before him at the trial and thus came to a wrongful finding that the Appellant failed to prove that the Respondent is a trespasser on Block 195, Plot 33 at Bukasa, Mukono District.

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At the hearing of this Appeal counsel for both parties opted to file written submissions which are on record.

15 *It is trite that the duty of the High Court in its appellate capacity is to appraise the evidence of the lower Court and may come up with its own findings, bearing in mind that it did not have the opportunity to see the witnesses who testified in the lower Court. Ref: Jinja High Court CA No. 94/2008 MufumbaBakali Vrs. TaalaBalonde and 6 Others.*

20 In **Pearl Motors Ltd. Vrs. Bank of Baroda (U) Ltd SCCA 15/2002**, it was held that The duty of the first Appellate Court “*to Review and re-evaluate the evidence on record to determine whether the conclusions of the trial Court were in accordance with the law and evidence or not and come up with its own decision*”.

25 Before going into the merits of this Appeal, I must comment on the delays this case has suffered, having first gone to Court in 2003 and was finally concluded in 2011 after over 40+ adjournments. It was also handled by different Judicial Officers right from the Land Tribunal, 3 Chief Magistrates and the Magistrate Grade 1 Mr. Imalingat coming in at the tail end of the case, at epitomizing a typical case of delayed justice. The magistrate Imalingat who completed the case had to rely to a great extent on a record that was made or
30 recorded by other Judicial Officers.

An Appellate Court as of necessity relies on the record as compiled or recorded by the lower Court. I have commented on the history for purposes of having the correct perspective of this case.

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Ground No.1 of Appeal:

It has been submitted for the Appellant that the trial Magistrate erred in law and in fact when he held that the Respondent was lawful owner of the suit kibanja when all evidence adduced showed the contrary.

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It was also submitted that the Respondent in his evidence at page 16 stated that his father bought the land from Naome Namirembe who was a SQUATTER, a clear indication that the said Naome Namirembe had no land to sell and could therefore pass no title to anyone having held no kibanja interest in the suit land.

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Further that the Respondent was not a bona fide occupant in accordance with section 29 (2) of the Land Act since he had not occupied or utilised the land for 12 years.

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In respect of documentary evidence, it was submitted that the Busuulu receipts exhibited by the Respondent were not genuine and in any case were in respect of the Respondent's father YokanaMakabugu. The sale agreement between the said Yokana and Namirembe was vague as it did not indicate the size of the plot, stating that it was in the forest without any further particulars.

25

It was therefore concluded that these were illegalities and irregularities and fraud that should not have been ignored once brought to the Court's attention. The case of **Uganda Railways Corporation Vrs. Ekwaru D.O. & Others; Misc. Application 185/2007** was cited in the above respect.

In response to the submissions for the Appellant in respect to Ground No.1, the Respondent through counsel submitted that the trial magistrate evaluated the evidence when he relied on the 2 Busuulu tickets and the purchase agreement that was signed by Naome in 1959.

5 In my view, the above reply does not answer a very valid concern raised by the Appellant and apparently not considered by the trial magistrate. That is the question whether Naome Namirembe the one claimed to have sold the suit land to the Respondent's father had any title to pass having been clearly referred to as a squatter by the Defendant himself and DW3.

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The trial magistrate relied on the Busuulu tickets which in any event were denied by the Appellant as not his.

In view of the above was Naome Namirembe and by extension Yokana Makabugu and the Respondent protected by section 29 (1) of the Land Act, were they lawful occupants within the provisions of the said section which refers to:

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(a) A person occupying land by:

(i) Busuulu and Envujjo Law of 1928.

(ii) Toro Landlord tenant and Tenant Law of 1937.

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(iii) Ankole Landlord and Tenant Law of 1937

(b) A person who entered the land with the consent of the **registered** owner and includes a purchaser.

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(c) A person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the lease hold certificate.

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Were they lawful occupants as defined by section 29 (2) which means a person who before coming into force of the Constitution;

(a) *Had occupied or utilised or developed any land unchallenged by the registered owner or agent of the recognised owner for 12 years or more...*

5 Firstly according to the Judgment and evidence on record, the Plaintiff obtained a Certificate of Title in 1973 and that is when he became registered owner within the meaning of the Land Act.

If any Busuulu was paid who was the registered owner at the time?

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Secondly, since the Plaintiff was not registered owner between 1959-1973, whose consent did the Respondent's father have within the meaning of section 29 (1) (b) of the Land Act?

If he was a customary tenant within the meaning of section 29 (1) (c) of the Land Act, how
15 come this was never in issue from 1973 when the Appellant became registered owner?

It is also on record that the Respondent's father died in 1999 4 years after the 1995
Constitution came into force. The dispute between the Plaintiff/Appellant and Respondent
started in 2001. The Respondent cannot therefore claim protection under section 29 (2) of
20 the Land Act.

Thirdly, the submission by the Appellant that much as the Respondent claims that his father
purchased the land from Naome Namirembe, that the purchase agreement is vague about
boundaries or size has not been answered and the evidence on record is also silent on this.

25

I observe that the magistrate concluded that because the Respondent acquired Letters of
Administration for the Estate of his father, he must have accordingly acquired the disputed
land as part of the Estate. This is also not borne out by any evidence on record.

30 With all the above issues in consideration it is clear that the magistrate's finding that the
Respondent was **a lawful occupant** or **a bona fide occupant** is not borne out by the

evidence. The claim of his father having acquired the land in 1959 is at best a concoction. This ground of appeal is accordingly resolved in favour of the Appellant.

Ground No. 2:

5 It has been submitted that the trial magistrate erred in law when he relied on extraneous and other evidence that was never before him.

That the magistrate could not ascertain whether the Respondent had any land or kibanja at Bukasa and whether Naome Namirembe ever existed.

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It is submitted that the magistrate ignored a report by the local LC.officials that established that the Respondent had no land in the disputed area. Regarding the evidence on pages 17 and 18 of the record, it was submitted that the Busuulu tickets referred to SepiriyaMugerwa, and not SepiriyaKagombe as the landlord. That this is a clear indication that they referred
15 to a different piece of land.

Finally, that the magistrate should have considered the evidence at page 27 of the record where the local LC. Chairperson testified that there had never been any person known as Naome Namirembe.

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For the Respondent, it was submitted in reply that the magistrate took into account that 50 years had elapsed between the acquisition of land by the Respondent of the kibanja and that it was likely that those who knew Naome Namirembe had most likely died or gone away.

25 I have considered the above submissions. The conclusion by the magistrate is not borne out by any evidence but rather, that it was a conclusion that at best was premised on speculation.

The record of proceedings reveals that the trial magistrate visited the locus in quo. The
30 summary of the findings at the locus in the Judgment omits some relevant information at

the locus. For example, no mention is made about the testimony of Mrs. Mary Kagombe at the locus, or that of KyohirweSpeciozaAleper the local chairperson, or that of James Nsubuga who all confirmed that Kagombe the original Plaintiff was the owner of the disputed land and the Respondent was an imposter. He stated that most people at the locus
5 were not willing to talk about the dispute. This however is not borne out by observations he should have made at the locus and would have therefore been considered in his Judgment.

Finally, according to the evidence of the Respondent/Defendant (Page 17 of the proceedings), he lives in a place called Dandira a village next to the village where the
10 dispute is he claims he has crops on the land and a piggery project.

He has no home or residence on the suit land which raises a very big question of why if he claims he and his predecessors in supposed title have been in occupation for over 50 years.

15 I have considered the proceedings and Judgment plus the submissions in their totality and come to the conclusion that Ground two of the appeal must succeed in favour of the Appellant. The trial magistrate failed to evaluate the evidence in its totality and therefore came to the wrong conclusions.

20 For the reasons above, I allow the appeal, and set aside the Judgment and Orders of the trial Court.

The following Orders are made:

- 25 (1) A permanent Injunction is issued to restrain the Respondent from further developing, using and cutting trees in the suit land.
- (2) Render vacant possession of the suit land to the Appellant/Plaintiff.
- (3) Respondent to pay costs to the Appellant in the trial Court and this Court.

The prayer for damages cannot be granted as they were neither proved by evidence or were
30 they argued.

Godfrey Namundi

Judge

5 **20/03/2014**

20/03/2014:

10 Parties present

Counsel for both parties absent.

Court: Judgment delivered in Court.

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Godfrey Namundi

Judge

20/03/2014