

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 45 OF 2011

*(From Nakasongora Chief Magistrates Court
Civil Suit No.004 of 2009)*

DISSAN SSEMPALA ::: APPELLANT

VERUS

**1. NDAGIRE GODFREY }
2. KAIJA SIMON } ::: RESPONDENTS**

Before: Hon. Mr. Justice J. W. Kwesiga

This appeal is against the Judgment and Orders of Her Worship DEBORAH WANUME Grade I Magistrate in Nakasongora Civil Suit No.004 of 2009 made on 3rd November, 2011.

In the original suit, the Plaintiff/Appellant sued the Defendants/Respondents alleging trespass on part of the land comprised of Bululi Block 81 Plot 6 measuring approximately 195.0 Hectares located at Namizo village. This land originally belonged to Late Nasanairi Muzindusi the Plaintiff's grandfather and the Plaintiff derives his authority over the land by virtue of Letters of Administration granted to him under Administration Cause Number 9 of 1999 of Nakasongora Chief Magistrates Court.

The Defendants are Bibanja holders over the said land by virtue of parents' holdings. The Plaintiff's suit alleges that they have exceeded the boundaries of their parents' Bibanja.

The trial Court settled the issues for determination as two namely:-

1. Whether the Defendants trespassed on the Plaintiff's land.
2. What remedies are available to the parties?

At the conclusion of the trial, the Plaintiff's case was dismissed. It was ordered and Decreed that:-

- (a) The Plaintiff's suit against the Defendants is dismissed with costs.
- (b) The Defendants were declared to have been using 40 to 50 acres which they were entitled to.
- (c) The Court emissaries shall demarcate the boundaries as granted by the Plaintiff's predecessor in Title.

The Memorandum of Appeal listed 6 (six) grounds of Appeal that:-

1. The Trial Magistrate erred in law and fact when she failed to consider the evidence collected at the Locus regarding the boundaries of the Appellants' Kibanja thereby coming to a wrong conclusion that the actual size of the Respondents' Kibanja is 40-50 acres.
2. The learned Trial Magistrates erred in law and fact in holding that the Respondents were bonafide occupants on the suit whereas it was not in contention thereby coming to wrong conclusion.
3. The learned Trial Magistrate erred in law and fact in holding that the Plaintiff's witnesses had an element of bias.

4. The learned Trial Magistrate erred in fact and law in completely failing to consider the Plaintiff's evidence and solely relied on the first Respondent's evidence and accordingly came to a wrong conclusion.
5. The learned Trial Magistrate erred in fact and law when she passed Judgment in favour of the second (2nd) Respondent without any evidence adduced to dispute allegation against him.
6. The Trial Magistrate erred in law and fact in evaluating the evidence on record and as such came to wrong conclusion.

Although I have reproduced the grounds of appeal, I do not intend to address each and every ground because in my view they all amount to the same issue, failing to evaluate the evidence and arriving at wrong conclusions. I will keep these grounds in mind while I do evaluate the evidence afresh to find answers for the fundamental issue which is "Whether the Defendants trespassed on the Plaintiff's land."

It is a duty of this Court to evaluate the evidence as a whole and determine the above issue. The guiding principle was well stated by Law J. A. (as he then was) in the case of Karanja Kago vs Karioki Njenga and Edward James Mungai, Civil Appeal No. 1 of 1979 (K-CA) held that a first appeal is by way of re-trial and the appellate Court is in as good a position as the Trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact. Also reference is made to:

- Peters vs Sunday Post Ltd. [1958] EA 424 at 429.
- Watt vs Thomas [1947] AC 484.

According to the plaint in the original suit, the Plaintiff/Appellant concedes that the Defendants are sons of legitimate Bibanja holders having obtained the same from the Late Muzindusi. The Certificate of Title shows that Bululi Block 81 Plot 6 measuring 195 Hectares belonged to Nasanairi Muzindusi, the Plaintiff's grandfather and predecessor in Title. The sub issue that emerges in what was the size of the Defendants' Bibanja. The Plaintiff avers that Defendants occupied, cultivated the land that Muzindusi gave them but they committed trespass by encroachment by cultivating, grazing and cutting trees outside the Defendants' parents' Bibanja. It is clear to me that it was important for the trial Court to receive evidence of size and boundaries of the Defendants' parents' Kibanjas before determination of the size of their legitimate occupation. I have perused the proceedings as a whole and I have not found the basis for the Trial Judges determination that the two Defendants were entitled to 40-50 acres occupancy.

I will not indulge in answering each and every ground of appeal but I will limit myself to the first ground and I will give reasons for this position later in this Judgment.

The ground states:-

“1. The learned Trial Magistrate erred in law and fact when she failed to consider the evidence collected at the Locus regarding the boundaries of the Appellant's Kibanja thereby coming to a wrong conclusion that the actual size of the Respondent's Kibanja is 40-50 acres.”

The evidence available on the record shows that there were no proceedings at the Locus in quo. The evidence collected at the Locus regarding the boundaries appears to refer to the testimony of the Local Council officials who testified that

before this suit they visited the suit land in attempt to resolve the dispute. It was clear from the testimony on record that there was no clear cut evidence proving the boundaries or the size of Bibanjas claimed by the 1st Respondent and the second Respondent. This was a typical case where it was imperative for the Trial Magistrate to have visited the Locus in quo, to record evidence showing the clarification of the contradictions on the boundaries.

In my view it is not in every case that it is necessary to visit the Locus in quo. It is now settled that the practice of visiting the Locus in quo is to check on the evidence given by the witnesses. In a case of alleged encroachment like the instant case the trial Court could not properly determine encroachment and its extent without visiting the Locus in quo. The circumstances of this case demanded that the trial Court availed itself the opportunity for visual appreciation of what was the Respondents' parents' customary occupancy and by what acreage they had exceeded the land if any.

The Trial Magistrate erred to determine the Respondents' entitlement by estimation and further hold or decree that *“This Court shall send emissaries to properly work out the boundaries of the Defendants given to Lwabuguli by Muzinduzi and the Plaintiff should respect the wish of his Late grandfather.”*

In my view the Trial Magistrate omitted her responsibility and it was irregular for her to delegate her judicial function of determining the boundaries which would have been determined by assessing evidence at the Locus in quo. This omission was fatal to the whole trial and filling the gap by appointing Court emissaries is incurably irregular and vitiates the whole proceedings.

In my view this ground alone disposes of this appeal and I will not deal with the other grounds of appeal which go to the root of the evidence and which may

influence future testimonies in the event of a retrial. I hereby allow the appeal and I order for expeditious retrial. Costs in this appeal and the Court below are granted to the Appellant against the Respondents in equal proportions.

John W. Kwesiga

Judge

17/6/2014

Judgment to be delivered by the Deputy Registrar on Notice.

John W. Kwesiga

Judge