THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0053-2012
(ARISING FROM CIVIL SUIT NO. 12/2008)

MUGALA HADIJA…….…….……..APPELLANT
VERSUS
KIROKO MESULAMU……...……...…….……RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal by appellant being dissatisfied with the orders of the trial Chief Magistrate in Mbale Civil Suit 12 of 2008.

The appellant raised 7 grounds contained in the memorandum of appeal namely:

1. That learned trial Magistrate did not evaluate evidence properly reaching an erroneous decision.
2. Learned trial Magistrate wrongly rejected appellant's consistent evidence and relied on Respondent's contradictory evidence.
3. Decision by learned trial Magistrate is full of fundamental misdirection and non-direction in law and on evidence.
4. The visit to the locus in quo was perfunctorily performed.
5. Learned trial Magistrate was biased in disregarding evidence found at the locus.
7. Decision occasioned a miscarriage of justice. (Ground 6 is a repeat of ground 3).

The appellant argued all grounds together.
The Respondent argued grounds 1, 2, 3, 6 and 7 together, and grounds 4 and 5 together.
This is a first appellate court.

The duty of a first appellate court was restated in the Supreme Court case of ***Nansensio Bagumisa and 3 Others v. Eric Tibebaga SCCA 17/2002***. In that case it was held that:

> "*even where as in this case, the appeal turns out on a question of fact, the first appellate court has to bear in mind that it is its duty to rehear the case, and the Court must reconsider the materials before the lower court with such other materials as may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong….*
> *The court therefore has to re-evaluate the evidence and then reach its own conclusions, bearing in mind that it did not have chance to observe the witnesses in court.*"

The case in the lower court was that by plaint dated 8th February 2008, the plaintiff sued defendant for vacant possession, damages for trespass, permanent injunction and consequential reliefs against the defendant (paragraph 3 of plaint).

According to paragraph 4 of the plaint, on the 19th March 2006 the defendant forcefully entered and occupied the plaintiff's piece of land situate at Busukuya village, Budama Parish Bukhulo sub-county.
By reason of the defendant's forceful entry the plaintiff has been deprived of possession and use of his customary land aforesaid and has suffered damage, hence the said suit.

The defendant by Written Statement of Defence, dated 21st day of February 2008 denied the above. In paragraph 4 of the written statement of defence the defendant avers that she occupies and owns as proprietor since 1980 when the plaintiff sold it to **Asuman Musene** late of Bubesye.

She raised a counter claim that she has been in occupation since 1980 digging and planting seasonal crops. The plaintiff took defendant to court, in 2006. She prays for judgment in lieu of that transaction.

The lower court, three issues were considered by the learned trial Magistrate.

1. Whether plaintiff is a customary owner of the suit land.
2. Whether defendant is trespassing.
3. Remedies.

The evidence led in proof of the case on record was as follows.

PW.1 Mesulamu Kiroko- stated that the defendant encroached on his land located in Busukuya, Budama, Bukulo-Sironko. The land is about 3 acres and is part of the whole land of about 19 acres. It is neighbours are **John Mafabi, Fenekansi Kutosi,** and **Kulwenya**. He acquired it from his father in 1952 when he was still alive. From 19.3.2006- defendant encroached on it and built there and also planted maize. He reported to the LC.I who forwarded him to police. Police arrested the defendant and took her to court. In court he won the case. A copy of that court judgment was exhibited. He told court that his father died in 1960, but he was not given an agreement but called clan members **Kalyebi, Nassan Kaba, Gustafasi Mukama**- who all had died. He denied the person of **Asuman Musene** and said he had never sold to him any land.

During cross-examination the witness denied knowledge of **Asuman Musene**. He denied the agreement and stated that he is diabetic and cannot write well. He was asked to write his name on a sheet of paper several times and this sample writing was admitted by court as DExh. 1. He denied that he has no signature and just writes his names.

PW.2 Natiko Abeduneko- stated that **Mugala Hadijja** is a wife to **Musene Asuman**. She encroached on the land of **Kiroko** which he got from his father. He was the clan head of Busukuya clan, and didn't know if defendant's husband (**Asuman Musene**) had bought the land because he wasn't called to witness. He confirmed that the land belonged to **Kiroko** and **Asuman** never used it at all.

PW.3 Robert Khaukha Patrick said he used to work on this land and knows it is for **Kiroko**. He said he saw defendant and two girls on 19.3.2006 planting crops in the garden which **Kiroko** had ploughed. It is him who informed **Kiroko** and it is him who advised him to report to the LCs. He said that he also gave evidence in the LC court.

PW.4 Mafabi Patrick said he has been chairman LC.I Busukuya village since 1986. He stated that the land belongs to **Kiroko M.** and that defendant entered on it in 2006. He said he didn't know **Asuman Musene** and **Mugala** has never been in occupation of the land.

In defence, **DW.1- Hadija Mugala** stated that she stayed on this land as hers. Her husband **Mesulamu Kiroko** bought it in 1985. She stated that she was not present, at time of purchase and no agreement was made; but upon death of her husband, the clan gathered and made the agreement. She began using the land in 1985 to date and her husband died in 1982.
She was not present when the agreement was being made. She left the land briefly in 1987 after the attack by the Karimajong but returned later and is still digging the same land to date. She described the land and its features. The land has a grave of **Badiru Musene** who died in 1981.

In cross-examination she said the late paid Shs. 9,000/= for the land and it is the clan which made the agreement for her.

DW.2 Mohamed Bokiro, said DW.1 is his mother. In 1985 **Kiroko** made an agreement before their clan members for DW.1, after death of their father. He knew all along that his father had bought this land but an agreement had not been made. He was present when the agreement was made. They began staying on the land in 1980. Though present he did not witness the agreement. All the witnesses died except **Fenekasi Kutosi**.
The agreement was tendered in as DExh.1.

DW.3 Wafula Stephen stated that he is a neighbor and that he has been on the land since 1980. He said that by then he knew the defendant and her husband as his neighbours. In 1981, they lost a child who was buried there. The husband died in 1982, living the defendant and her children on the land. He attended the meeting that gave rise to the writing of the agreement. In 1987 Karimajong destabilized them and DW.1 left him the keys to her semi-permanent house which he used. House was even utilized by NRM soldiers. She (DW.1) destroyed the house and began going to that land only to cultivate.

Court visited the locus in quo and recorded evidence from **CW.1 Mugabe** and **CW.2- Fenekasi Kutosi**.

In her judgment the learned trial Magistrate found for the plaintiff for reasons she gave therein.

I have also carefully considered the submissions by both counsel. I am now of the following opinion regarding the grounds as raised.

Grounds 1, 2, 3, 6 and 7 (on evaluation of the evidence by the learned trial Magistrate).

Grounds 4 and 5 (Locus).

It was the argument of the appellant that court ought to have considered the defendant's evidence of the fact of possession of the land by the defendant by virtue of a sale done in 1980 between her late husband and the plaintiff. He argues that the learned trial Magistrate failed to comprehend the evidential value of DW.1 and her witnesses, and the exhibited DE.I. He argued that court ought to have concluded that the defendant acquired rights to this land by succession from her late husband.

In response Respondent's counsel after a review of all evidence noted that respondent never sold any land to defendant's/appellant's late husband.

Respondent's counsel pointed out that there were contradictions in the testimony of DW.1 and raised the fact that she was not present during the purchase and the fact that the agreement is questionable to move court to find for the Respondent.

In answering the above grounds court is cognizant of the fact that in civil matters proof is on a balance of probability. The Evidence Act under Section 101-103 requires he who asserts a fact to prove it.

In this case the plaintiff had the burden to prove that:

(i) he was the customary owner of the suit land.

(ii) that the defendant/respondent was a trespasser.

(iii) that he was entitled to the prayers sought in the plaint.

From the assembled evidence as already reviewed, customary land ownership is provided for under Article 237 (1) (a) of the Constitution of Uganda.

Section 3 of the Land Act provides for under section 3 (1) for customary tenure.
Section 1 of the Land Act defines customary tenure as a system of land tenure regulated by customary rules which are limited in their operation to a particular description or a class of persons of which are described in section 3.
Section 3 specifies under which category an alleged customary interest falls.

I notice from the pleadings in this case and the evidence in court that the plaintiff did not specify what category of customary holding (tenure) he held. The evidence though seems to suggest that perhaps he was claiming under Section 3 (e) or (f) which details use of land by families, clans and individuals.

There is always a need for the person claiming under customary tenure to lead evidence to show under what customary tenure genre his right is rooted. This is crucial in a case where parties all claim ownership basing on family acquisitions, and yet one side alleges trespass.

This then leads me to consider the question of trespass.

The question of trespass is tied into the question of title and of possession.

According to ***John Looke Law of Tort 7th Edition page 293***-

> "*Trespass to land is unjustifiable interference with the possession of land. Trespass to land is normally actionable only by the person who is in possession of the land. In Pollock and Wright in An essay on possession in the common law, pages 94-95. We read that: " At common law title is relative. In order to defeat a possessor's title the person challenging it*

must rely on the superiority of his/her own title and not the weakness of the possessor's title."

In the case of ***Nambulu Kintu v. Ephraim Kamuntu (1975) HCB 221*** it was held that for possession to be adverse, it must be proved to be continuous.

I have laid out the principles above to enable me answer sufficiently the issues which were for determination before the lower court.

I note from evidence on record that there was not sufficient evidence led by the plaintiff in court to prove that he possessed the land in question at time of filing the suit. For trespass to arise, the plaintiff must be in actual possession. Evidence from PW.1,PW.2, PW.3, PW.4- shows that PW.1 got land from his father and that in 2006 defendant encroached on the piece he sues her for. However the defendant through DW.1, DW.2, DW.3, and ED.1 successfully showed that she was in constructive possession of the said land since 1980 when the same was brought by the late (her husband) from the plaintiff.

The evidential burden is upon plaintiff to prove what he asserted in his plaint. From the evidence which was assembled, I notice that, the plaintiff's evidence was not conclusively persuasive that defendant was a trespasser. The evidence of the purchase was corroborated by DW.2 who said he was present, though he did not sign on the document. He however corroborated the facts as stated by DW.1- that the plaintiff and the deceased (husband of DW.1) were friends and he explained how this agreement (DE.1) came up.

This was also explained with the same consistency by DW.3- a neighbor who proved the allegations stated by DW.1 regarding her title to the land. When court visited the locus, evidence of CW.1- was also in agreement with evidence of DW.1, DW.2 and DW.3. The above evidence when critically analyzed leaves the version of the plaintiff in balance.

I further notice that the agreement was found suspicious by the learned trial Magistrate, on grounds stated by her.

What I notice however is that the plaintiff claimed in court that he could not write by virtue of being sickly (diabetic). He also stated in cross-examination at page (10) and page (11) that he has no signature, and that in the bank he could not sign and would just write his name. (See page 11 of typed proceedings). However while perusing the proceedings on record , I came across a document from Gibogi Court Bailiffs, regarding execution proceedings done soon after the conclusion of the cases which had an attached Anex 'A' and Anex 'B', containing a list of people in attendance where plaintiff signed thereon as No.'3' and attached a 'signature'!!

Whereas this was not evidence in court it is informative of the fact that plaintiff was not truthful in denying his signature on the agreement. It also puts in doubt the learned trial Magistrate's reliance on the specimen handwriting given by plaintiff in court which was received in evidence as PE.I.

In view of the above findings, in my opinion having assessed the evidence on record afresh. I am in agreement with the appellant that her evidence was not accorded the proper weight it carried. The learned trial Magistrate unilaterally dismissed evidence of the defendants superficially just because there was no eye witness to the agreement who testified.

The learned trial Magistrate ignored the fact that documentary evidence is always the best evidence. Section (58 of the Evidence Act).
This court held in ***Amos Obonyo versus The Registered Trustees of Tororo Diocese HC-CA-53/2014-***, that contents of documents are best proved by documentary evidence. In contentious matters such as this one the best evidence to be admitted is the primary evidence.

Under Section 61 of the Evidence Act- it is provided that primary evidence means the document itself produced for the inspection of court.
I find that the learned trial Magistrate having been able to inspect DE.1, and having heard evidence of DW.1, DW.2, DW.3 and CW.1 ought to have tested its evidential value as against plaintiff's evidence other than merely dismissing it on account of among others CW.2's evidence given at locus.

I must also point out that the procedure at locus was not correctly handled.

The courts have held in many cases that court should not go to locus to patch up evidence, but to seek clarifications on evidence which was adduced in court.

For court to assist the parties by calling a key witness who was meant to testify on a crucial document in court but was not called by the party, only to be called by court at locus is a fatal procedural mishap.

See the case of ***Yaseri Waibi v. Edisa Lusi Byandala [1982] HCB 28*** which held:

> "*the practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap for them or court may run the risk of making itself a witness in the case*."

The court at locus must adhere to the procedure as set out under practice direction 1/2007 issued by the Chief Justice. The court should:

a) Ensure that all the parties, their witnesses and advocates if any are present.
b) Allow the parties and their witnesses to adduce evidence at the locus in quo.
c) Allow cross-examination by either party or his/her counsel.
d) Record all the proceedings at the locus in quo.
e) Record any observation, view opinion, or conclusion of the court, including drawing a sketch map if necessary.

In this case the record shows that CW.1 and CW.2 were called as witnesses. It is not on record whether they took oath. It is not clear from the record how they came up to give this evidence. It was therefore irregular for court to base the rejection of the agreement adduced in evidence in open court relaying on among others on evidence given by CW.2 at locus. This is because CW.1 and CW.2 are strangers to the trial at best.

In conclusion for all the reasons I have discussed I have reached a conclusion that the trial Magistrate did not properly evaluate the evidence in this matter. She failed to reach a correct conclusion that the evidence did not prove on the balance of probability that:

1. Plaintiff is customary owner of the suit land.
2. That defendant is a trespasser on the land.
3. That plaintiff was entitled to any of the sought reliefs.

I therefore find that the appellant succeeds on all the grounds of appeal as raised. I find that the appeal succeeds. The judgment and lower court orders are hereby set aside and replaced with judgment for the defendant/appellant.

This court finds that the Appellant/defendant is owner of the suit land and is not a trespasser. Appeal is granted with costs to the appellant here and below. I so order.

Henry I. Kawesa

JUDGE

15.11.2016