

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA 29 OF 2014

(Arising from KAS – 00 – LD – CS – 0012 of 2012)

1. KURUSMU EDRISA
2. EDIRISA BALINGAYA }APPELLANTS
3. MAMA REHEMA }

VERSUS

1. MASEREKA SELEVANO }
2. MBAMBU MIRIDA }RESPONDENTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an Appeal against the decision of His Worship Mfitundinda George Magistrate Grade one at Kasese delivered on 8/05/14.

Background

The Respondents as Administrators of the estate of Masinda Stephen Kahekamahwa instituted a Civil Suit against the Appellants for trespass on customary land and a declaration order that the suit land belongs to the estate of the late Masinda Stephen Kahekamahwa, a permanent injunction order, eviction order, general damages, mesne profits and costs of the suit.

That the late Masinda Stephen Kahekamahwa died intestate in 2007 leaving behind 8 acres of land at Kyihalimu, Kyaminyoku, Nyakabingo II, Kasese District.

In around 2008, the Appellants trespassed onto 3 acres of the suit land, started cultivating and also cut down several trees growing on the land belonging to the estate of the deceased. That the suit land was being utilised by the Respondents and was acquired by the deceased in 1966

and the Appellants unlawfully stopped and or prevented the family of the deceased from utilizing 3 acres of land which is part of the estate of the deceased. That due to the acts of the Appellants denying them the right to the suit land, losses, inconvenience, the Respondents sought general damages.

The Appellants on the other hand in their Written Statement of Defence averred that it is true that the late Masinda Stephen Kahekamahwa left customary land which is adjacent to that of the 2nd Appellant's customary holding. That the 2nd Appellant acquired the suit land in 1965 from one Mbabu a Village elder and the Appellants have at all times been in occupation of the same. That the suit should therefore be dismissed with costs.

Issues for determination were;

1. Whether the suit land belongs to the estate of the late Masinda Stephen Kahemukahwa the 1st Plaintiff's father and the 2nd Plaintiff's husband?
2. Whether the Defendants are trespassers on the suit land?
3. What remedies are available to the parties?

The trial Magistrate found the Appellants to be trespassers on the suit land and that the suit land belonged to the estate of the late Masinda Stephen Kahemukahwa, ordered for eviction, permanent injunction, and costs of the suit in favour of the Respondents. The Appellants being dissatisfied with this decision lodged the instant appeal whose grounds are;

1. That the learned Magistrate Grade one erred in law and fact when he handled the matter that was *Res-judicata* as the same had been fully handled by the Local Council I Court of Kyaminyoku, Kyahalimu cell, Central Division, Kasese Municipality between the same parties and on the same subject matter.
2. That the Learned Magistrate Grade one erred in law and fact when he made judgment in respect of 8 acres contrary to the 3 acres prayed for in the Plaintiff's pleadings.
3. That the learned Magistrate Grade one erred in law and fact when he ignored the Defendant's objection on limitation to suits having been in possession of the suit land for over 49 years.
4. That the learned Magistrate Grade one erred in law and fact when he ignored the fact that the Plaintiffs filed the suit without locus for failure to obtain Letters of Administration.

5. That the learned Magistrate Grade one erred in law and fact when he made judgment on unregistered Court file as the Defendant has never been party to Civil Suit No. KAS – 00 – CV – CS – 012 of 2013.
6. That the learned Magistrate Grade one erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong decision.

Counsel Kizito Deo appeared for the Appellants and Counsel Masereka Chan for the Respondents.

It is the duty of the first Appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the appellate court may re-appreciate the evidence and reach its own conclusion. (See: **Pandya versus Republic [1957] EA 336, Kifamunte Henry versus Uganda Criminal Appeal No.10 of 1997, Page 5. (Supreme Court).**)

In the instant case both parties did not make appearance in Court at the various dates of hearing. The Appellants only appeared in Court on two occasions as per the Court record.

On 12/9/15 neither the parties nor their advocates were in Court.

On 21/10/15 none of the parties or their advocates appeared in Court.

On 19/8/16 Counsel Kateeba Cosma appeared on holding brief for Counsel Chan Masereka and the parties were in Court. Counsel Kateeba prayed for a schedule for written submissions which was given by Court.

On 16/11/16 there were no written submissions on Court record, no parties or their advocates appeared in Court.

Neither the parties nor their advocates have endeavoured to follow this appeal diligently or given any explanation for the failure to attend on the various dates. I find this to be a case of gross negligence, abuse of the Court process and a waste of time.

Order 9 Rule 17 of the Civil Procedure Rules, provides that;

“Where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed.”

In the Case of **Agri-Industrial Management Agency Ltd versus Nayaika Lee Kasunga, HCT – 01 – CV – CS – 0039 of 2003** which was before this Honourable Court relied on the case of **Canster Rags (U) Ltd versus Stanbic Bank (U) Ltd and Others, HCCS No. 159 of 2012** which was dismissed for non-compliance with the directions of the commercial Court Judge coupled with failure by the Plaintiff and its counsel to appear in court on the scheduled date.

This appeal is dismissed for want of prosecution. I make no orders as to costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

20/12/2016

Delivered in open Court in the presence of;

1. The Appellant
2. The 1st Respondent
3. Court clerk – James

In the absence of both Counsel.

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OYUKO. ANTHONY OJOK

JUDGE

20/12/2016