

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

**HCT-04-CV-CA-223-2014
(ARISING FROM BUSIA LAND CIVIL SUIT NO. 27 OF 2011)**

1. MARY TUSUBIRA

2. HANIFA BABIIKE ::: APPELLANTS

VERSUS

RUKIA SALIM:::RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This appeal is against the Judgment of Her Worship **Nantawo Agnes** Magistrate Grade I Busia of 25 November.2014; decided in favour of respondents.

The appellant raised four grounds of appeal.

As a first appellate court, this court has a duty to re-evaluate the evidence and reach its own conclusions; aware that it didn't have a chance to hear or observe the witnesses.

The court therefore has accordingly reassessed the evidence on record and I do find as follows.

In the lower court, by plaint (amended), the Plaintiff sued the defendants jointly and severally for recovery of a piece of land measuring approximately 50 by 100 feet situated at Arubaine 'A' village, Busia Municipal Council in Busia district. Plaintiff married late **Salim Bakali** in 1950's and together they possessed customary land in Arubaine A village Busia.

That in 1984 **Bakali** died and left his estate including the suit land to the plaintiff. that sometimes in early 1980s a one **Abdu Kasanvu** (deceased) who used to sleep on the street in Busia town appeared on plaintiff's land and out of sympathy allowed him to sleep on a portion of the land.

In September 2010 he died and defendants (daughters) began laying claim to the land.

That defendants have surveyed the land and are in process of having it Titled by Busia District Land Board. Defendants have further hired out the suit land for furniture workshop.

Plaintiffs prayed for permanent injunction, declaration of ownership, damages for trespass and conversion and cancellation of certificate of Title, vacant possession and costs of the suit.

In defence by Written Statement of Defence defendants objected to plaintiff's *locus standi* under paragraph 3. They also denied the contents of the plaint above. They under paragraph 4 (b) alleged that they are joint administrators to the land in dispute at Arubaine 'A' in Busia which forms part of the estate of their late father Hasafu Edilisa who owned the land before his demise.

Defendants were both borne and lived on this land before their marriage and their father formally bequeathed the suit land to both defendants under his last will and testament. They named the Administration Cause as Administration No. 27 of 2011. They denied the case for the plaintiff.

In court, to prove her case the plaintiff led evidence of **PW.1 Rukia Salim, PW.2 Haji Zubairi Salim, PW.3 Mutesi Mwajibu, PW.4 Nasur Yusuf**, while defendants led evidence of **DW.1 Mary Tusbira DW.2 Hanifa Babike, DW.3 Wafula Wakodo, DW.4 Ibrahim Wasike.**

DW.5 Obuya Basani Richard defendants relied on a number of documents and court admitted some as exhibits, others for identification.

Court visited the locus.

In his judgment the learned trial Magistrate found for the respondent. The learned trial Magistrate basically answered four issues, which all terminated in favour of the respondents hence this appeal.

I will now consider the grounds of appeal as presented by the appellants and responded thereto by the Respondent. All grounds were argued together. I will therefore follow the same trend.

To determine the appeal, court has to examine the issue again.

1. Who is the rightful owner of the suit land?
2. Is the suit land part of the Estate of **Abdu Kasanvu Edirisa Hasafu**.
3. Did defendants trespass on the suit land?
4. What remedies are available?

The burden of proof is on the Plaintiff/Respondent to prove the case on a balance of probability. (Sections 101-103 of the Evidence Act).

The plaintiff from her plaint pleaded ownership of the suit land since 1950, by virtue of marriage to **Salim Bakali**. She claimed that on his death she left his estate (including the suit land to the plaintiff). She also claimed that a one **Abdu Kasanvu** had been allowed to live on that land, then following his death in 2010, defendant laid claim to the land, surveyed it and were in process of titling it, an act she considered a trespass and unlawful conversion.

The Plaintiff had a duty to come to court with evidence to prove all allegations above.

Did she do so to the required standard of proof?

The evidence on record shows that she led oral evidence of PW.1-PW.4. This evidence was denied by defendants who on their side brought to court five witnesses and a series of documentary evidence.

Court believed the plaintiff's version being swayed by the fact that *"the Plaintiff proved that she inherited the suit land from her late husband. The question of her marriage was not in issue as it was not brought out during scheduling..... on the contrary I find the defendants to have failed and involved themselves in acts of fraud and failed to prove genuine evidence of ownership of the suit land. The defendants cannot deny participation in the fraud they engaged in deliberate acts of dishonesty..."* (See page 12-13 of typed judgment).

From that conclusion appellants alleged that learned trial Magistrate did not evaluate evidence properly hence reaching wrong conclusions.

Having gone through the evidence, what evidence did plaintiff have viz viz the defendant's evidence? Was court right in its assessment/rejection of the evidence? I find as follows.

It was PW.1's assertion that the land belonged to her and her husband jointly as customary land (in pleadings) and left to her as part of her husband's estate on death. However when giving evidence she said the land was clan land. She then stated that upon death of the father of husband (father-in-law) it was then left to her husband.

In civil matters, evidence must be adduced to prove every fact alleged by the one who alleges. This burden does not shift. The plaintiff in this case does not clearly show under what title genre she sued the defendants. Was she an owner of the land by customary possession? Was she an owner by gift from her husband (late)? Was she an owner by inheritance? Counsel for the appellant/defendants went at length in submissions at the lower court and on appeal to argue that evidence by plaintiff did not prove the question of title. I do agree especially when the contradictions of PW.1's evidence as pointed out are taken into consideration. The learned trial Magistrate ignored these matters and jumped on the evidence of the defence to try and use it to offer credit for the plaintiff's case. No reasons are given why she believed that plaintiff has title. The reasons given are that defendant's documents were tainted with fraud.

From evidence on record, I notice that the defendants came to court with five witnesses. DW.1-DW.5 on top of those witnesses the defence exhibited for court's examination documentary evidence in proof of their title as opposed to that of plaintiff. They showed by evidence that they hold letters of Administration to the said land, that their father was in possession of the land until 2005 when he died. He willed the land to them. They have taken steps to survey. They are doing business thereon (see evidence of DW.1-DW.5). See exhibits DE.1, DE.2, 3, 4, 5, 6, 7, 8-16.

I find that the court went into an examination of forgeries and fraud which matters were neither pleaded by the plaintiff, but smuggled in by counsel for plaintiff upon being faced with the documents in court.

At best, these documents should not have been admitted in evidence by court if it felt they were of no evidential value. However once admitted then court ought to have let the parties rely on them as they presented them in accordance with the laws of evidence. It was jumping into the area for court to “assume fraud” just because a document appears erased or has a missing letter etc. No evidence was led before court to warrant the finding that “*defendants cannot deny participation in the fraud as they engaged in deliberate acts of dishonesty.*”

Contrary to that finding I find on record evidence of **DW.3 Wafota Wakodo** who testified that his brother **Edirisa Hasafu** owned the suit land in 1942; that it originally belonged to his father who also got it from **Obara** a traditional ruler for whom **Wakodo** guarded. DW.3, supplied them milk in 1945. He testified how defendants were children of the late **Asaf** that the land had a lineage of descendants since 1942- with no disputes.

All this evidence was not evaluated by learned trial Magistrate when rejecting the defence case.

Also **DW.4 Obuya Richard** told court how the one **Edirisa Hasafu** used to pay taxes to him as a former chief. DW.5 a former land supervisor told court a history of how defendants took steps to regularize the title to the land. The impact of the evidence of the defendants in court is that it offered a parallel claim to the land resting in both inheritance and registrable interest. Their title to the land therefore could not merely be washed away by a mere oral claim that the land they surveyed did not belong to them on account of an “alleged fraud” by court. The plaintiff had a legal burden to show that she came to court with a better title than the defendants.

I do not find that evidence on record for the following reasons:

1. The plaintiff failed to lead evidence to show that she customarily owns the land. Her own evidence showed that she got the land from her late husband. However she did not have in court any proof of such inheritance.
2. The plaintiff did not have Letters of Administration to support her allegation that she is managing the estate of the late and to show that the land in question was part of the alleged estate in view of the claim by defendants that this was part of the estate of their father.

3. The plaintiff did not prove by evidence the fact of adverse possession. The law is that the one in adverse possession holds better title until the contrary is proved; by the one who claims better title.
4. The Plaintiff's evidence was discredited in cross-examination to such an extent that it appears from record that plaintiff's reference to defendant's father as **Abdu Kasanvu**, and to the neighbours of this land as not including customs Road- is itself questionable as to whether the land in dispute is well known to her.

From the above, I do agree with counsel for the appellants that the learned trial Magistrate was not correct in her assessment of evidence.

I do also disagree with the Respondents' counsel that the learned trial Magistrate was right to assume fraud. I do not agree that court can frame fraud, as an issue arising out of submissions by counsel. The case of *Israel Kabwa v. Martin Banoba Musiga SCCA .52/1995* offers help in cases where though not pleaded, the party raising it leads evidence to prove it in court; and parties submit on it.

In this case, defendants' documents were being rejected at time of assessing their evidential value by learned trial Magistrate. Definitely that was not the case in the *Kabwa case* (supra). All arguments arising therefrom therefore fail.

I do not agree that the case of *Makula International v. Cardinal Nsubuga (1982) HCB 11*, should be employed as a magic wand for every default or error allegedly pointed out to court. In this case the documents have errors of form, but no fraud has been proved in court by evidence. The technical officer who testified as DW.5 showed court that these were official documents and the process has never been faulted anywhere for fraud. I therefore do not find any need to take note of any illegality as none has been proved in this court or in any other court.

I agree that as per the holding in *Interfreight Forwarders (U) Ltd v. East African Development Bank CA No. 33 of 1992*:

“ a party is expected and is bound to prove the case as alleged by him and covered in the issues as framed he will not be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings.”

I agree but add that adverse possession is a common law principle which is noted as of right pleaded or not. Whoever is in possession is assumed to have adverse possession and cannot be held a trespasser save by one who holds a better title. It was the duty of the plaintiff to lead evidence showing that she held a better title to the land than the defendants.

In my view she failed in this duty. Defendants had better title being holders of Letters of Administration to an estate, they proved by evidence of DW.1-DW.5, as having belonged to their father since 1942. They further led documentary evidence to show that they have taken steps to survey and process title, a process which began as far back as 1980's by their late father. They have been in possession and have rentals on the land, all actions which show adverse possession.

Their title was not destroyed by evidence of PW.1-PW.4 who only alleged but had no proof of the inheritance by PW.1 to the late's estate as claimed by plaintiff.

Having found as above, I have reached a conclusion that the appellants have proved that the learned trial Magistrate fall into the temptation of using the pitfalls in the defence case to cast doubt on the defence and believe the plaintiff without assessing the plaintiff's evidence and determining the case on the strength of the plaintiff's case. The burden is always on the plaintiff. I find that the Plaintiff/Respondent failed to prove their case on the balance of probabilities.

I hold that:

On issue 1- Defendants were the rightful owners of the suit land.

Issue 2- The suit land is part of the estate of the said **Hasafu Edirisa**.

Issue 3- Defendants did not trespass on the suit land.

Issue 4- The Respondents are not entitled to any of the reliefs they sought.

I therefore find that the appeal succeeds on all grounds. I allow the appeal, set aside the lower court judgment, and enter judgment for the appellants with costs here and below.

I so order.

Henry I. Kawesa

JUDGE

12.12.2016