

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

**HCT-04-CV-CA-0177-2013  
(ARISING FROM BUSIA LAND CIVIL SUIT NO. 0033 OF 2011)**

**YOFISA OGWEYO ADYERI::: APPELLANT  
VERSUS  
OGUTTU EMMANUEL OKUMU:::RESPONDENT**

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

**JUDGMENT**

The appellant was aggrieved by the Judgment of Her Worship **Nantaawo Agnes Shelagh** of Busia Grade I Court dated 12<sup>th</sup> November 2013.

Appellant raised 6 grounds of appeal.

In the lower court, the appellant had been sued by the Respondent vide Busia Civil Suit 33 of 2011.

According to the plaint under paragraph 3 and 4 thereof, the Respondent had sued defendant/appellant for harvesting one acre of his maize worth 1,000,000 (one million) Uganda shillings and sorghum. Paragraph 4 states that the plaintiff derives customary inheritance from the land of his late father **Adyeri** distinct from that of the plaintiff herein referred to as disputed land.

In paragraph 5, he stated that there is in between the land of the late **Ibulaimu Ogwangi** the father of the plaintiff and land of the late **Adyeri** father of the defendant, there was land of the late Nathan the father of **Yokana** hence the plaintiff and defendant do not share a common land boundary at the disputed land.

In the written statement of defence, the defendant denied all the above and averred in paragraph 4 that plaintiff is not the heir of the late **Ibrahim Ojwang**. In paragraph 5 he stated that the land in between that of the father of the plaintiff and that of the defendant belonged to **Onyango Nikola** who gave it to **Oguttu Johnson Ogweyo** in 2005.

The duty of a first appellate court was stated in the case of **PANDYA v. R (1957) EA 336**.

The court has a duty to re-evaluate the evidence and reach its own conclusions, bearing in mind the fact that it did not have a chance to examine and observe the witnesses.

I have carefully gone through the lower court record, re-evaluated the evidence and analyzed submissions by counsel.

I now determine the grounds of appeal in the order they were presented as here below:

Grounds 1, 3, 4, 5, and 6 were argued together and ground 2 separately.

### **Ground 2 Res Judicata**

The appellant faults the learned trial Magistrate for disregarding the appellant's plea of *res judicata*.

From the record of proceedings I find that both plaintiff and defendant relied on the outcome of civil case CV.25/65. Plaintiff tendered its judgment and it was received in court as PIDI, while defendant had the same judgment admitted as D.Exh.I.

From the proceedings at paper I **PW.I Oguttu Emmanuel** testified that the land he was disputing for was the same land decided in 1966 by court and **Nicholas Onyango** was the successful party. He confirmed that there is a relationship between the parties in 1965 and to the defendant. (See last paragraph Page 2).

He tendered in the copy of the said judgment.

**PW.2 Christian Bwire** confirmed the litigation in court between **Nicholas Onyango** and **Ojwang Ibrahim**.

**PW.3 Egesa Alex** confirmed that there was a matter between **Nicholas Onyango** and **Ojwang Ibrahim** and a Magistrate planted boundary marks between the parties.

The defendant **Ogweyo Yofisa** also alluded to the 1965 case between **Nicholas Onyango** and **Ojwang Okumu** and tendered a judgment received as D.Ex.1 by court.

**DW.2 Fransico Okumu** also traced the earlier dispute before court, confirming that **Onyango** won.

**DW.3 John Okumu** confirmed that **Nicholas Onyango** was defendant's guardian. He confirmed that there had been a dispute which the Magistrate settled between **Onyango** and plaintiff's father.

**DW.4 Mangeni Nekesa** also confirmed that **Onyango** and **Ojwang** once had a dispute over this land. Plaintiff's father lost and **Onyango Nicholas** was successful. She said that the defendant was rightfully on the land because it was left to him by his father. It was therefore the defence raised by the defendant that he was on the land not as a trespasser, but it was plaintiff who was a trespasser. His argument by evidence was to the effect that **Onyango** had left the land to him. Plaintiff's father had lost the case and the matter having been determined already, it was *res judicata* and plaintiff had no *locus* to reinstate it.

This argument was not well addressed in rebuttal by respondent who was not represented. The arguments raised are not comprehensible and were an attempt to lead evidence in submissions, which is unacceptable.

The law provides under Section 7 of the Civil Procedure Act Cap.71 that:

*“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that court.”*

Counsel quoted decided cases of *Mwanje Enoc v. Nakamate Deborah Mwanje Misc. App. 66 of 2013* arising out of *DV. 64/2012* but no citation.

*Abasolom Batunya v. Sentalo Moses Anor. Civ. Rev. 7/2009* (No citation). I must point out that though principles enunciated by the cases cited though right, the practice by Counsel of quoting cases without citations, and not providing the copies of such Authorities quoted is unbecoming and must be avoided.

The principle is that for a case to be *res judicata* the matters in issue ought to have been finally decided upon by a competent court.

From evidence on record it is a fact that both plaintiff and defendant sought reliance on the outcomes of CV.25/65 between **Nicholas Onyango** and **Ojwang Ibrahim**. This case was finally determined and boundary marks were laid by a Magistrate according to the evidence.

From the evidence plaintiff claimed that he derived title from his father **Ibrahim Ojwang** (on same piece of land) which **Ibrahim** contested with **Onyango** and lost the case). On the other hand Appellant/Defendant also claimed interest in this same piece of land tracing his right of ownership to **Nicholas Onyango** who was his guardian, and had won the case against **Ibrahim** (Respondent/Plaintiff's father).

Technically speaking, the Plaintiff/Respondent went to court without *locus standi*. He reintroduced in court a cause of action which was already litigated upon by his father against defendant's guardian and it had been finally settled by court. The matter was *res judicata* and could not be reopened by plaintiff.

I agree with appellant's counsel therefore that following the law of evidence, "he who asserts must prove." The plaintiff failed to prove his case and it was clearly shown by the defendant that his suit was *res judicata*.

This ground therefore succeeds.

**Grounds 1, 3, 4, 5, and 6:**

These grounds allude to the learned trial Magistrate's failure to evaluate the evidence.

I have re-evaluated the evidence. From the evidence on record it was clear that the land belonged to late **Nicholas Onyango**. This land had been subjected to a litigation in 1965 between plaintiff's father **Ibrahim Ojwang** who lost to **Nicholas Onyango**. The boundaries and neighbours were well articulated by witnesses for defendant. Having found that under ground 1 Plaintiff/Respondent had no locus to the suit land, it follows that Defendant was able to establish locus.

I do not agree with the learned trial Magistrate's finding of fact that defendant failed to establish ownership of the land and was hence also a land grabber.

I find evidence of DW.1, DW.2, DW.3 and DW.4, consistent and reliable. The evidence shows that defendant as a beneficiary from **Nicholas Onyango** his guardian. The learned trial Magistrate referred to contradictions between the defendant and his witnesses regarding how he acquired the land, and his action on locus of failing to locate his father's grave as evidence of intent to mislead court.

I am aware that minor inconsistencies in evidence are always excusable for as long as they do not affect the root of the matter. I find explanations given in court and at locus, as to how defendant came into possessing the land cogent, truthful and consistent.

I find that the defendant having been in possession of the land at time of the suit he cannot be held a trespasser. He had a good equitable interest in the land by virtue of the late **Onyango's** title. On a balance of probability I find that the appellant led sufficient evidence to establish ownership.

The above grounds are therefore proved and I hold that the learned trial Magistrate did not evaluate the evidence properly thereby reaching a wrong conclusion. These grounds are upheld.

In the result therefore, this appeal succeeds on all grounds.

The judgment and orders of the lower court are hereby set aside and replaced with a finding for the appellants with costs here and below.

I so find.

**Henry I. Kawesa**

**JUDGE**

**21.11.2016**