

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. 0010 OF 2016

(Arising from Hoima Chief Magistrates Court Civil Suit No. 16/2015)

IRUMBA LAWRENCEAPPELLANT

VERSUS

MUGISA JUSTINE.....RESPONDENT

BEFORE HO.JUSTICE RUGADYA ATWOKI

JUDGMENT

This appeal arises from the judgment and orders of the Grade I Magistrate sitting at Hoima, in which he ruled that suit land belonged to the plaintiff and that the defendant was a trespasser. The defendant felt aggrieved and dissatisfied with that decision and appealed to this court.

The brief background from which this suit arises as discerned from the record of proceedings is as follows. The appellant was the daughter of Jonh Nyakwehara, a friend and neighbour of Stephen Komubitoke, the father of the appellant. Both old men have since died. The parties herein inherited the lands of their respective fathers, situated in Kaigo village, Munteme parish, Kiziranfumbi sub county, Buhaguzi county in Hoima District.

The disputed piece of land measures approximately one acre. The plaintiff Mugisa Justine stated that the land was part of the estate of her father. Their family had lived on the land since 1957, and she was born in 1961. They had at all material times had peaceful occupation of their seven acres of land including the disputed one acre. She and her siblings were born and lived on the same land. It was only in 2015 that the defendant trespassed on the same; hence this suit. She and the defendant are closely related. Her father is a brother to the defendants mother.

The defendant now appellant on the other hand stated that information from his father was that the land occupied by the plaintiff and her family was a gift from him to plaintiff's father. But the disputed piece was outside the land offered to them as a gift.

The learned trial Magistrate heard the evidence from both sides. He visited locus and decided as stated above. Four grounds were set out in the memorandum of appeal as follows;

1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence for the defendant but only analysed that of the plaintiff thereby exhibiting elements of bias thereby arriving at the wrong decision.
2. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching an erroneous decision which occasioned a miscarriage of justice.
3. The learned trial magistrate erred in law and fact when he failed to consider the evidence collected at the locus regarding the boundaries of the parties thereby coming to a wrong conclusion which occasioned a miscarriage of justice.
4. The learned trial magistrate erred in law when he failed to conduct a visit to the locus in quo in accordance with the law which occasioned a miscarriage of justice.

The defendant prayed for judgment in his favour with costs, or in the alternative, for orders of a retrial. Mr. Hatega represented the appellant while Mr. Alibankoha represented the respondent.

Mr. Hatega argued the 1st and 2nd grounds of appeal together. These were centered on evaluation of evidence. He ended with the 3rd and 4th grounds also together which were a complaint regarding the visit to the locus in quo. In reply Mr. Alibankoha for the respondent did likewise. I intend to follow the same procedure.

This is a first appeal. The approach to be followed by a first appellate court is that it ought to subject the evidence adduced before the trial court to a fresh and exhaustive scrutiny so that it weighs the conflicting evidence and draws its own conclusions. It is not enough for the appellate court to merely scrutinise the evidence to see if there was some evidence to support the findings and conclusions of the lower court, it must make its own findings and conclusions. Only then can it decide whether the findings of the trial court should be supported. In so doing the appellate court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. *Yosamu Kawule v. Erusania Kalule* [1977] HCB 135, *Sitefano Baraba v. Haji Edirisa Kimuli* [1977] HCB 137, *Ugachick Poultry Breeders Ltd. v. Tadjin Kara C.A.*, Civil Appeal No. 2 Of 1997.

The plaintiff's case was from four witnesses. PW1 was the plaintiff, now respondent. She told court she and her family members were in possession and had quiet enjoyment of suit land from time she was born till 2015, when the defendant entered the same, divided it up among his family members and planted pine trees thereon. Her father and defendant's father had co existed as neighbours in the same area peacefully prior to their passing on. She described the boundaries of suit land. Her knowledge was that her father acquired suit land in 1957 through free acquisition, which was duly recognized at that time.

PW2 Katusabe Augustine was the brother of late John Nyakwehara, father of the plaintiff. His testimony was that he lived with his brother on suit land peacefully until he married in 1983. He described the boundaries, and that the defendant had planted pine trees in part of the boundary. All the time he lived with plaintiff's father on this land, the father of the defendant never complained about suit land which was even then utilized by plaintiff's father. All lived peacefully together. He never heard of Komubitobe giving Nyakwehara any land.

PW3 Nsungwa Teopista is the mother of the defendant. She told court that suit land belonged to the plaintiff's father. She had lived on that land with her brother the plaintiff's father and even later fell in love with the defendant's father while living on that land. Her testimony was that defendant was born while she was living on that land with her brother. By the time Nyakwehara acquired this land in 1957, her son the defendant was not yet born. She was therefore well acquitted with the facts concerning the same. She told court that she was on very good terms with her son the defendant, and was currently living on land which he bought for her. Her testimony which was not controverted was that her son only wanted to grab land belonging to the plaintiff. Her supreme desire was for these two to live in harmony.

PW4 Byangire Gerald was a cousin of the defendant while the plaintiff was his aunt. He was living on suit land since 1995 with the permission of his grandfather, the father of the plaintiff. But in 2015 the defendant came and cleared one acre, which he paddocked and started grazing his cattle there from, hence this suit. Until that time, there was no dispute at all between the parents of the parties, or any other person in respect of that land.

The defendant testified as DW1. He told court that his father showed him the boundaries of their land, and that plaintiff's father was only I that land as a gift he gave to him. He told court he was

using the one acre piece to graze his cattle. He told court that in 2008 he planted pine trees on that land and no one raised a finger in protest.

DW2 Kasangaki Leonard told court that he has stayed on the land of the defendant since 1988. His mother was wife to plaintiff's mother but they never had a child together and they separated. He asked plaintiff's father for land to build, and he was referred to defendant's father, for the reason that it was defendant's father who gave him land also. The witness approached defendant's father who referred him to Katusabe Augustine (presumably PW2) who allocated him a small 40x40 feet plot, and that's where he stays to date. He testified that suit land was at all material times in possession of plaintiff's father. The plaintiff has since been in occupation. The defendant has never utilized that piece of land which is about one acre.

DW3 Nyamaizi Federesi was the step mother of the defendant. She was the wife of Komubitoke, the defendant's father. She was the one living with him by the time of his death. She told court that the defendant was the one utilizing the suit land growing millet, rice and cassava. She told court that the plaintiff was not utilizing suit land as she was married elsewhere in Kabwoya. She told court that her late husband gave the plaintiff's father land on which to build, but did not specify the extent of the land.

In cross examination she told court that the grandchildren of plaintiff's father were the ones in possession of suit land, and that crops like coffee which are on suit land belonged to the plaintiff's father. The defendant has never utilized suit land.

From the evidence on record, one thing comes out clearly. The boundaries of the suit land are well known. Each of the witnesses described it with clarity and precision. The suit land is about one acre.

PW3 Nsungwa Teopista the mother of the defendant told court that she lived on the land with her brother, Nyakwehara. While there, she fell in love with Komubitoke. They produced four children and the surviving one being the defendant. Her testimony was that the suit land belonged to the plaintiff. Her co wife Nyamaizi Federesi DW3 told court that the defendant was utilizing suit land to grow millet, rice and cassava. She was the sole witness to testify that the defendant was so utilizing suit land. Even the defendant himself did not state so. He only said he was using suit land to graze his cattle.

The testimony of Nyamaizi Federesi was inconsistent with that of even the defendant himself. It was even inconsistent with itself. In cross examination she told court that the defendant did not after all utilize the suit land. That it was the grand children of the plaintiff's father who were in possession.

The defendant was clear. His father gave the plaintiffs father land. The defendant told court that there was nothing written in respect of this give away. He told court that indeed he was only utilizing the suit land to graze cattle, and this was confirmed by the plaintiff. When he cleared the area to create paddocks, the plaintiff objected.

PW2 Augustine Katusabe the brother of Plaintiffs father also lived on suit land. His testimony corroborated that of the plaintiff. There was peaceful co existence between the parents of the parties as plaintiff's father utilized suit land. There was no mention of one having given the other.

Both the plaintiff and the defendant came on the scene later. Those who were on the scene like PW3, PW2 and DW3 testified to the plaintiff's father being in possession of suit land at all material times.

I found it rather interesting that the defendant who, like the plaintiff got onto the scene much later, and who testified that the father gave land to the plaintiffs father, he was at the same time trying to undo what the father did, if indeed that was what happened. If the defendant inherited the estate of his father, then he did so subject to any existing encumbrances. However, there was no proof of this give away from the evidence on record. I have already stated that the evidence of Nyamaizi Federesi left a lot to be desired as it was quite contradictory, even contradicting the testimony of the defendant himself.

Augustine Katusabe PW2 was referred to by DW2. According to DW2, when he wanted land to settle, and he asked defendants father about the same, defendant's father told him to approach Katusabe the brother of plaintiff's father. It was Katusabe who allocated DW2 a plot of land, and not defendant's father. That would strengthen plaintiffs case that when it came to suit land, the plaintiffs father was in charge.

From the evidence on record, I found that the learned trial Magistrate correctly evaluated the evidence before him, and came to the right conclusion. He was criticized for not mentioning the witnesses of the defendant. That was his style. He stated that he had analysed the evidence of all the witnesses, though he did not go into the specifics of what each witness said. I however would not fault him in his conclusion. The 1st and 2nd grounds of appeal are therefore dismissed.

The 3rd and 4th grounds of appeal were in respect of locus. It was submitted that the learned trial magistrate did not follow the procedures of conducting locus proceedings. The main complaint was that he did not cross examine the witnesses about their testimony in court, and especially the boundaries of disputed land. According to Counsel for the appellant, the land visited in locus was different from the land in dispute. For example, the defendant stated that the boundary of his land was a thorn tree known commonly as ‘omuko’. Counsel submitted that there was no attempt by court to establish this boundary mark.

I found the criticism of the trial court at locus not made out. I must admit however that I did not see the sketch plan or the notes at the locus. I stated elsewhere that virtually each witness and the parties clearly mentioned the boundaries of suit land. There were pine trees in the plaintiff’s suit land though some were in the road reserve. The other boundaries seemed not to be disputed. The ‘omuko’ tree was not mentioned by any other witness from either side. In any event, there did not appear to be any dispute about the boundaries of suit land. The dispute was whether the defendant trespassed onto to plaintiffs land.

I therefore dismissed the 3rd and 4th grounds of appeal. In the result therefore the appeal is dismissed with cost her and in the court below to the respondent.

Rugadya Atwoki

Judge

24/10/2017.

Court: The Ass. Registrar of the court shall deliver this judgment to the parties.

Rugadya Atwoki

Judge

24/10/2017.