

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0020 OF 2015
(Arising from Arua Chief Magistrate’s Court Civil Suit No. 0005 of 2006)

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BITHUM CHARLES **APPELLANT**

VERSUS

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ADONGE SALLY **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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In the court below, the respondent sued the appellant for general damages for trespass to land, a declaration that the land in dispute, measuring approximately ten acres, belongs to the respondent, a permanent injunction against further acts of trespass, mesne profits and the costs of the suit. The respondent's case was that the land in dispute situate at Ocolini village, Buntu Parish, Oluko sub-county, Ayivu County in Arua District forms part of the estate of her late uncle, Silvano Wayi in respect of which estate she is the legal representative by virtue of letters of administration granted to her on 29th May, 2006. Before his death, the late Silvano Wayi was the owner of that land under customary tenure since 1932. He had a settlement on the land, grew seasonal and perennial crops on the land and planted fruit trees and trees for timber and firewood on the land. During the 1980s war, Silvano Wayi was killed and buried in Koboko. His son, Mawa took over the land but he too died in 1982 leaving behind his family in possession. The appellant forced the family of the deceased off the land and took possession.

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Sometime in the year 2000, the respondent discovered the appellant's trespass on the land and in the year 2004, the appellant sold off murruam from the land to a construction company without accounting to the respondent for the proceeds. The appellant thereafter refused to vacate the land despite the respondent's demand for him to vacate, hence the suit.

In his defence, the appellant refuted the respondent's claim and contended instead that it was his father who in 1946 gave a part of his land to the late Silvano Wayi for grazing his livestock. When during 1968 Silvano Wayi migrated back to Ocoko, he left his son Awongo in possession but he too fled into exile during the 1979 war, never to return. It is during the year 2001 that the
5 respondent returned and demanded to be offered an alternative piece of land which request was rejected by the family members of the appellant, prompting the respondent to seek the intervention of the L.C.II which directed the appellant to give the respondent two acres, with which directive he complied. The respondent now intends to acquire land beyond the boundaries that were set when she was given the two acres. He prayed that the suit be dismissed.

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The respondent testified as P.W.1 and stated that the dispute was over eight acres out of the ten, of the land that belonged to the late Silvano Wayi, her uncle. The late Silvano Wayi had obtained the land in dispute in 1952 as a gift from a one Keria and he had lived on and cultivated that land until his death in 1980. The respondent began administering the estate in 2006 and took
15 over possession of the land. Dispute over the land sprouted in the 1990s. The parties having failed to reach an out-of-court settlement, the respondent filed the suit. During 2003 - 2004, the appellant entered onto the land and destroyed a number of features on the land including graves, trees and houses. The appellant and his brothers planted eucalyptus trees on the land, made bricks on the land and allowed a construction company to excavate marrum from the land.

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P.W.2 Yosam Odo Onyoro testified that it is his father the late Onyoro who gave the respondent's father, Silvano Wayi, the land in dispute during the 1930s. The respondent was in possession when the appellant trespassed on the land. When the dispute was considered by the L.C.II, the respondent was dissatisfied with the outcome hence the suit. P.W.3 Tikodi Onesmus
25 testified that the land in dispute belonged to respondent's father, the late Silvano Wayi who had a garden and buildings on the land but these were destroyed during the war of 1979. Only the perennial crops and trees remained on the land. The appellant had trespassed onto the land and made bricks, cut down trees, cultivated crops and constructed two houses thereon. P.W.4 Awongo John testified that it is the appellant's father Opio who in 1983 began encroaching on
30 the land in dispute. It originally belonged to Onyolo who gave it to Silvano Wayi in 1932 who occupied it until his death in 1980. When the appellant cut the eucalyptus trees which were on

the land during the year 1990, and made bricks on the land, the issue was reported to the L.C.I Court which decided in favour of the respondent, giving her only a portion of the land. She was dissatisfied, hence the suit.

5 P.W.5 Aritia Tuwaha testified that the dispute between the parties was referred to him in his capacity as the Chairperson L.C.II. by the L.C.III of Oluko sub-county on 12th August, 2003. The executive, after hearing the evidence, ruled in favour of the appellant. Her father had previously lived on the land but fled into exile during the 1979 war. When they returned from exile, the family was denied the opportunity to re-settle on their land. The respondent prevented the
10 appellant from renovating the home. The court visited the land during the hearing and found graves, fruit trees and a hedge that marked the boundaries, on the land. The houses had collapsed. The respondent was a neighbour to the eastern side of the land in dispute. The appellant was dissatisfied with their decision because she had been given back only part of the land she claimed, hence the suit.

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P.W.6 Ndebua E. Nelson testified that he was at the material time to the suit, the Chairman of Oluko sub-county. The land in dispute originally belonged to his grandfather, Onyolo who gave part of it to the respondent's uncle, Silvano Wayi and the other to the appellant's grandfather, Sagara. The problem between the two families came about during the war of 1979 when many
20 people fled into exile, including the family of the respondent. When the respondent and her family attempted to re-settle on their land after the war, the appellant prevented them. They found that the crops, trees and graves they had left behind before fleeing into exile had been destroyed by the appellant. When the respondent reported to him, he referred her back to the L.C.II which decided in her favour, around October, 2013 and ordered restitution of about two
25 acres to her. The appellant continued intimidating her and in 2007 destroyed her house and some of the newly planted fruit trees. That was the close of the appellant's case.

In his defence, the appellant who testified as D.W.1 stated that he owns the land in dispute having inherited it from his parents. His father died in the year 2002 while his mother died in
30 1992. It is in 1946 that his father Mr. Quirino Opiyo gave a piece of land adjacent to Esau River to Silvano Wayi measuring only 20 x 20 metres. Silvano Wayi lived on that land until 1968

when he returned to his place of origin, leaving behind his son Awongo who joined the army and fled into exile in 1979 never to return. In the year 2000, he was approached by the respondent with a request for land to resettle her mother Erina, sister to Silvano Wayi, who was sick and suffering in Congo. Before the family could sit to decide on that request, the respondent filed a
5 complaint with the L.C.I of Ocoli village on or about 28th July, 2003. the matter was subsequently referred to the L.C.II for settlement. A meeting involving the elders was convened by the L.C.II. He was directed by the meeting to give the respondent land and he gave her three acres, which is the same piece of land his father had given to them. Boundary marks were installed. The respondent took possession, began construction of a house and undertook
10 cultivation of crops. He denied having encroached on any part of that land.

D.W.2 Mbia Enock testified that he was the sub-parish chief of Bunya Parish from 1st June 1980 to 1994. In 2003, the respondent made a claim to the land in dispute. A meeting involving the L.C.II Executive and the elders was convened. It was proved before them that the respondent's
15 late uncle owned three acres of the land in dispute and they directed the appellant to hand it over to the respondent. They proceeded to demarcate the boundaries of that land. The respondent took over possession of the land, built a house and grew crops thereon. She subsequently sold this land off. The area she was given was a distance from the area Awongo used to possess. Before 1979, Awongo used to be in possession of the land now in dispute. The appellant was now
20 cultivating crops on that land. The L.C.II decided to give the lower part to the respondent, leaving the upper part that used to be occupied by Awongo.

D.W.3 Kararina Ayikoru testified that she is the appellant's step-mother. Her husband Qurino Opio has been in possession of the land in dispute since 1977. She was using the land until it was
25 given to the respondent by the L.C.II. After the boundaries were demarcated, the appellant has never trespassed on the part that was given to the respondent. D.W.4 Owiny K. Frederick testified that the land in dispute historically belonged to the appellant's grandfather, Zagara. Upon his death, it was inherited by Quirino Opio, the appellant's father. When he too died in 2002, his eldest son, the appellant took it over. The respondent has no claim over the land. That
30 was the close of the defence case.

The court the visited the *locus in quo* on 25th February, 2014. The parties and their respective witnesses proceeded to show court the features they ahs mentioned in their testimonies before court such as the boundaries, the houses, trees and so on. The court allowed each party to exercise their right of cross-examination. The court prepared a sketch map of the land in dispute
5 and its surroundings as well as the features pointed out by the witnesses. It also placed on record such observations as were considered pertinent to the suit. Both counsel later filed their respective written submissions.

In his judgment, the learned trial magistrate found that the land in dispute originally belonged to
10 Silvano Wayi, who fled into exile and never returned. The appellant took advantage of that occurrence to trespass onto the land. He found that the respondent and her witnesses had been more impressive and consistent at the *locus in quo* in pointing out and identifying features on the disputed land which were evidently more ancient in comparison to those the appellant and his witnesses pointed out, which were more recent. He also found a number of contradictions in the
15 appellant's evidence relating to the history of ownership of the land. He found that the appellants activities on the land constituted acts of trespass. He ordered vacant possession in favour of the respondent with regard to the approximately five acres in dispute, declined to award any general damages but awarded her the costs of the suit.

20 Being dissatisfied with the decision, the appellant appeals to this court on the following grounds;

1. The learned trial magistrate erred in law and in fact when he failed to find the respondent's / plaintiff's suit *res judicata*.
2. The learned trial magistrate Grade one erred in law and in fact when he failed to properly
25 and judiciously evaluate all the evidence on Court record and at the *locus in quo* visit and reached a wrong decision that the appellant was not the lawful owner of the suit land and was therefore a trespasser on the suit land.

Submitting in support of those grounds of appeal, counsel for the appellant Mr. Sammuel
30 Ondoma argued that *res judicata* is provided for by section 7 of The Civil Procedure Act and the authorities to that effect include *Masural Ramji Kharia v. Attorney General, C.A Civil Appeal No. 69 of 2000* and *Cheborion Barishaki v. Attorney General, C. A. Civil Appeal No. 4 of 2006*.

The first suit relating to the subject matter was decided in 2004 by the L.C.II Court between the same parties over the same land. In that decision the respondent as plaintiff was given about 2.5 acres of the land. They were clearly demarcated by the L.C.II Court. The decision was proved in the evidence of P.W.5. There was a record tendered in court jointly marked as P.E.3. The respondent admitted having appeared in the court and that she was given 2.5 acres. She sued because she wanted all the land. The brother of the respondent P.W.4 Awongo John testified to the same effect. P.W.1, 2, 4, 5 and 6 admitted there was no appeal. After the L.C.II Court decided the matter in 2004, the plaintiff / respondent took possession until 2006 when she filed the suit against the appellant. From the judgment, the trial magistrate avoided what transpired in the L.C.II court and did not make any finding in that regards despite the evidence of all witnesses. The court made a visit to the locus and the demarcations were visible, the Kalijuku plants. The suit filed offends section 32 (2) (b) of *The Local Council Courts Act 2006*. She should have appealed and not filed a fresh suit. He prayed that the court finds the suit to be *res judicata*.

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With regard to the second ground, he submitted that the trial magistrate relied on hearsay evidence from the respondent on the issue of ownership. The respondent said she was told that her uncle owned the land by Wayi Awongo that it was given by a one Onolo to her uncle. Wayi Awongo was not called as a witness. P.W.2 also said he heard about that gift a long time ago. That he was not present when the land was given. P.W.3 too said he heard from the Children of Omolo. P.W.4 too just heard of the gift. P.3.5 and p.w.6 too just heard. He attached a lot of weight to this and relied on their testimony. They failed to tell the exact size of the suit land. The respondent said it was about ten acres and that two acres had been given to her by the appellant. P.W.2. said his father gave land both to the plaintiff's father and to the defendant's father and it was divided into two but he did not know the size. P.W.3. stated that it was 2.5 acres and it had already been given to the respondent by the L.C.II P.W.4 said it was about 50 - 60 acres. P.W.5 and PW6 did not mention the size of the land. The rest of the land has many people settled on it. The two acres were the only land which was given to her uncle.

30 The trial magistrate alluded to contradictions on both sides which he pointed out but he failed to properly mention those on the appellant's side which go to the root of the suit yet he had

observed that they existed. He believed the evidence of the appellant based on features such as trees and graves found on the land. At the locus they were located on the land given to the respondent by the L.C.II which land is not in dispute. The testimony of the defence witnesses, DW1, 2 3 and 4 was very clear and cogent and they stated he inherited the land from his father
5 who in turn inherited from his grandfather who began using it in 1911. In 1977 he gave 20 x 20 meters of the land to the plaintiff's father.

They left due to the war and when they returned in 2003, the respondent claimed the land and that is when he accepted to give her the 20 x 20 and because she was dissatisfied she sued before
10 the L.C.II Court. We pray that the court be pleased to enter judgment in favour of the appellant and set aside the judgement of the court below and declare the appellant as the lawful owner of the suit land and the appellant should be awarded costs of the appeal and the court below.

In response, counsel for the respondent Mr. Odama Henry submitted that the suit was not
15 *judicata*. The L.C.II Judgment did not mean that the matter was already settled. Although it is between the same parties, over the same subject matter, it is not a final decision it did not conclude. It has no final order regarding the entire land. Out of the ten acres, they left the eight acres to the appellant. They left to the parties to decide whether or not to appeal. The Court was not competent by virtue of the court not having been elected in 200. The courts became
20 incompetent because their mandate was not renewed by elections. The mandate is renewed after five years. There is no evidence on record as to when the mandate began to run. The issue of *res judicata* was not canvassed because it was not one of the issues framed. It was second thought on the part of the appellant. The suit was properly before the trial court below and section 32 of *The Local Council Courts Act* was never offended.

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As regards the second ground there is no hearsay. All witnesses testified based on personal knowledge. They relied on their own observations. They were people who had settled around the suit land and knew the history as to how the respondent's father acquired the land. The court went to the *locus in quo* and confirmed the features they talked about which were evident on the
30 land, let alone the two acres that were separate and distinct. The claim was about ten acres of

land and the two acres were surrendered before the filing of the suit and the rest of it had not been surrendered.

From the record, the trial magistrate noted there were contradictions from both sides. He said he applied the law to the contradictions. The contradiction is about the acquisition of the land and the location of the land. After confirming the features at locus, the contradictions were clarified. He proceeded on a proper basis. Section 7 of *The Civil Procedure Act* and section 32 of *The Local Council Courts Act* cited were not applicable. The magistrate properly evaluated the evidence. The respondent holds letters of administration and she was entitled to the decision in her favour. The appeal should be dismissed with costs to the respondent.

In reply, counsel for the appellant argued that the issue of *res judicata* was a substantive issue before the trial court, in paragraph 10 of the written statement of defence. PW5 testified to the same effect and was introduced by the plaintiff although he was not listed. The issue was raised in submissions and in rejoinder. The referendum was in 2006 and the decision by the L.C.II Court was in 2013 and therefore the court was competent.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the

evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

In the first ground of appeal it is contended that the suit was *res judicata* and ought to have been dismissed. According to section 7 of *The Civil Procedure Act* and 32 of *The Local Council Courts Act, 2006* no court may 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. In short, once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh (see *In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others* [2007] 2 EA 185). By *res judicata*, the subsequent court does not have jurisdiction.

For the doctrine to apply, it must be shown that; a) there was a former suit between the same parties or their privies, i.e. between the same parties, or between parties under whom they or any of them claim, or parties who claim through each other, litigating under the same title; b) a final decision on the merits was made in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their case; c) by a court of competent jurisdiction, i.e. a court competent to try the suit; and, d) the fresh suit concerns the same subject matter and parties or their privies, i.e. the same matter is in controversy as was directly and substantially in issue in a former suit (see *Ganatra v. Ganatra* [2007] 1 EA 76 and *Karia and another v. Attorney-General and others* [2005] 1 EA 83 at 93 -94).

Although it was not framed as one of the issues for determination by the trial court, according to Order 15 rule 1 of *The Civil Procedure Rules*, issues arise in a suit when a material proposition

of law or fact is affirmed by one of the parties and denied by the other. For that reason, the court ought to be alive to and to address material propositions of law or fact affirmed by one party and denied by the other and make the necessary findings. the question of *res judicata* being a jurisdictional issue, the trial court ought to have framed the issue of *res judicata* and decided it since it was necessary for determining the matters in controversy between the parties.

That notwithstanding, for *res judicata* to apply, it must be shown that the earlier decision was by a court of competent jurisdiction, i.e. a court competent to try the suit. The decision must be shown to have been final on the merits in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their respective cases. The party relying on *res judicata* therefore has to prove that not only is the physical subject matter of the subsequent suit directly and substantially in issue in a former suit, but also that the issues decided concerning it in the former suit, were not merely collaterally or incidentally in issue for the purpose of deciding matters which were directly in issue in the case. The decision should be demonstrated to have made pronouncements on matters directly and substantially in issue as opposed to mere expression of opinion on incidental matters. The rights claimed by the litigants in the previous suit should be identical to the ones claimed in the subsequent suit. The parties should be litigating under the same title, i.e. the same capacity as those in the previous suit.

As regards the question whether the proceedings before the L.C.II Court of Bunyu Parish that took place in October, 2013 constituted a suit before a court of competent jurisdiction and resulted in a final on the merits, at the time of these proceedings, the law in force was *The Local Council Courts Act, 2006* which under section 11 (1) provided as follows;

(1) Every suit shall be instituted in the first instance in a village local council court if that court has jurisdiction in the matter.....”

The implication of that provision was that the proceedings ought to have began at the L.C.1 Court level. However, section 76A of *The Land Act* (introduced by section 30 of *The Land (Amendment) Act, 2004*), divested L.C. I Courts of primary jurisdiction over disputes in land, providing instead that “the Parish or Ward Executive Committee Courts shall be the courts of first instance in respect of land disputes.” The impact of that amendment was considered in *Busingye Jamia v. Mwebaze Abdu and another, H. C. Civil Revision No. 33 of 2011*, which was

cited with approval by the Court of Appeal in *Nalongo Burashe v. Kekitiibwa, C. A. Civil Appeal No. 89 of 2011* where it was held that as a result of that amendment, the L.C.II Court had original jurisdiction to hear and determine disputes over land.

5 Nevertheless, by reason of section 95 (3) of *The Land Act*, jurisdiction over land disputes was divested from Executive Committee Courts and magistrates' Courts and vested in District Land Tribunals as from 2nd July, 2000. With the coming in force of *The Land Act, 1998*, the L.C. Courts ceased to have any jurisdiction to entertain suits concerning land disputes. However, according to section 95 (7) of the Act, Executive Committee Courts were to continue to have the
10 jurisdiction they had immediately before the 2nd of July, 2000 until establishment and commencement of operation of the land tribunals. By October 2013 when the L.C.II proceedings in the instant case were initiated, Land Tribunals had been constituted and therefore Executive Committee Courts were no longer courts of competent jurisdiction over land disputes.

15 It is trite law that the jurisdiction of courts is a creature of statute. A court cannot exercise a jurisdiction that is not conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a nullity *ab initio*. It is settled law that a judgment of a court without jurisdiction is a nullity and a person affected by it is entitled to have it set aside *ex debito judititiae* (See *Karoli Mubiru and 21 Others v. Edmond Kayiwa [1979] HCB 212; Peter Mugoya v. James Gidudu and another [1991] HCB 63*). The proceedings and judgement of the L.C.II
20 Court relied upon by the appellant to found an argument for *res judicata* therefore are a nullity. In the circumstances, this ground of appeal fails.

In the second ground of appeal, the trial court is assailed for the manner in which it went about
25 its evaluation of the evidence. There being no standard method of evaluation of the evidence, a decision of the trial court may be set aside only if the conclusions reached are not supported by the evidence on record. A first appellate court only departs from findings of fact of the lower court if these findings of fact seem to be inconsistent with the evidence in the case generally (see *Sanyu Lwanga Musoke v. Sam Galiwango S.C. Civil Appeal No. 48 of 1995; Selle and another v. Associated Motor Boat Company Limited and others [1968] EA 123 and Peters v. Sunday Post [1947] 1 All E.R. 582*).
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The conclusion reached by the trial court was that out of the approximately ten acres originally given to Silvano Wayi and subsequently occupied by his son, Awongo and later a one Mawa and now being claimed by the respondent as the administrator of the estate of the late Silvano Wayi, the appellant had returned only two acres. That conclusion is supported by the
5 uncontroverted evidence of D.W.2 Mbia Enock to the effect that before 1979, Awongo used to be in possession of the land now in dispute, yet the appellant was now cultivating crops on that land. The L.C.II decided to give the lower part to the respondent, leaving the upper part that used to be occupied by Awongo, to the appellant. This evidence proves on the balance of probability that the upper part that the L.C.II had left to the appellant, indeed formed part of the estate of the
10 late Silvano Wayi. There being no legal basis for having divested the respondent out of the upper part of that land, the trial magistrate cannot be faulted for the conclusion he reached. I do not find any merit in this ground as well and it too fails. In the final result, the appeal fails and it is hereby dismissed. the costs of this appeal and those of the court below are awarded to the respondent.

15 Dated at Arua this 21st day of December, 2017.

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Stephen Mubiru
Judge
21st December, 2017

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