

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. HIGH COURT CIVIL APPEAL NO. 002 OF 2010

(Arising from civil suit no. 0044 of 2005 Hoima Court)

- 1. NYAKAHARA MARGRET**
 - 2. BALIHIKYA YOWAKIMU**
 - 3. BIKORWENDA LAWRENCE:.....:APPELLANTS**
- VERSUS**

TUHUMWURE JOY:.....:RESPONDENT

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BEFORE: HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellants, Nyakahara Margaret, Balihihya Yowakimu and Bikorwenda Lawrence, being dissatisfied with the judgment and orders of Senior Principal Magistrate Grade one Hoima appealed to this court.

The Respondent is Tuhumwire Joy.

The following were grounds of appeal.

1. That the learned trial Magistrate erred in law and inf act when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion that the disputed land in Civil suit no. MSD-00-CV-CS-0044 of 2005 belongs to the Respondent
2. That the Trial magistrate erred in law and infact when he failed to address himself as to the correct procedure to be followed at locus in quo or to conduct the locus in quo at all.
3. The learned trial Chief magistrate erred in law and infact when he ordered and/or created new boundaries on the disputed land against the weight of evidence led to the well known boundary separating the land of the late Kibego Bonifance and Samson Kakongoro/Kalaya.

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4. The Trial Magistrate erred in law and fact when he declared the suit land as the property of the Respondent
5. The trial Magistrate erred in law and infact when he declared the appellants as trespassers on their ancestral customary land.

Brief background facts:-

The 1st appellant is said to own land measuring approximately 40 ha (100 acres) at Katikara Kasokero villages, Kisabagwa Kyabigambire Hoima District which she inherited from her father the late bonifance Kibego who inherited the same from his father the late balihandago Yeremiya who acquired it as vacant land. When mr. balihandago died he bequeathed the land to the 1st appellant's father the late Bonifance Kibego and her uncle kaahwa katenga who died in 1996 and 1992 respectively, leaving the disputed land in the 1st appellant's hands. The 1st Appellant was born on the suit land in 1960 and has continued utilizing the suit land to date. The first appellant's father Mr. Bonifance Kibego applied for a lease on the land in 1975 , had it surveyed and the land was offered to him in 1985 . The land is bordered by a tea garden in the south, a Muhoohi tree in the west, pine trees of Balihikya Yowakimu (the 2nd Appellant herein) in the north, and the road to Nyamirima-Kyabigambire in the south completing the southern circle . The Respondent claims approximately 40 acres of the 1st Appellant's land and approximately 8 acres of land owned separately by the 2nd and 3rd appellant's who also inherited the land from their forefathers. The Respondent claims to have bought the disputed land in 1977 from Mr. Kasaija Christopher alleged to be the son of Kalaya a partner to the late Samson Kakongoro who was a neighbour to the appellant's parents, had known land in the area with clear boundaries which she could have sold and is not claimed by the appellants.

The Respondent instituted a civil suit vide land suit No. 044 of 2005 in the Hoima district land Tribunal at Hoima against the appellants which was concluded on 25/2/2010 in ffour of the Respondent. The Respondent produced four witnesses to prove her case while the appellants produced six witnesses. The Magistrates Court also visited locus in quo. Judgment was delivered on the 25th day of February, 210 infavour of the Respondent.

Ground 1,4, and 5 .

The Advocates on both sides urged the above grounds together. Counsel for the appellant submitted that whereas Kasaija Christopher on 21/8/1977 sold gardens and an incomplete house to the Respondent as per sale Agreement Ex PI, that the Respondent alleged appellants had encroached even on land which was under Farlow (uncultivated).

He added that there were contradictions with regard to the boundaries of land sold to Respondent as stated by PW1 and PW4. The other factor was that during the sale or purchase by the Respondent, all neighbours were not present.

Another point of contention by the appellant's counsel was that the plaintiff and all her witnesses including the expert village and parish heads whose pre occupation was overseeing land transactions in villages could not testify about the size of land owned by the plaintiff, the Respondents or even the size of portions alleged to have been trespassed upon by the Appellants. Their claim before court was not defined and all they could state was that the land had not been surveyed and its size was not known. They did not even assign reason as to why the land subject of sale was not measured in 1977.

He added that the evidence of the boundary with the 1st appellant was also contradictory. PW1 stated that the garden tea belonged to Kibego but that her boundary curved inside following the line of the garden tea leaving the garden tea outside up to the trench on Nyakahara's side. There is no way such a crooked boundary line could have existed amongst neighbours. Besides, contradictory evidence was led that Kalaya's land stopped at the garden tea!

It was further submitted that if the trial Magistrate had properly evaluated the evidence, he would not have concluded that if one Samson did not sue Respondent, then Kasaija who acquired from Samson passed good title to Respondent.

The reason he, Counsel gave for the above wrongful conclusion was because PW4, Christopher Kasaija testified that he bought the land from Kalaya.

Counsel also wondered how Kasaija could claim to have bought from Kalaya when evidence from appellants was that he came to look after Kalaya who was his aunt and had no land in the area. Counsel for the appellants added that from the evidence on record, Christopher Kasaija followed her aunty Kalayo on the suit land as shown in the evidence of DW1, DW2 AND DW3.

He deliberately omitted this fact from his testimony. The impression he gave in his evidence was that he bought land by an agreement from a “random” woman named Kalaya which agreement he lost. He feigned ignorance that Kalaya was a wife of Samson Kakongoro, the original owner of the suit land a fact which could not have been unknown by Christopher since he was raised by the said woman Kalaya. It is shown from the evidence of DW1 and DW2 above that the said land was for Samson Kakongoro and all that his three wives including Kalaya had had thereon gardens and portions of land they were utilizing. If Kasaija’s stay was not challenged on the disputed land, it is because he grew up on the disputed land as a nephew to Kalaya and later stayed on the land under the pretext of looking after his aunties garden and property thereon.

10 The Respondent also came under the pretext that she had come to take care of Kasaija’s property and that is why her stay on the land in the dispute was not challenged. The learned trial magistrate therefore erred in law and fact in holding that Christopher acquired good title to the disputed land when he took over possession and occupation from Kalaya and therefore could pass on to the claimant when he failed to prove that he bought or inherited the same from Kalaya. Mere possession and occupation without proof of purchase or inheritance of land per se does not confer on a person good title to the land.

On that point, counsel for Appellant concluded that in case Kasaija Christopher acquired a good title, then it was in respect of the undisputed portion that was occupied by Kalaya which the appellants don’t claim.

20 Counsel for the Appellants concluded that since Kasaija had failed to prove how he acquired the land in dispute, then it was wrong for the trial Magistrate to have held that he passed good title to Respondent.

In reply on the above three grounds, counsel for the Respondent first raised a preliminary objection that the grounds contained in the memorandum of appeal violate O. 43 r. 1 (2) of the Civil procedure rules as they were argumentative and narrative, and that they be struck off with costs.

In the alternative he urged that the trial Magistrate properly evaluated the evidence and decided in favour of Respondent. Counsel for Respondent otherwise conceded that the sale agreement

tendered in Court was in respect of a garden but that PW4 sold his entire kibanja to the Respondent.

He added that Kasaijja even had a kraal and that it was supported by PW3.

As regards contradictions in the boundaries we do not see any contradictions in the evidence of PW1 and PW4 related to boundaries. Whereas, PW1 testified that there is a road to Nyamirima as a boundary and PW4 mentioned a road to Kyabigambire, the two meant one and the same thing as Nyamirima is in Kyabugambire sub County and the road to Kyabigambire passes via Nyamirima. That is why even counsel for the appellants in his submissions at page 10 of the numbered written submissions 2nd paragraph line 5 thereof stated thus”.....line with garden tea
10 down to Nyamirima Kyabagambire road..... “ meaning that counsel for the appellants also recognized that the road to Nyamirima on boundaries between PW1 and PW4 in reference to the road. As for the rest of the boundaries, PW1 used the names of neighbours whereas PW4 used boundary marks to describe the boundaries thus showing no contradictions.

On the presence of PW4 during demarcations, Counsel for Respondent replied that PW4 in his evidence during cross examination informed the court that he called Kairu when demarcating the boundaries, PW4 did not say that Kairu was present during the time of demarcating boundaries but just said I called Kairu. This could mean that Kairu was called by PW4 to be present but did not attend the demarcation of boundaries that could be the reason why other witnesses did not mention him because they might have not seen him.

20 Alternatively, it is also not true that other witnesses for the Respondent denied the presence of neighbours. It is on record that PW1 in her evidence told the court the people who were present when she was buying and went ahead to state that she had forgotten the other person who was present at the time she was buying. This could mean that the person she forgot could have been Kairu.

On the size of the land, counsel for Respondent submitted that it would be demanding or too much for someone to expect a person who was buying Kibanja in 1977 to first survey it to ascertain its acreage. It is even today the same situation because apart from people with titles, very few people know the size of their kibanja. Secondly the Respondent and her witnesses are lay people who could not even think about surveying the suit Kibanja in 1977. It is even

possible that some of them do not know how big an acre is thus making it difficult to know the size of the suit Kibanja in terms of acreage.

He denied any major contradictions in the Respondent's case, adding that the evidence of DW1 regarding what her parents told her about Kasaijja and looking after the property of kalaya was hearsay.

Counsel added that PW4, Kasaijja bought the suit land from Kalaya but his agreement got lost. He justified the same with presence of Mukuru Mugongo and Mutongore chief of the area.

He therefore supported the finding of the trial Magistrate that Kasaijja had acquired good title which he could pass to the Respondent. Counsel for Respondent also submitted that there was
10 nor requirement of neighbours being present when one is selling his/her land. And that sch discrepancy is not fatal to deprive the Respondent of her property.

I have considered the submissions from both sides as summarized and also studied the record of proceedings and judgment of the lower court.

Under **Section 101 (1) and (2) of the evidence Act**, whoever desires any court to give judgment as to any legal right or liability dependant on existence of facts, which he or she asserts must prove that those facts exist.

Secondly, I wish to emphasize that as a first Appellate Court, it is important to re-examine, re-appraise and re-evaluate evidence on record, and come to my own inference of facts and
20 conclusions.

The case of **Pandya vs R. [1957] E.A 336** refers.

The second point of Law I shall consider is the burden of proof.

In the case of **Miller vs Minister of Pensions [1947] 2 All E.R 372. Lord Denning J (as he then was) held: "The standard of proof required to discharge a burden in civil cases is well settled. It must carry a reasonable degree of probabilities but not so high as is required n a**

criminal case. If the evidence is such that the tribunal can say we think it is more probable than not the burden is discharged, but if the probabilities are equal, it is not.”

First of all, as far as the preliminary objection raised by counsel for the Respondent is concerned, O 43 r 1 (2) of the civil procedure rules provides:-

“The memorandum of appeal shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds shall be numbered consecutively.”

In National **Insurance Corporation vs Pelican Services, Civil Appeal No. 15 of 2003, Twinomujuni J.A** , (RIP) citing the supreme court decision in **Sietco vs Noble Builders (U**
10 **Ltd, Civil appeal No. 31 of 1995** stated as follows:-

“It does not specify the points which are alleged to have been wrongly decided. In order to comply with this rule.....it is not enough to state that the trial Judge was wrong to make a certain statement. A ground of appeal must challenge a holding, a ratio decidendi and must specify points which were wrongly decided, failure to comply with the rule renders the ground of Appeal incompetent and liable to be struck off”

I have considered the five grounds of appeal which challenge the Judgment that arose from improper evaluation of evidence alleged wrong procedure at locus in quo, the creation of new boundaries and the declaration that appellants are trespassers.

20 In my view, the appeal raises matters of fact and law which are alleged to have been wrongly decided and so there is nothing argumentative or narrative.

Right from their written statements of Defence in the lower Court, the Defendants/appellants denied the claim of the Plaintiff/Respondent asserting the sale agreement relied on by the Respondent was fraudulently made with the intention of grabbing their land. The Respondent, Tuhumwire Joy who testified as PWI on page 3 of the proceedings stated that she bought the land in dispute from Christopher Kasaijja in 1977 in the presence of Mukuru Mugongo (Erinest late) Parish Chief, Ndobereire Peter, georgina Rkagebya and bangakihemu. According to the

sales agreement exhibited in Court (exh P1) , Kasaijja Christopher sold his gardens and an incomplete house to the Respondent. The subject of sale was therefore gardens and uncompleted house. However, PW1 in her testimony in court included uncultivated land which was not stipulated in the agreement. That was a fundamental departure by the Respondent which should have been considered by the trial Magistrate. Even Counsel for the Respondent in his submissions agreed that the agreement tendered in Court was in respect of gardens. Then he adds that there was other evidence to prove that Kasaijja (PW4) did not sell gardens to Respondent but his entire Kibanja. The question is why was all that information not stated in the sale agreement? Even PW2, Georgina Rukagoba on page 6 of the proceedings stated that

10 Kasaijja sold a house and gardens of bananas. That was in line with the exhibited agreement. PW4, Christopher Kasaijja who sold the land to the Plaintiff /Respondent testified as follows on page 8 of the record “.....***I know the suit land and I am the one who sold it to the claimant in 1977. I had a house, coffee and bananas n the suit land.***”

PW4 on page 9 of the record added that when he sold, the Respondent immediately took possession and that he had never gone there to ascertain whether the appellants had trespassed or not. If the person who sold PW4, testified that he sold a house, banana and coffee plantations, where did the additional uncultivated land or portion come from? That therefore cast doubt in the Plaintiff/ respondent’s case.

When it came to describing the boundaries of the land Respondent bought from Christopher

20 Kasaijja (PW4) , there was a difference. PW1 (Respondent talked of neighbouring Katenga, then Bonifance Kibego to the south, Appellants to the west and government forest reserve to the north. However, PW4 Christopher Kasaijja talks of boundaries as a road to Kyabigambire, then a hill, bananas on one side. For instance he does not mention a government forest reserve like PW1 the Respondent. So I agree with Counsel for Appellants that the boundaries that the are contradicted and this again casts doubts in the Respondent’s case. The other issue which further cast doubt in the Plaintiff/Respondent’s case is that none of the neighbours were present during the alleged sale between Kasaijja and Respondent. Whereas counsel for Respondent talked of Kairu, but he turned to state that Kairu was called by PW4 but did not attend. Both PW2 and PW3 also denied the presence of Kairu.

And what makes Respondent's case worse is that PW4, Kasaijja who sold to Respondent also testified that when he bought the land from Kalaya, the agreement in respect thereof got lost. So there was nothing to show or prove how Kasaijja got the land and then pass on to the Respondent. I also wondered why none of the neighbours to the disputed land were present when Respondent bought from Kasaijja. Whereas counsel for the Plaintiff/ Respondent submitted that there is no legal requirement for neighbours to be present when someone is buying or selling land, this court's experience and understanding is to the contrary.

Neighbours must be present so as to:-

- 1) Confirm the boundaries of the land the seller is selling to the purchaser.
- 10 2) Neighbours have to confirm that the land being sold belongs to the seller.
- 3) Neighbours have to be present so as to welcome the new neighbour.
- 4) The purchaser has to be confident and comfortable that she has purchased and properly invested her/his hard earned money.
- 5) To avoid future conflicts .

The presence of neighbours during selling and buying of land in Uganda and elsewhere is an established good practice which has acquired a force of law. It is prudent and therefore a legal requirement in my view. That is where the Respondent's case collapses. Given such contradictions with regard to the boundaries, absence of neighbours during the purchase by Respondent are major contradictions and inconsistencies intended to mislead the Court and such
20 evidence has to be rejected. Case of **John Okalebo v. Eluluma & another [1978] HCB 200** that transactions in customary land must be done formally and any transfer of land must be done through local authorities and agreement witnessed by members of the clan to which the vendor belongs.

The other outstanding contradiction in the Respondent's case and her witnesses related to the size of the land Respondent purchased. None knew whether it was one acre, five acres, 10 acres or how much, even if it was an estimate. And neither could they state the size of the portions the appellants had allegedly encroached or trespassed upon. So I agree with the submissions of counsel for the appellants that the Respondent's claim was not defined and the size was not

known. No one could explain why the land sold in 1977 was not measured. Counsel for the Respondent urged that the Respondent and her witnesses were lay people who could not think of surveying the land and that they don't know how big an acre is. With due respect, I disagree with that line of thought. The Respondent who testified as PW1 stated that she is a teacher by profession. By all standards, a teacher by profession is not a lay person at all.

In summary, the burden on the respondent on how Kasaijja obtained the suit land was not proved on the balance of probabilities. This is because PW4, Kasaijja stated he lost the agreement by which he bought the disputed land and apart from mentioning Mukuru Mugongo, he did not mention any neighbours present to confirm sale and boundaries, how much was paid and in what installments. The circumstances of Kasaijja's acquisition of the land allegedly sold suspicious as no one corroborated the Respondent's version that the land she bought from Kasaijja was the one he allegedly bought from one Kalaya.

On the other hand, the case of the appellants in the lower Court was consistent and straight forward. On page 10 of the proceedings, DW1, **Margaret Nyakahara** testified as follows:-

"I was born on the suit land we have been using the suit land since I was born up to now...there was a woman called Kalaya who was on the boundary between us and Samson. Kalaya was on the land of Samson. When Kasaijja came, our parents asked him and he said that he had come to take care of Kalaya's property. Later Kasaijja left and we saw the mother of the claimant coming on the suit land. When we asked the mother of the claimant, she told us that she had come to take care of Kasaijja's property. We stayed there knowing the mother of the claimant was taking care of Kasaijja's property...."

DW2 Balihikeya Yowakimu, told court he has known the claimant because of this case only. He lives on the land of his grandfather Samson. That he lives thereon with his father who is still alive. That Samson married Kalaya a relative of Kasaijja. And that when Kalaya was leaving the place, she left Kasaijja thereon to look after her properties.

DW3 Bikorwenda Lauransio told court he does not know the land the claimant is claiming. He has never trespassed on to the claimant's land. That the land under dispute belongs to them, their grandfather called Gatwehi-Rwakaikara who got it from the kingdom.

DW3 added that he knew Kasaijja who came thereon with DW3's step mother in the year DW3 does not know, but that Kasaijja shifted from the dispute land in 1985. That Kasaijja did not have land there. He added that his grandfather had three wives and each wife had her gardens.

DW4 Semeo Kasiro told court the dispute land is for Nyakahara (DW1). That is the Plaintiff/Claimant who is a trespasser. That Kasaijja used to stay on his aunt's land only, and had no land of his own. That nobody knows of the sale agreement between Kasaijja and the claimant. Otherwise the claimant's mother came as a worker for Kasaijja. He added that by the time the claimants came on the dispute land Samson, the owner was still alive and did not see her.

10 DW6, Antonio Kaija Bahoire's evidence corroborated that of DW1, DW2, DW3 and DW4. The appellants and their witnesses traced Kasaijja's presence on the portion of land to Kalaya. And they were consistent that when Kalaya was leaving her portion of her land on the village, it was Kasaijja who was left in charge. Consequently, when the mother of the Respondent came, she was taking care of Kasaijja's property, which property was the portion of Kalaya. So if the trial Magistrate had properly evaluated the evidence on record, he would have found in favour of the appellants and not Respondent. The 1st appellant was born on the suit land in 1960, and her father obtained a lease offer in 1985. She was a witness of truth and could not be mistaken as to the boundaries. The other Appellants were also born there.

In any case and as already found, the Respondent, PW4 bought a house and gardens and not
20 other pieces of land without gardens as she claimed.

In the premises, I find and hold that grounds 1, 4, and 5 of appeal are hereby allowed.

Ground 2.

That the Trial magistrate erred in law and in fact when he failed to address himself as to the correct procedure to be followed at locus in quo or to conduct the locus in quo at all.

Counsel for the Appellant submitted that there was no record of whether court conducted locus or not and if court and visited locus, there is no record of what transpired at the locus in quo. It is not clear whether parties and witnesses attended locus. There is neither record of evidence

taken at locus nor any observation made thereon. All in all there is no written record of what transpired at locus in quo as part of the record of proceedings.

In reply , Counsel for Respondent stated that the purpose of visiting locus is to clarify on the evidence already given in court. Evidence at locus cannot be a substitute for evidence already given in court. If the trial magistrate sees that the evidence given in court is enough, he or she may not visit locus. Further more, visiting locus is not mandatory. Whereas we agree with the submission on the procedure to be followed at locus, it is important that evidence at locus, cannot be considered in isolation from the existing evidence on record. Therefore evidence was
10 given in Court and the visit to locus was to confirm the evidence that had been given. Failure to follow the procedure does not in any way prejudice the appellants because with or without visiting locus, the trial Magistrate would have reached the same conclusion because there was other evidence of the Respondent that weighed against that of the appellants. Therefore, the Appellate Court should not fault the trial Magistrate's finding and this ground must fail as a result.

Whereas it is true that the purpose of locus in quo is to clarify on the evidence already given in court, and such evidence both in court and at the locus should be considered together, there was need for witnesses in this case to clarify on the features on the land and confirm what they stated in Court. Also a sketch map should have been drawn. And in cases where there were boundary
20 dispute as in the present one, it was necessary to follow the correct procedure at the locus. Failure to follow the correct procedure at the locus in quo led the trial Magistrate to reach an erroneous decision that appellants were trespassers on their ancestral land as clearly brought out by the consistent evidence of Appellants and their witnesses.

I therefore allow the second ground of appeal.

Ground 3.

**The learned trial Chief Magistrate erred in law and infact when he ordered and/or created new boundaries on the disputed land against the weight of evidence led to the well known
30 boundary separating the land of the late Kibego Bonifance and Samson Kakongoro/Kalaya**

I shall not waste much time on this ground of appeal. The submissions on both sides notwithstanding, I find and hold that it was completely wrong and erroneous for the trial Magistrate to have indulged in creating new boundaries on the disputed land. It is never the duty of court to create boundaries for to do so would amount to descending in the Arena. The trial Magistrate's portion of the judgment on page 6 that **"From the side of DW1's have the boundary line shall be in accordance to the vividly seen trench up the hill up to the forest reserve there is a Mukanaga tree. It shall follow the line of the forest reserve through the pine trees up to Musisa and Mugoma trees on the said boundary with Kairu, then down to the road to Nyamirima, then curves inside towards, the home of claimant, then follows the line of the tea garden, leaving the tea garden outside up to the trench on Nyakahara's side."**

The trial Magistrate in view of the above passage descended in the Arena and became a witness instead of an independent Judicial officer as dictated by the law. Such judgment cannot be allowed to stand. So I find ground 3 of appeal in the affirmative.

Having found all the grounds of appeal in the affirmative and in the circumstances, I do hereby allow the appeal, set aside the judgment and orders of the lower court and decree the disputed land for the appellants.

I also award costs of this appeal to the appellants.

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W. Masalu Musene

Judge

08/08/2017