

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL APPEAL NO. 0062 OF 2016
(ARISING FROM NSANGI CIVIL SUIT NO.41 OF 2014)**

- 1. NANYUNJA MARGARET**
- 2. KALEMBA MATHIAS:.....APPELLANTS**

VERSUS

NALUWUMU GRACE :RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT:

This is an appeal against the Judgment and decisions of His Worship Talisuna Patrick Magistrate Grade I, sitting at Nsangi Court in Wakiso District.

The grounds of appeal are that;

1. The Learned Trial Magistrate erred in law and fact when he held that the suit land/kibanja belonged to the Respondent when there was no sufficient evidence to support the finding thereby coming to a wrong conclusion/decision.
2. The Learned Trial Magistrate erred in law and fact when he held that the Appellants were trespassers on the suit land when there was no sufficient evidence to support the findings, thereby coming to a wrong conclusion.
3. The Learned Trial Magistrate erred in law and fact when he turned himself into a witness for the Respondent in specific contravention of the law thereby becoming biased and therefore reaching a wrong decision.
4. The Learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole thereby reaching a wrong decision.

5. The Learned Trial Magistrate erred in law and fact when he decided a land dispute without first visiting the *locus* to establish what was on the ground.

The Appellants formulated issues around all those grounds and addressed Court on them as such.

As a first appellate Court, this Court has the duty to re-evaluate the evidence as a whole and make its own findings and draw its own conclusions thereon as per **Pandya versus R(1957) EA 336**.

A review of the facts of the case in the lower Court shows that by the amended plaint dated 25th March 2014, the Plaintiff Naluwumu Grace Milly sued the Defendants; Nanyunja Margaret and Kalemba Mathias. Paragraph 4 places the cause of action in trespass and paragraph 5 lists the brief facts leading to the cause of action; and the remedies sought for from Court.

In their written statement of defence filed separately dated 23rd June 2014, respectively, each Defendant denied the said allegations.

During the scheduling, the parties agreed on 3 issues for resolutions and these were;

1. Who between the Plaintiff and the 1st Defendant owns the suit plot.
2. Whether the Defendants are trespassing on the suit plot.
3. What remedies are available to the parties.

During the hearing, the Plaintiff called 4 witnesses who testified briefly as follows:

PW1; Naluwumu Grace Milly told Court that she is the customary heir to her late mother Namubiru Adella. She said Kalemba Mathias was a trespasser on her house and plot at Bulenga 'B' zone. The chunk is a kibanja which she acquired in 1986 as a gift *intervivos* from her grandmother called Eriyasafu Mubiru and other clan members of Mamba clan for a meeting and told them that she had given her (PW1) a kibanja; measuring 50 x 100 ft located at Bulenga 'B' and boarder marks called '*luwaanyi*' were planted. She was aged 9 years then. Her mother Milly Senyonjo and members of Mamba clan constructed a 2 roomed commercial house on the kibanja plus a store. Nanyunja Margaret would collect rent from

the tenants from her house and had even the money to her for paying of school fees. Later, when she graduated in 1995 and had completed school, she went to Nanyunja and requested to start using her house, but she became evasive. The matters went to Court vide Civil Suit No. 008/2001, tendered as PE1. The matter was resolved amicably and Kalemba Matthias agreed to pay shs. 200,000/- (*two hundred shilling*) to reconstruct the latrine and pay shs. 50,000/- (*fifty thousand shillings*).

The agreement was tendered as PE2; and a photograph of the damaged latrine tendered as PE3. Later by 2008, her house had been converted into a canteen for Bulenga Parents School; where Kalemba Mathias is a director and headmaster. On her land, was a constructed building accommodating 2 classes. She went to Nanyunja Margaret and requested to be compensated, but each Defendant referred her to the other hence this suit.

PW2 Kizito Fred Salongo said PW1 is his daughter of Mamba clan while Kalemba Mathias is a tenant on a plot of land that used to belong to Adella Namubiru. He is the clan leader of Mamba clan, and he confirmed that during the last funeral rites of Adella Namubiru, Naluwumu Grace Milly was installed as the customary heir for Adella Namubiru. He received information from Eriasafu Mubiru; his father that Adella had given a plot to Naluwumu Grace while still young.

During cross examination by the 1st Defendant, the witness clarified that Adella died when she was a very old woman and she had gifted the suitland to Naluwumu Grace Milly.

PW3 – Namayanja Janet said that the plot in dispute formerly formed part of Namubiru Adella's land. Adella was PW3's mother and Nanyunja is a daughter to Adella, while Naluwumu Grace is a granddaughter to the late Namubiru Adella.

She stated that before Adella died, she said Naluwumu Grace should become her successor and that she should acquire a portion of her land upon her demise; and the other portion would be for the other children of Namubiru Adella.

These, she stated in PW3' presence; around 1985, she stated that Adella said her heir would take the plot on Kampala side while the Mityana side would remain for her grandchildren and that is where she would be buried. She further said that while still alive, Adella called her (PW3), her brother Edward Nsubuga and Lasto Katuba and showed them the extent of the portion Naluwumu Grace Milly would take, and the extent where her children would take and where she would be buried.

After the death of Adella, Eriyasafu demarcated the land, in the presence of PW3; Edward Nsubuga and Lasito Katuba due to her tender age, (of Naluwumu Grace) her mother Kayaya constructed a small house for her on the plot. The house was being rented and Nanyunja Margaret collected rent which was being used to pay school fees for Naluwumu Grace. After some time, Naluwumu Grace started claiming ownership of the said plot and began renting out the small house to Kalemba Mathias. Today it is used as part of a school ran by Kalemba Mathias, hence this suit.

PW4; Mustafa Kadala said that he bought land from Rogers Segujja and has a certificate of title. That the land has kibanja owners and among those introduced to him was Naluwumu Grace.

In defence, DW1 Nanyunja F stated that the kibanja in dispute is hers. It used to belong to her father Alipo Kigundu who died. He gave them the kibanja as children and he used to pay busulu vide busulu receipts, she remained with. She agreed that the Plaintiff is heir to her mother Adella Namubiru, but she inherited blood and not a kibanja.

DW2; Kalembe Mathias told Court that he has been a tenant of Nanyunja's kibanja since 2002; and in cross examination, she said that the small belongs to PW1.

DW3; Henry Ssali stated that the Plaintiff is heir to their mother Adella Namubiru. Nanyunja Margaret is the elder sister. Alipo Kigundu owned a kibanja at Bulenga. When their father died in 1940's he left this kibanja with their elder sister Nalukwago Nakanjako and Nanyunja. Namubiru Adella died and Naluwumu Grace became her heir. The heir did not get any part of her father's kibanja. When their mother died in the 1980's the Plaintiff and her mother started claiming part of this kibanja. It was then when the Plaintiff's mother constructed a small house on this kibanja in the 1990's. The small house is still there. The kibanja their mother left is about 6 acres of the kibanja, the Plaintiff claims 50 x 100 ft, but nobody gave it to her. He said that there is no Nkima clan resolution giving this plot to the Plaintiff. Their mother was from another clan, which can not own a kibanja belonging to Nkima clan.

DW4; Watwale Harriet stated that D1 is the owner of the kibanja; D1 is a daughter of Adella and also the witness's mother. Namubiru was staying in Bulenga. He stated that Kigundu

was staying on the land with his wife Adella. When he died, he left it to his children. He gave it to D1 to look after the mother (his wife) and that he was there when the grandfather gave it to D1. He agreed that the Plaintiff is heir of the grandmother but she is claiming things from another clan.

In his Judgment, the learned Trial Magistrate found in favour of the Plaintiffs, hence this appeal.

I have internalised the arguments by Counsel for the Appellant and the Respondents on this appeal and I now do find as follows:

ISSUE NO. 1:

Whether the Learned Trial Magistrate erred in law and facts when he held that the suit land/kibanja belonged to the Respondent.

In his submissions, Counsel for the Appellant reviewed the above evidence and faulted the trial Magistrate and said that he failed to properly analyse the evidence on record. He pointed at the Learned Trial Magistrate's reference to Nkima clan and Mamba clan evidence by the defendants as a major flaw in analysis. He argued that DW1, DW3 and DW4's evidence was more viable and if well assessed shows that PW1 inherited blood not property. The Appellant's Counsel insists that the Plaintiff as one of the tenants who were bibanja holders thereon. This same evidence shows that even the Defendant was shown to him as one of the tenants (bibanja holders) for a different portion.

This evidence when it is considered along that of PW2 Kizito Fred Ssalongo that she was around when Adella Namubiru gave a plot to Namubiru Grace, of 50 x 100 ft, alongside PW2's evidence.

PW3 Namayanja Janet, detailed steps taken by Eriyasafu Mubiru who planted boundary marks between the Plaintiff's plot and that left for the Defendant and her sisters.

The legal requirements as to what amounts to a gift in my view, by virtue of the evidence on record were satisfied. The fact that the Plaintiff is of a different clan from that of the

Defendants is irrelevant because there is evidence that favours a finding in favour of the defence/Appellants. The Respondent/Plaintiffs' Counsel on the other hand argued that the Learned Trial Magistrate was right.

In my re-assessment of the evidence on record, I do find that there is very consistent and reliable evidence through PW1, PW2, PW3 and PW4 alongside PE₁ and PE₂ which confirms that the Plaintiff/Respondent was gifted the plot in question.

While DW4 stated that D1 owns the land, he does not satisfactorily explain convincingly the relationship between the Plaintiff's interest on the land and that of the Defendant. It is clear from all the evidence on record that the plot/kibanja in question lies on a tilted land whose title is in the names of PW4; Nsubuga Mustafa Kadala. His evidence is crucial. He told Court that in buying the land, he was shown both the Plaintiff and D₂ got their interests from Adella.

I do not believe that this plot belonged to D1's father. The crucial evidence of PW3 and PW4 shows this land was bequeathed as a gift arising from the kibanja of Adella. The Learned Trial Magistrate's assessment of the evidence is therefore proper. This issue is therefore terminated in the negative.

ISSUE NO. 2:

On whether the learned Trial Magistrate erred in law and fact when he held that the Appellants were trespassers on the suit land;

I have found that there is sufficient evidence to prove that this land in issue belongs to the Plaintiff. The Defendants in their evidence acknowledge that the Plaintiff had a small house which D1 is occupying.

There is also evidence that the Plaintiff's latrine was demolished by the Defendants. Evidence of PW1, PW2, PW3, PW4, DW1 and DW2 all shows that the Defendants acted with knowledge that the Plaintiff had equitable interests thereon. PE2 shows that the negotiations were entered into and the Defendants were aware that the Plaintiff was in constructive possession. The standard ***Justine Lutaya versus Sterling Civil Engineering Co. SCAA*** on trespass were satisfied: This ground also terminates in the negative.

ISSUE NO. 3

Whether the Learned Trial Magistrate failed to re-evaluate the evidence.

This ground is answered underground 1 and is found in the negative.

ISSUE NO. 4

Whether the Learned Trial Magistrate erred when he did not visit the locus.

Visiting of *locus* is necessitated by Court realizing that there arose in evidence in Court, certain unexplained factors whose explanation warrants visiting *locus*.

Under **Practice Direction 1/2007**, the **Chief Justice** guided Courts to try as much as possible to visit *locus* in land matters. The cases of ***Ongom Stephen versus Otada Clement & Anor; Mbale HCT CA NO. 009 OF*** 2015, Court emphasised that the Court should inform itself if the case before it is one where visiting of *locus* is necessary.

I have looked at the proceedings and nature of conflict before Court. The parties do not contest the boundaries of the land/kibanja. They only contest rights of ownership thereto. Visiting *locus* therefore would not be of great advantage to the findings.

The failure to visit *locus* was therefore not fatal.

The learned trial Magistrate considered all the evidence before him and weighed it correctly thereby reaching a correct conclusion thereon. This ground as well fails. The issue is found in the negative.

In all, this appeal fails on all grounds raised.

I do find that the learned trial Magistrate reached a right decision. The appeal is dismissed with costs to the Respondent.

I so order.

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Henry I. Kawesa

JUDGE

21/12/2018

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

21/12/2018

21/12/2018:

John Mary Mugisha: for the Appellants.

Richard Shibale for the Appellant.

Kiboneka Richard for the Respondent.

Respondent absent.

Matter for Judgment. We are ready to receive it.

Court:

Judgment read in the presence of the parties above.

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Henry I. Kawesa

JUDGE

21/12/2018

We apply for stay of execution pending execution.

Kiboneka:

The grant will occasion miscarriage of justice.

The Appellant has not indicated if he is applying or not. He may set back.

The Appellant now on the balance of convenience has been in unlawful occupation for over 20 years. It is now her time to enjoy the fruits of her gift. We pray that the application is disallowed. It should come after the Appellant has taken steps towards intended appeal. There is no appeal.

Mugisha:

The Appellants intend to appeal and lives of intended grounds.

No demonstration how the stay would negatively impact.

Distention under Sec (98) can't be denied by imaginary fears of the Respondent – inconvenience can be.

Court

The authority is not provided. In view of the fact that this is an appeal arising out of a judgment now, I need to internalise the law above and make a decision.

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Henry I. Kawesa

JUDGE

21/12/2018

Court: Matter is for Judgment.

Judgment delivered to parties above.

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Henry I. Kawesa

JUDGE

30/08/2018

Right of Appeal explained within 30 days

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Henry I. Kawesa

JUDGE