

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0015 OF 2016

*(Arising from Civil Suit No. 0027 of 2007)*

1. KIIZA STEPHEN	}	:..... APPELLANTS
2. KARUBANGA PEREZI		
3. BYAMUKAMA GODFREY		
4. TWESIGE NELSON		

VERSUS

1. OCHEN AJOOBA	}	:..... RESPONDENTS
2. LAWRENCE BATEGAIRA		

JUDGMENT

*Before: Hon. Justice Byaruhanga Jesse Rugyema*

[1] This is an Appeal from the Judgment/decision of **H/W Yeteise Charles**, the Magistrate Grade 1 Hoima Chief Magistrate's Court at Hoima delivered on 22<sup>nd</sup> day of April, 2016.

[2] **Facts of the Appeal**

The Plaintiffs/Appellants filed **C.S. No. 27 of 2007** against the Defendants/Respondents seeking orders that the Defendants are trespassers on the suit land, general damages and costs of the suit with interest thereon. It was the Plaintiff's case that they are sons of a one **Petero Gubaza** son of the late **Gurru Isingoma** the initial owner of the suit land. They claimed to be the lawful owners of the customary land situated at **Rujunju LC. 1, Bilimya Parish, Kizirafumbi, Hoima District** (the suit land) that was left behind by their late grandfather, **Gurru**

**Isingoma** which they have occupied, utilized and possessed for over 50 years.

- [3] As against the 1<sup>st</sup> Defendant, the Plaintiffs contended and averred that the 1<sup>st</sup> Defendant is a Congolese who was permitted to temporarily occupy part of the suit land by the relative of the Plaintiff called **Kasaija** but that the 1<sup>st</sup> Defendant has since claimed ownership thereof and has extended to lands owned by the Plaintiff by constructing thereon and growing cultivatable crops without permission or consent of the Plaintiff. That besides, he had brought other persons on the land to gang grab it.
- [4] As against the 2<sup>nd</sup> Defendant, the Plaintiffs averred that the 2<sup>nd</sup> Defendant bought a piece of land comprising of Serere banana plantation from a relative of the Plaintiffs called **Byakagaba** but has extended claiming other land beyond what was sold to him and is alienating land belonging to the Plaintiffs by trying to obtain a lease offer over the land, cultivating crops and constructing houses without permission or consent of the Plaintiff.
- [5] The Defendant/Respondents on the other hand denied the Plaintiff/Appellants' claim and averred that they have been utilizing the suit land uninterrupted, the 1<sup>st</sup> Defendant having been lawfully in occupancy of the disputed land for over 40 years and the 2<sup>nd</sup> Defendant having bought the suit land way back in 1987 from a one **Wilson Byakagaba**. Both Defendants contended that their respective portion of the suit land were adjudicated upon in their favour by the **LC II Court** and **LC I Court** respectively. The 2<sup>nd</sup> Defendant has processed to secure a lease offer in relation to his respective portion of the land.

- [6] The Defendants counterclaimed that the Plaintiffs in early April, 2007 without any right trespassed onto the suit land by way of slashing, cutting down trees and charcoal burning, and they sought a declaration that they are the lawful owners of the suit land, general damages, costs and interest thereon.
- [7] The learned trial Magistrate on his part found that the 1<sup>st</sup> Defendant has since lived and produced children and grandchildren on the suit land while the 2<sup>nd</sup> Defendant was found to have purchased his portion of the suit land from **Wilson Byakagaba**. He gave Judgment in favor of the Defendants with the following orders:
- (a) The suit land is the property of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their respective shares.
  - (b) The Plaintiffs' suit is dismissed with costs and the counter claim is accordingly allowed.
  - (c) A permanent injunction was issued restraining the Plaintiffs, their servants and successors from further claiming or trespassing over the suit land.
- [8] The Plaintiffs/Appellants were dissatisfied with the Judgment/decision of the learned trial Magistrate and appealed to this Court on one ground of Appeal as contained in the Memorandum of Appeal.

***“The learned trial Grade 1 Magistrate erred in law and in fact when he failed to properly evaluate evidence on record and came to a wrong conclusion that the Appellants failed to prove their case to the required standard”.***

## **Counsel Legal Representation**

- [9] The Plaintiffs/Appellants were represented by **Mr. Lubega Willy** of **Ms. Lubega, Babu & Co. Advocates, Kampala**, while the Defendants/Respondents were represented by **Mr. Aaron Baryabanza** of **Baryabanza & Co. Advocates, Hoima**. Both Counsel filed their respective Written Submissions for consideration in the determination of the instant Appeal.

## **Duty of the 1<sup>st</sup> Appellate Court**

- [10] As submitted by Counsel for the Appellants and rightly conceded to by Counsel for the Respondents, the duty of this Court as the first Appellate Court is to re-evaluate the evidence on record and come up with own findings, see the case of **Fr. Narsensio Begumisa & Ors Vs Eric Tibebaga S.C.C.A. No. 17 of 2002**.

**Ground of Appeal:** *The learned trial Magistrate erred in law and fact when he failed to properly evaluate evidence on record and come to a wrong conclusion that the Appellants failed to prove their case to the required standard.*

- [11] The trial Magistrate commenced his determination of the issues before him by, correctly in my view, first addressing himself on the burden and standard of proof as follows:

*“I am very mindful of the burden of proof in civil cases. It is on the Plaintiff or any person who alleges and the standard of proof on balance of probabilities”.*

The above is the import of **S.101 of the Evidence Act** which provides thus;

### ***“101, Burden of Proof***

***1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.***

***2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.***

[12] The above clear provisions of the law provide that the burden lies on the party who asserts the affirmative of the issue or question in dispute and the standard of proof is on a balance of probabilities; **Murama Robinah v Abigaba Tadeo, Masindi H.C.C.A. No. 104 of 2014**. In the case of **Nsubuga vs Kavuma [1978] HCB 307** it was held that;

***“In civil cases the burden lies on the Plaintiff to prove his or her case on the balance of probabilities”.***

[13] It follows therefore in this case, the burden lied on the Plaintiffs/Appellants to prove that they were the lawful owners of the suit land and that the Defendants/Respondents trespassed thereon.

[14] As alluded to by the trial Magistrate and as I find, the undisputed facts of the case were as follows:

- (a) The 1<sup>st</sup> Defendant settled on the portion of the suit land when he came in this area in the 1960s as a worker/porter. According to **Byakagabi Wilson (Pw3)** in cross examination, the 1<sup>st</sup> Defendant was given the land around 1971 or 1972.

(b) As for the 2<sup>nd</sup> Defendant, he purchased the portion of the suit land from **Byakagaba Wilson (Pw3)**, the cousin of the Plaintiffs. Both Defendants have been in occupation and utilization of the above portion of land uninterrupted.

[15] In the Plaint, the Plaintiffs refer to the 1<sup>st</sup> Defendant as the Congolese. This is denied by the 1<sup>st</sup> Defendant. In his evidence, he testified that he came from West Nile as a worker for **Kasoro** whose father was a Sub County Chief, though in cross examination, he described **Kasoro** to had been Omukuru womugongo (Sub Parish Chief). I find no evidence that the 1<sup>st</sup> Defendant was a Congolese. The fact that he is a Ugandan was not challenged at all during cross examination. Secondly the Defendant's claim that the suit portions of land were adjudicated upon by the **LC II** and **LC I Courts** respectively is not supported by any evidence.

[16] The Plaintiff however, on the other hand claim that the Defendants have extended from their lawful portions of land thereby trespassing on the Plaintiffs' land. It is claimed that the 1<sup>st</sup> Defendant was given about **1½-3 acres** but has extended to **10 acres** while the 2<sup>nd</sup> Defendant purchased **3 acres** and has extended to **8 acres**.

[17] The Plaintiffs while in Court described the alleged trespass upon portions of their land as follows:

**(a) Portion of land allegedly trespassed by the 1<sup>st</sup> Defendant.**

Evidence of **Kiiza Stephen, (Pw1)**; At page 3 of the Proceedings, he stated thus:

*“Before this matter came to Court there were boundaries where the bananas stopped. Whereas for the 1<sup>st</sup> Defendant, there were **Migorora and Munyangabi trees**”.*

Evidence of **Byakagaba Wilson (Pw3)**; At page 9 of the Proceedings, he stated thus:

*“I know the land where the 1<sup>st</sup> Defendant stays... I know the boundaries of the land he was given. The 1<sup>st</sup> Defendant shares boundary with me **up**. **East**, there is a Munyangabi tree, **Down**, there is a Munyangabi tree... there is a river called Nakasimine and **West** there is a boundary planted by the Plaintiff which is a Muramura tree. The 1<sup>st</sup> Defendant crossed the boundaries I have referred to above”.*

**(b) Portion of land allegedly trespassed by the 2<sup>nd</sup> Defendant**

Evidence of **Kiiza Stephen (Pw1)**; At page 3 of the Proceedings;

*“The 2<sup>nd</sup> Defendant came to buy banana plants of Serere from Byakagaba Wilson... The bananas were about three acres. I do not have any problem with the land where the bananas are. The defendant want to add on about 8 acres on the land he bought which had bananas. We have eucalyptus trees on the suit land plus cassava and rice gardens and beans plus Misambwa trees”.*

Evidence of **Byakagaba Wilson (Pw3)**; At page 9 of the Proceedings;

*“The land is in Rujunju L.C. I. I am the one who sold the land to the 2<sup>nd</sup> Defendant. I sold to him land which had bananas on it and it was about 3 acres... but later, he wanted to grab other people’s land... the Plaintiffs’ land. The land I sold to the 2<sup>nd</sup> defendant had boundaries which includes: **North**, a path, **down** there, there is banana; on the **East**, a path to the well”.*

### **Evidence at Locus**

- [18] As observed by Court in **Okee & 2 Ors v Otim Eronayo H.C.C.A. No. 41/2015 [2019] UG HCCD 2**

Visiting the locus in quo is generally for purposes of enabling the trial Court understand the evidence better. It is interested to witness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as Canvassed during the oral testimony in Court and to testing the evidence on those points.

- [19] At locus in this case, when checking on the evidence by the witnesses as is expected of Court; **Yeseri Waibi Vs Edisa Byandala [1982] HCB 28, Kiiza Stephen, (Pw1)** who was present did not describe to Court the boundaries of the portions of land lawfully owned and the extent of the alleged trespass by the respective defendants as he did and described them in Court. It is only **Byakagaba (Pw3)** who attempted to do so but also failed to describe to Court the boundaries of the portions of land claimed by the respective defendants which they allegedly crossed to trespass on the Plaintiffs’ land. He could not mention, describe and or show/point to Court the **“paths”, the “bananas”, the “path to the well”, “Munyangabi”**



and “**Muramura**” trees, and the “**river Nakasimine**” as he described them in Court. He only mentioned the neighbours who were inconsistent with those that were mentioned in Court. Even if one is to assume that the boundary features mentioned while in Court which were in form of trees, were uprooted and or destroyed, **Pw1** and **Pw3** would have pointed at their original location. The other features such as the “path”, the “path to the well”, and the “rivers”, these are permanent features which would still be visible and if not, an explanation would be given as to their non-existence.

[20] The above scenario was amidst a situation where, as the trial Magistrate observed, the agreement of the land sold by **Pw3** to the 2<sup>nd</sup> Defendant (**Dw1**) was silent on or did not mention the boundaries and the acreage or size. The agreement itself was never exhibited. The same apply to the land allegedly given to the 1<sup>st</sup> Defendant. It was neither demarcated nor is its size known.

[21] The 1<sup>st</sup> Defendant on the other hand testified that he was the 1<sup>st</sup> occupant on the suit portion of land in 1964 having gotten it from his boss **Kasoro**, and not **Kasaija** as alleged by the Plaintiffs. The Plaintiffs had nothing on the suit land. Indeed, at locus, they never showed any thing owned by them, be it crops or the alleged eucalyptus trees.

[22] The 2<sup>nd</sup> Defendant on his part confirmed that he bought the suit portion of the land from **Pw3**. The agreement got lost while he was shifting. His purchase is not disputed by the Plaintiff. What they disputed upon was the size. The burden is on the Plaintiffs to prove what size of the suit portion of land **Pw3** sold to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant explained that by the

time he purchased the suit portion of land, there was nothing on the land. It is him who had built a house, grown some crops and planted eucalyptus trees thereon.

[23] From the totality of the above I find it evident that whereas the Plaintiffs/Appellants were seeking for a declaration that the suit land belonged to them, they never adduced any evidence to prove that claim. They merely led evidence that left the case in equilibrium, the Plaintiffs' word against that of the Defendants, thereby failed to prove their case on the balance of probabilities. They failed to discharge the burden of proof placed upon them by the law.

[24] In the premises, I find that the trial Magistrate properly evaluated the evidence on record and in so doing reached a right decision that the Appellants failed to prove their case on the balance of probabilities and therefore, that the Respondents/Defendants/Counter claimants were the rightful owners of their respective portion of land.

[25] As a result I find the sole ground of appeal raised by the Appellants lacking merit. The trial Magistrate's Judgment and Orders are upheld and the Appeal is accordingly dismissed with costs.

Signed, Dated and Delivered at Masindi this **26<sup>th</sup> day of August, 2022.**

.....  
**Byaruhanga Jesse Rugyema**  
**JUDGE**