

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
CIVIL APPEAL NO. 38 OF 2019

ASIIMWE PAUL.....APPELLANT

5  
VERSUS

1. KALULE JOSEPH

2. BUTEERA JOHN

3. NYENJE PETER

4. EMMANUEL KASOZI

10 5. KAMIRI KIZITO

.....RESPONDENTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

Judgment

15 This is an appeal against the decision of His Worship Muinda Tadeo Magistrate  
Grade one of the Chief Magistrate’s Court of Mpigi delivered on the 21<sup>st</sup> day of  
March 2019 in Civil Suit No. 046 of 2011.

**Background:**

20 The Appellant sued the respondents jointly and severally seeking inter alia for a  
declaration that he is the legal owner of land comprised in Block 47 Plot 11  
Butambala Land at Bya, Mpigi District, a permanent injunction to restrain the 1<sup>st</sup>,  
2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, their agents and servants or any other person  
claiming from them from trespassing and interfering with the appellant’s use of  
the suit land and breach of agreement by the 4<sup>th</sup> and 5<sup>th</sup> respondent, eviction of the  
1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, specific performance of Clause 9 of the sale agreement  
25 by the 4<sup>th</sup> and 5<sup>th</sup> respondents, mesne profits, compensation, general damages,  
costs of the suit and interest thereon.

The appellant contended that he purchased the suit land from the 4<sup>th</sup> and 5<sup>th</sup>  
respondents who were joint tenants of the land. The vendors did not mention that

the 1<sup>st</sup> – 3<sup>rd</sup> respondents' kibanja was 20 acres and that the 3<sup>rd</sup> respondent's kibanja measured 4 acres and that of the 2<sup>nd</sup> respondent was 1 acre.

5 The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a joint Written Statement of Defence denying the claim of trespass and maintained that they were in occupation of the land as lawful tenants.

10 The trial Magistrate in his judgment found the 1<sup>st</sup> and 3<sup>rd</sup> respondents as bona fide occupants on the suit land, the 4<sup>th</sup> and 5<sup>th</sup> respondents as having breached the terms of the sale agreement dated 13<sup>th</sup> May 2010, 4<sup>th</sup> and 5<sup>th</sup> respondents to compensate the appellant an equivalent of the market price of kibanja, the 1<sup>st</sup> and 3<sup>rd</sup> respondents are occupying, interest on general damages and costs of the 1<sup>st</sup> and 3<sup>rd</sup> respondents to be borne by the appellant while the 4<sup>th</sup> and 5<sup>th</sup> respondents pay the costs of the suit to the appellant.

The appellants being dissatisfied with the lower court's judgment filed the instant appeal whose grounds as per the Memorandum of appeal are as follows;

- 15 1. That the trial Magistrate erred in law and fact when he failed to make a finding on the facts as to the size of the kibanja held by the 1<sup>st</sup> and 3<sup>rd</sup> respondents resulting in an ineffective judgment.
- 20 2. That the trial Magistrate erred in law and fact when he erroneously and against the weight of the evidence held that the appellant and his witnesses did not know the size of the 1<sup>st</sup> and 3<sup>rd</sup> respondent's kibanja.
3. That the learned trial Magistrate erred in law and fact in handling and determination of the suit when he denied the Appellant the benefit of reserved legal counsel by refusing to consider the Appellant's submissions resulting in a miscarriage of justice.
- 25 4. That the learned trial Magistrate erred in law and fact when he refused to consider the written submissions filed on behalf of the plaintiff based on a wrong legal premise, personal ego and bias.
5. The learned trial Magistrate erred in law and fact when he ignored and failed to address the glaring contradictions in the 1<sup>st</sup> and 3<sup>rd</sup> respondent's evidence on the ownership and size of their kibanja holdings.
- 30 6. The learned trial Magistrate erred in law and fact when he failed to properly conduct and keep proper record of the locus in quo visit as legally required.
7. The learned trial Magistrate erred in law and fact when he failed to properly consider the evidence on record thereby reaching a wrong conclusion that

the appellant had failed to prove his case as against the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

8. The learned trial Magistrate generally misdirected himself on the law and facts and reached a wrong decision ordering the plaintiff to pay costs of the 1<sup>st</sup> and 3<sup>rd</sup> respondents thereby causing a miscarriage of justice.

#### Representation:

M/s Namanya, Kafureeka & Co. Advocates represented the appellant while M/s Lukwago & Co. Advocates represented the respondent. Written submissions were filed by the appellant and the 1<sup>st</sup> respondent.

#### 10 Duty of a first appellate Court:

This is a first appeal from the decision of the learned trial Magistrate. The duty of the first Appellate Court was outlined by Hon. Justice A. Karokora (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke v. Sam Galiwanga, SCCA No. 48/1995** where he held that;

- 15 *“...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity...”*

- 20 This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion. (See: **Banco Arab Espanol v. Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998**).

- 25 The powers of the High Court as an appellate Court are stipulated in **Section 80** of the **Civil Procedure Act Cap 71**. The High Court accordingly has power to determine the case to finality, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

- 30 According to **Section 80 (2)** of the Civil Procedure Act, the High Court has the same powers and nearly the same duties that are conferred on courts of original jurisdiction in respect of suits instituted in it as an appellate court.

Submissions:

Grounds 1, 2, 5, and 7:

5 1. That the trial Magistrate erred in law and fact when he failed to make a finding on the facts as to the size of the bibanja held by the 1<sup>st</sup> and 3<sup>rd</sup> respondents resulting in an ineffective judgment.

2. That the trial Magistrate erred in law and fact when he erroneously and against the weight of the evidence held that the appellant and his witnesses did not know the size of the 1<sup>st</sup> and 3<sup>rd</sup> respondent's bibanja.

10 5. The learned trial Magistrate erred in law and fact when he ignored and failed to address the glaring contradictions in the 1<sup>st</sup> and 3<sup>rd</sup> respondent's evidence on the ownership and size of their bibanja holdings.

7. The learned trial Magistrate erred in law and fact when he failed to properly consider the evidence on record thereby reaching a wrong conclusion that the appellant had failed to prove his case as against the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

15 Counsel for the Appellant submitted that the gist of the above grounds is that the trial Magistrate erred when he held that the respondents were bonafide occupants of the suit land. That the appellant sued the 1<sup>st</sup> and 3<sup>rd</sup> respondents in trespass and pleaded that by agreement dated 13<sup>th</sup> May 2010, he purchased the suit land comprised in Butambala Block 47 Plot 111 at Bya, Mpigi, from the 4<sup>th</sup> and 5<sup>th</sup>  
20 respondents. On 15<sup>th</sup> June 2010, the suit land was registered in the names of the appellant who then started developing it without interference from any one. That after about 6 months the respondents started claiming unregistered interest in 20 acres.

25 It was further submitted that save for the 1<sup>st</sup> and 3<sup>rd</sup> respondents pleading to be lawful occupants they did not prove that they paid any busulu or that they entered the land with the consent of the mailo land owner as provided under **Section 29 (2) (b)** of the Land Act and the case of **Nalwoga v. Bagaaliwo (Civil Appeal No. 8 of 2012)**. That the respondents did not plead having any developments on the suit land or having occupied the suit land without any interruption from the registered  
30 owner for 12 years before the coming into force of the Constitution. (See: **Kalya & 2 Others v. Macekenyu (Civil Appeal No. 82 of 2012) [2014] UGCA 25**).

Counsel added that parties are bound by their pleadings and thus the trial Magistrate was wrong to find that the respondents were bonafide occupants and

purchasers of the suit land yet they had not pleaded the same. That the respondents only claimed to be lawful occupants and not bonafide occupants and gave inconsistent evidence from what they pleaded claiming to be purchasers. Counsel relied on the case of **Interfreight Forwarders (U) Ltd v. East African Development Bank SCCA No. 33 of 1992** where it was held;

*“A party is expected and is bound to prove the case as alleged by him and covered in the issues framed therein. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings...”*

Further, that the trial Magistrate failed to make findings on the size of the bibanja allegedly held by the 1<sup>st</sup> and 3<sup>rd</sup> respondents because the appellant pleaded that they were trespassers. That the appellant proved that he was the registered proprietor having lawfully purchased it from the 4<sup>th</sup> and 5<sup>th</sup> respondents without any third party claims. That it was the duty of the bibanja holders to show court their actual boundaries and extent of their land.

Counsel for the appellant added that the appellant proved that he was a registered proprietor with a certificate of title and that it was after taking possession that the relatives of the 1<sup>st</sup> and 3<sup>rd</sup> defendants surfaced on the land claiming to have interest in the kibanja. And it was the appellant’s evidence that the 1<sup>st</sup> and 3<sup>rd</sup> respondents had bibanja of 4 and 2 acres respectively and he purchased about 35 acres from the 4<sup>th</sup> and 5<sup>th</sup> respondents and thus it was the duty of the 1<sup>st</sup> and 3<sup>rd</sup> respondents to prove that they were lawful occupants.

Furthermore, that the 1<sup>st</sup> respondent stated that he purchased the said land by agreement but he did not sign the agreement and the said agreement did not indicate the size of the land actually sold to him.

Counsel for the 1<sup>st</sup> respondent on the other hand submitted that the issue of size of the kibanja did not ever at any one time come up during the trial as it was not part of the issues framed for determination. That the 1<sup>st</sup> respondent was sued as a trespasser and the findings of the trial magistrate in regard to size were not the final findings on the matter. That during the locus visit the 1<sup>st</sup> respondent was able to show court the boundaries of his kibanja and the same had also been adduced in evidence during his testimony. Therefore the issue of size should be disregarded in grounds 1 and 2.

It was further submitted for the 1<sup>st</sup> respondent that the 1<sup>st</sup> and 3<sup>rd</sup> respondents did prove that they were bonafide occupants according to their evidence. That they acquired the suit land on the 2<sup>nd</sup> day of February, 1977 and attached evidence to wit a sale agreement. That the 1<sup>st</sup> respondent took possession and developed the  
5 suit land with a residential house which constitutes his home and planted a banana plantation, coffee, cocoa and yams and lived on the same for over 30 years until 2/7/2010 when they received a letter from the appellant's lawyers.

Further, that the 1<sup>st</sup> respondent in his pleadings was referred to as a lawful tenant having purchased the suit land and not a lawful occupant. That the respondents  
10 proved that they were bonafide occupants of the suit land and the appellant failed to prove that they were trespassers.

Further, that according to the sale agreement between the appellants and the 4<sup>th</sup> and 5<sup>th</sup> respondents, it was disclosed that there were squatters on the land.

In rejoinder it was submitted for the appellant that grounds of appeal are derived  
15 from evidence as was led in court and the same considered in arriving at the decision of court. That a person cannot claim a kibanja without knowing its size and neither can they claim to own kibanja in the bush. (See: **Kalya & 2 Others v. Macekenyu (Civil Appeal 82 of 2012) [2014] UGCA 25**).

#### **Analysis of court:**

20 I have carefully considered the submissions of both parties and the court under the above grounds and I will go ahead to resolve the same.

**Section 29(2)(a) of the Land Act** defines a bonfide occupant to mean a person who before coming in force of the Constitution of 1995, had occupied and utilized or developed any land unchallenged by the registered owner or agent of the  
25 registered owner for twelve years or more. And **Section 29(5)** of the same Land Act provides:-

*“Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this section shall be taken to be a bonafide occupant for purposes of this Act.”*

30 In the instant case all the parties claimed to having derived their interests from purchases and attached sale agreements to that effect. I have accordingly perused the agreements under which the appellant, the 1<sup>st</sup> and 3<sup>rd</sup> respondents derive their interests. The appellant according to his sale agreement purchased about 44.4

acres whereas the agreements of the 1<sup>st</sup> and 3<sup>rd</sup> respondents indicate the boundaries of the pieces of land they bought and not measurements. The 1<sup>st</sup> respondent bought his piece of land in 1977 and the 3<sup>rd</sup> respondent derives his interest from the purchase made by his father Sitefano who bought in 1948. The  
5 1<sup>st</sup> and 3<sup>rd</sup> respondents maintained that they had been on their respective pieces for over 30 years. That the appellant only started making his claim in 2010. It is therefore not true that the 1<sup>st</sup> and 3<sup>rd</sup> respondents had not lived on the suit land for over 12 years before the coming into place of the Constitution of the Republic of Uganda, 1995 as submitted by the appellant.

10 It should also be noted that the appellant's sale agreement was indicative of the fact that there were squatters on the suit land. Who the Appellant would have been expected to do a follow up on and due diligence to ensure that they were indeed compensated or dealt with. The appellant instead claimed that he bought land without any squatters which was not the case.

15 The 1<sup>st</sup> and 3<sup>rd</sup> respondent also in their pleadings claimed to be lawful tenants and not lawful occupants.

It was the appellant's contention that the trial magistrate failed to make a finding as to the size of the bibanja. Whereas I agree that the trial Magistrate ought to have ascertained the extent of the alleged trespass of the 1<sup>st</sup> and 3<sup>rd</sup> respondents on the  
20 suit land. Measurements or size of the land however, can be told in two different ways especially for and registered and unregistered land. Registered land having been surveyed, the Certificate of title will indicate the acreage of the land in questions, as for unregistered land because it is usually unsurveyed, will usually go by the boundary description to tell the size which will not necessarily be in  
25 acreage.

It is my considered view that if at all size of the suit land was that important and ought to have been determined in terms of acreage of which the trial Magistrate is not an expert to conduct, the appellant had the opportunity to bring it to the attention of court to have the boundaries of the suit land opened, which was not  
30 done. That leaves me with the impression that the issue of size was not that important since the same could be achieved through boundary description as was done by the 1<sup>st</sup> and 3<sup>rd</sup> respondents and their witnesses and was corroborated by their sale agreements.

The appellant also contended that the trial magistrate erroneously found the 1<sup>st</sup>  
35 and 3<sup>rd</sup> respondents as bonafide occupants of the suit land while they had not

pleaded the same. Evidence in the instant case was led to the effect that the 1<sup>st</sup> and 3<sup>rd</sup> respondents started utilizing their respective pieces of land from 1977 and the 3<sup>rd</sup> respondent derived his interest from a 1948 purchase and inherited in 1976 respectively. The 3<sup>rd</sup> respondent even tendered in a receipt of busulu payment that was made by his father from whom he inherited his land which was admitted in court as DID3. That the 4<sup>th</sup> and 5<sup>th</sup> respondents had been known to them as the Landlords until the appellant purchased the suit land. It was even found that the 4<sup>th</sup> and 5<sup>th</sup> respondents were in breach of agreement. This clearly indicates that there were interests on the suit land that the 4<sup>th</sup> and 5<sup>th</sup> respondents wanted to defeat even when they were aware of them. Be that as it may, court has the discretion to make findings in accordance with the evidence that is brought before it and in the instant case the 1<sup>st</sup> and 3<sup>rd</sup> respondents led evidence which in my view was satisfactory to prove that they were bonafide occupants of the suit land and the trial Magistrate rightly found so.

In the case of **Odd Jobs v. Mubia, [1970] EA 476**, it was held that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to *“arrive at a correct decision in the case and to finally determine the controversy between the parties.*

I accordingly find no fault in the trial Magistrate’s findings in regard to the size of the suit land and the fact that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were held to be bona fide occupants on the suit. These grounds of appeal hereby fail.

#### Grounds 3 and 4:

3. That the learned trial Magistrate erred in law and fact in handling and determined of the suit when he denied the Appellant the benefit of reserved legal counsel by refusing to consider the Appellant’s submissions resulting in a miscarriage of justice.

4. That the learned trial Magistrate erred in law and fact when he refused to consider the written submissions filed on behalf of the plaintiff based on a wrong legal premise, personal ego and bias.

Counsel for the appellants submitted that submissions were filed albeit out of time but before judgment was written and filing out of time was a merely technicality and this compromised the appellant’s right to be heard.

It was submitted for the 1<sup>st</sup> respondent on the other that the fact that all parties filed submissions out of time, the trial Magistrate disregarded them while writing



his judgment. Since no leave was sought. Counsel added that the submissions do not constitute evidence and court with or without submissions can make its judgment. That submissions are only intended to persuade court to decide for either party but are not a mandatory requirement.

- 5 Counsel for the appellant agreed with the submissions of the 1<sup>st</sup> respondent that submissions are only persuasive but still maintained that he trial Magistrate used his discretion injudiciously.

**Analysis of court:**

10 It is my considered view that a court can make its decision with or without submissions of the parties. Submissions are merely to guide court by either party in favour of their case and not evidence. Court also has the liberty to disregard the same if it so wishes as they are not binding on it.

15 In the instant case I find that the trial Magistrate in disregarding submissions filed out time did not prejudice the appellant in away. If the appellant is so aggrieved by this then it should be taken as a learning experience that when court gives guidelines or directives the same ought to be followed and are not for show since there can be implications. In case of failure to comply for some reason or another then the party affected can seek leave of court. As the maxim goes, *equity aids the vigilant and not the indolent*.

20 I therefore, find and hold that the trial Magistrate did not err in disregarding the submissions of both parties in reaching his decision. These grounds of appeal hereby fail.

25 **Ground 6: The learned trial Magistrate erred in law and fact when he failed to properly conduct and keep proper record of the locus in quo visit as legally required.**

30 Counsel for the appellants submitted that none of the defendants and their witnesses could clearly identify the boundaries of their bibanja. That no allowance was given to the witnesses during locus visit to clarify on what they had stated in court. That it was not indicated that the Magistrate was taken from point to another and thus the locus proceedings were procedurally wrong. And the decision of the lower court should be set aside and was prejudicial to the appellant.

Counsel for the 1<sup>st</sup> respondent submitted that the suit land being 20 acres was not in issue therefore it was the 1<sup>st</sup> respondent's duty to show court the boundaries of the suit land and developments thereon as per his evidence which he ably did.

**Analysis of court:**

5 I have had the privilege of looking at the locus proceedings and in my view all the parties were given an equal chance to show the extent of their pieces of land to an extent of the trial Magistrate even drawing three different sketch maps to elaborate what the parties were showing him. I therefore, find no fault in the trial Magistrate's record of the locus in quo proceedings. This ground of appeal also  
10 fails.

**Ground 8:**

**That the trial Magistrate misdirected himself in award costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondent who failed to prove their case and could not identify the size of their bibanja.**

15 Counsel for the appellant contended that the 1<sup>st</sup> and 3<sup>rd</sup> respondents should not have been awarded costs as they did not prove the size of their bibanja.

Counsel for the 1<sup>st</sup> respondent on the other hand submitted that it is a general principle that costs follow the event as provided under **Section 27** of the Civil Procedure Act, and since the case was dismissed against the 1<sup>st</sup> and 3<sup>rd</sup> respondents,  
20 they ought to have been paid costs since they were the successful parties in the suit.

**Analysis of court:**

It is trite that costs follow the event and according to **Section 27** of the Civil Procedure Act, costs are awarded at the discretion of court to a successful party. In  
25 the instant case the trial Magistrate awarded costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents having found bonafide occupants of the suit land. The main suit was also in part found in favour of the appellant who was also awarded costs. The appellant contended that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were not successful parties thus they should not have been awarded costs. I disagree with the appellant's argument with  
30 all due respect, the suit was found partly in favour of the appellant and the other part in favour of the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

I therefore, find and hold that the trial Magistrate did not erroneously award costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents as they too received judgment in their favour. The trial Magistrate used his discretion correctly.

This ground of appeal also fails.

- 5 This appeal hereby fails on all grounds. The decision of the lower court is accordingly upheld. Appeal is dismissed with costs to the 1<sup>st</sup> respondent.

I so order.

Right of appeal explained.

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**OYUKO ANTHONY OJOK**

**JUDGE**

**9/05/2022**

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