THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

CIVIL APPEAL NO. 23 OF 2021

(Arising from Chief Magistrate's Court of Mpigi Civil Suit No. 058 of 2019)

1. JOSEPH GONJAGABWE NSUBUGA ……APPELLANTS
2. PETER MUGONGO NSUBUGA

VERSUS

1. NAMUGENYI MARGARET
2. PATRICK SERUGO AKA PADDY
3. NAMULI BETTY ……..RESPONDNTS
4. NAMUDDU TEO
5. HAJJI MOHAMMED KATANYOLEKA

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

Judgment

This appeal is against the decision of the Chief Magistrate at the Chief Magistrate's Court of Mpigi at Mpigi Her Worship Nabaasa Ruth delivered on the 23rd September, 2021.

The appellants being aggrieved by the said decision lodged the instant appeal whose grounds are as follows;

1. That the learned Chief Magistrate erred in law and fact in finding that the 1st and 2nd Respondents are bona fide and lawful occupants of Kibanja measuring 1.5 acres on the appellant's land at Kitemu known as Busiro Block 353 Plot 301 at Budo.
2. The learned Chief Magistrate erred in law and fact in not finding that the respondents were not trespassers on the suit land.

The appellants brought a suit against the respondents jointly and severally, seeking the following orders; that the respondents pay the sum of UGX 48,000,000/= being special damages for the damage caused by the respondents on their land through trespass on the Appellants' land at Kitemu, interest of 25% per annum on

the UGX 48,000,000/=, damages for trespass; punitive damages for forceful entry and erection of illegal structures on the appellants' land; interest on the damages at court rate from the date of judgment till full payment; a permanent injunction restraining the respondents from interfering with or entering on the appellants' land, all their illegal structures on the same land be demolished at their costs and costs of the suit.

It was the appellants' case that they are the registered proprietors of land comprised in Busiro Block 353, Plot 301 measuring 14.381 acres of land at Kitemu. That the respondents trespassed on part of the land, destroyed property and built illegal structures thereon which stand to date. That the respondents used to occupy part of the suit as bibanja owners but deserted the same in 2000. That the respondents have destroyed crops worth over UGX 48,000,000/= and have since demarcated small plots there from and are selling the same to third parties. As a result the appellants were denied gainful utilization of the suit land leading to financial loss and prayed for an eviction order.

The respondents on the other hand averred that they were bona fide tenants on the suit land, who inherited the kibanja from their parents who owned approximately 1.50 acres as far back as the 1920s and were even buried there.

The Chief Magistrate in her judgment dated 23/9/2021 held that the 1st respondent and her children were bona fide and lawful occupants of the Kibanja on the appellants' land measuring 1.5 acres to be identified and measured off, ordered for eviction of the respondents from the land in excess of the 1.5 acres. Thus, the instant appeal.

Representation:

At the hearing of the appeal Mr. Katoono James held brief for Mr. Nerima Nelson appearing for the appellants while Mr. Joseph Kiryowa represented the respondents. Both parties filed written submissions.

Duty of a first appellate Court:

This is a first appeal from the decision of the learned Chief 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;

> ***"...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 verocity..."

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 versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998).**

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 finally, 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.

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

Resolution:

Ground 1: That the learned Chief Magistrate erred in law and fact in finding that the 1st and 2nd Respondents are bona fide and lawful occupants of Kibanja measuring 1.5 acres on the appellant's land at Kitemu known as Busiro Block 353 Plot 301 at Budo.

Counsel for the appellants submitted that the Chief Magistrate failed to evaluate the concepts of Kibanja, Bona fide occupant and lawful occupant. That there is a difference between a bonafide occupant and a lawful occupant as per the provisions of **Section 29** of the Land Act. That the respondents claimed to have a kibanja since the 1920s and they fall in the category of bonafide occupants.

That however, they did not adduce evidence to prove that the kibanja they owned measured 1.5 acres nor did they show court any kibanja measuring 1.5 acres or any dimensions. That DW2 only confirmed to court at locus that from 2000-2019 he did not do any farming on the suit land while the 2nd appellant in his witness statement stated that the 1st to the 4th respondents were known to him as family members and used to occupy a kibanja measuring about 50x100ft which he reiterated at locus.

Further, that the 2nd respondent sold the house on the kibanja to the 2nd appellant in 2000. That after the said sale the 1st respondent and her children had no home on the land as they left the land and the 2nd appellant's employees occupied the house that was built thereon. That the 2nd respondent reappeared in 2019 as he had come to visit the graves and that occasional visiting of the graves was not evidence that the respondents owned and occupied a kibanja of 1.5 acres. That in

the instant case the respondents are only entitled to land measuring 50x100ft and the appellants do not dispute the right of the 1st respondent there on. And this covers the grave yards too.

Counsel for the respondents on the other hand submitted that it was the evidence of PW1 while he showed the disputed land to court during the locus proceedings that it measured 1.5 acres and had three graves. That the trial Magistrate rightly condemned any extension beyond this acreage as amounting to trespass. Thus, she rightly ordered that the 1st – 4th respondents are entitled to only 1.5 acres surrounding the burial grounds which were to be identified, measured off and marked by the parties to avoid future conflicts.

Analysis of court:

I have carefully considered the submissions of both parties in regard to this ground and the entire court record. It is the contention of the appellants that the 1st - 4th respondents are only entitled to 100ft x 50ft of the suit land and not 1.5 acres as held by the trial Magistrate.

The respondents on the other hand insist that the trial Magistrate rightly found that they were entitled to the 1.5 acres.

During the locus visit it was the evidence of PW1 that the entire suit land was 1.5 acres yet the respondents were entitled to only 100ft x 50ft which are not disputed by the appellants.

The trial Magistrate however, in her judgment found that according to her observations during the locus visit, the respondents had occupied about 4 acres as opposed to the 1.5 acres they claim and ordered for their eviction off the land in excess of the 1.5 acres.

It is not in dispute that the respondents had occupied the suit land before 2019, but had left the same in 2000 due to misunderstandings by the 1st respondent. They only returned in 2019 to claim what they say is rightly theirs. The respondents made they interest known to court as 1.5 acres however, court found that they had occupied over and above said acres.

I find that the trial Magistrate rightly held that the respondents were entitled to 1.5 acres including the grave yard as land they had inherited and occupied from the 1920s through their grandparents. The appellants do not dispute the respondents' interest on the land but only claim that it is smaller that is 100ft x 50ft and not 1.5acres. If it were indeed the case, I believe the trial magistrate would have made observations in regard to same from her locus in quo findings.

I am therefore, unable to find merit in this ground of appeal. It hereby fails.

Ground 2: The learned Chief Magistrate erred in law and fact in not finding that the respondents were not trespassers on the suit land.

Counsel for the appellants submitted that in order to prove trespass, it was incumbent on the appellants to prove that the disputed land indeed belonged to them, that the respondents had entered upon that land and that the entry was unlawful since it was made without the permission of the appellants or did the respondents have any claim or right or interest in the land. **(See: Shiekh Mohammed Lubowa v. Kitara Enterprises Ltd, Civil Appeal No. 4 of 1987).**

Counsel added that in the instant case, it is not in dispute that the appellants are the registered proprietors of the suit land and a certificate of title is conclusive evidence of title under **Section 59** of the Registration of Titles Act. Whereas the respondents are mere trespassers on the on the same forcefully.

Counsel for the respondents on the other hand submitted that it was alleged by the appellants that all the respondents deserted the kibanja in 2000 only to return to forcefully and illegally in May 2019.

The respondents however, averred that their abandonment was not voluntary and that their return in May 2019 was lawful. And the trial Magistrate right found so based on the decision the case of **John Busuulwa v. John Kityo and Others, C.A.C.A No. 112 of 2003**, where it was held that involuntary abandonment does not terminate one's interest in land where such interest existed before. And properly interpreted **Section 37** of the Land Act on abandonment and termination of occupancy. That the trial Magistrate correctly found that the respondents' interest on the suit land existed as far back as 1920s from their grandparents.

That the 1st – 4th respondents temporarily abandoned the suit land due to the threats on their lives and that the respondents would come back to clear and clean the graveyard to their people. To support his argument counsel cited the case of **Ogaba John v. Kirama Bosco, H.C.C.A No. 0051 of 2015 at pages 9 and 10** and **Oyet Bosco and Anywar Charles v. Abwola Vincent, H.C.C.A No. 0068 of 2016**. Thus, the appeal should be dismissed with costs.

Analysis of court:

The appellants argued that they are the registered proprietors of the suit land and a certificate of title is conclusive evidence of title under **Section 59** of the Registration of Titles Act. Whereas the respondents are mere trespassers on the on the same forcefully.

The respondents told court that they did not abandon their interest on the suit land but rather were forced to do and that this did not however, extinguish their rights

in the suit land and relied on the case of **Oyet Bosco and Anywar Charles v. Abwola Vincent, H.C.C.A No. 0068 of 2016,** where court held that;

> *"Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances.*
>
> *When the appellants vacated the land as a result of the insurgency that did not terminate their ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see:* John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*). Similarly, the passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of* Strauch v. Coastal State Crude Gathering Co., 424 S.W. 2d 677*. The temporary abandonment of the land by the appellants in the instant case not having been voluntary, their rights as owners were revived when they returned after the insurgency. When the court visited the* locus in quo *as illustrated by the sketch map drawn thereat, the entire land in dispute was occupied by the appellants while the respondent occupied the adjacent piece of land, just as they had before the insurgency."*

I accordingly agree with the submissions for the respondents. The respondents upon temporarily abandoning the suit land did not meant that they lost their interest in the suit land or had none to begin with.

I find no fault in the decision of the trial Magistrate in not finding the respondents as trespassers since the appellants too do admit that the respondents had lived on the suit land before leaving the same in 2000. The appellants also acknowledged that the respondents had a part of the suit land.

I find no merit in this ground, it also fails.

In a nutshell this appeal as a whole lacks merit and fails on all grounds. The decision of the trial Magistrate is hereby upheld and the appeal dismissed with costs. I so order.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUGDE

03/11/2022