

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO.12 OF 2016

(Arising From Buliisa Civil Suit No.5 Of 2014)

BATURUMAYO RWAMUKAGA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MUHINGWA MUKAMBA

KAJURA RICHARD ::::::::::::::::::::::::::::::::::: RESPONDENTS

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] This is an appeal from the judgment and orders of the Magistrate Grade 1 Masindi Chief Magistrate's court holden at Buliisa Magistrate Grade 1 court in **C.S No.5 of 2014** dated 19/12/2014.

Facts of the Appeal

- [2] The plaintiff/Appellant filed the suit against the defendants for inter alia, the following orders:
- a) A declaration that he is the rightful owner of the suit land located at Bikongoro village, Kigwera Sub County, Buliisa district.
 - b) A declaration that the defendants have unlawfully interfered with the plaintiff's right over the suit land.
- [3] It was the plaintiff's case that he had lived on and utilized the suit land by way of carrying out agricultural activities thereon, leasing, hiring and renting to some tenants, among other activities without any interruption. That as a result, there are residential homes, Mizoloyi trees and other trees and part of the suit land is hired to a Tele-Communication company that has a mast thereon.
- [4] That the defendants were once authorized by the plaintiff to temporarily occupy the suit land but when they left in the year 1990, the plaintiff re-occupied his land without any complaint nor third party claims. It is in the early 2015, that the defendants interfered with the

plaintiff's ownership and use by way of falsely claiming ownership thereof.

- [5] In their Written Statement of Defence (**WSD**), the defendants denied the plaintiff's allegations, contended and averred that the defendants and their ancestors have lived on the suit land for more than 80 years and it is on this land that their ancestral burial grounds are situate. That the suit land of now belongs to the estate of the late **Mukamba Yostansi** who died in 1990 who held the suit land under customary tenure. The 1st and 2nd defendants are son and grandson of the late **Mukamba Yostansi** respectively and are beneficiaries of the said estate.
- [6] Lastly, that the defendant's family, while in the process of converting the land into free hold tenure, the plaintiffs signed for them on the Application form in recognition of the defendants' rights over the suit land.
- [7] The trial magistrate on his part found that none of the parties had any developments on the suit land as the land was solely in the hands of Tullow (an Oil and gas exploration company) but that the defendants once lived on the land and later left and are residing elsewhere. As a result, the plaintiff/Appellant's suit was dismissed without costs.
- [8] The plaintiff/Appellant was dissatisfied with the trial magistrate's decision and orders and filed this appeal wherein his grounds of appeal are;
1. *That the Learned Trial Magistrate erred in law when he failed to properly evaluate the evidence before him thereby arriving at a wrong decision.*
 2. *That the Learned Trial Magistrate erred in law when he held that no declaration could be made over land occupied by an **oil well** thereby coming to a wrong decision.*
 3. *That the Learned Trial Magistrate erred in law and in fact when he held that the Appellant had no rights on the suit land.*

Counsel Legal representation

- [9] The Appellant/plaintiff was represented by **counsel Ian Musinguzi of M/s Musinguzi & Co Advocates, Masindi** and the

Respondents/defendants were represented by **Counsel Susan Zemei of M/s Zemei, Aber law Chambers, Masindi**. Counsel for the Appellants made oral submissions but counsel for the Respondents did not respond. She absented herself.

- [10] In his submissions, counsel for the Appellant submitted first on ground 1 and 3 and then, on ground 2 separately.
- [11] On grounds 1 and 3, counsel argued that from the record of the lower court, the Appellant and his witnesses were consistent as to ownership and the Appellant showed that he was in occupation and actual use of the suit land and his evidence was corroborated by his witnesses who testified that there were structures. That he was resident on the suit land, reared animals and there were trees and other meaningful agricultural developments engaged into and developed over years. It is his contention that this was verified at locus. Lastly, that court found that the Respondents had abandoned the land as far back as 1990 and only returned in 2010 when there was a rumor that there was some oil on the land. He concluded therefore that if the trial magistrate had properly evaluated the foregoing evidence, a return of finding in favour of the Appellant as to ownership of the suit land would have been found.
- [12] On ground 2, counsel submitted that the trial court did not answer the question as to “who is the lawful owner of the suit land.” The land was not decreed to either the plaintiff or the defendants. That court instead stated that the only development it saw while on locus was an oil well which belonged to Tullow yet there was no evidence about the oil well either by Tullow or the litigants. That besides, 3 witnesses testified at locus yet they had not testified at trial, a violation of the purpose of locus which is to crosscheck evidence that was given in court as against the facts possibly on the ground.

Determination.

- [13] It is a trite principle of law that in civil cases, the burden of proof is on the plaintiff to prove his case on a balance of probabilities; **NSUBUGA VS KAVUMA [1978] HCB 307. S.101 of the Evidence Act** is also to the effect that,

“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.”

- [14] It follows therefore that in the instant case, since the law of evidence is premised on proof of alleged facts, the burden of proof is so that the plaintiff/Appellant who asserted was under obligation to prove and if he asserted and failed to prove, then the trial magistrate would be entitled to dismiss the suit.
- [15] In the instant case, the issues before the lower court for determination were;
- a) Who is the lawful owner of the suit land.
 - b) Whether the defendants are trespassers and;
 - c) What are the remedies in the circumstances.
- [16] This court being a first appellate court is duty bound to subject the evidence on the lower court record to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that respect; **SELLE VS ASSOCIATED MOTOR BOAT CO [1968] E.A 123** and **SANYU VS LWANGA MUSOKE VS GALIWANGO S.C.C.A. No. 48 OF 1995.**
- [17] Counsel for the plaintiff, first argued grounds **1** and **3** of appeal and I shall also follow suit in the course of determination of this appeal.
- [18] As regards the 1st issue of “who is the lawful owner of the suit land”, the plaintiff **Kaahwa Justus**, a donee of the Appellant **Baturumayo Rwamukaga** described the defendants as people of “Mukamba.” He stated that the plaintiff (and his ancestors) used to stay with the defendants’ ancestors without any misunderstanding on the suit land until when the defendants left the suit land in the 1990’s and then, the plaintiff and group in their absence started using that land, erected fences as boundaries and put up plantations which are still there. That it was in 2010 when Tullow Oil Company started drilling oil that the defendants returned and started demanding for the land. That on the suit land, he had houses and houses of his children. That there are

acacia trees and rears thereon animals. Lastly, that there is a booster of **Airtel** for which he was paid for.

- [19] On the other hand, it is the defendants' case that the suit land belonged to their ancestors and some of his relatives including the grandfather were buried there. **Kiramali Vinel** (DW1) testified that the land belonged to his grandfather **Mukamba Wilfred** and it was inherited by his father who died in 1989. That for him, he has been on the suit land from 1989 -1991 when he left the land for farming elsewhere.
- [20] It is my view that though a person leaving his land for other activities elsewhere does not amount, without any other evidence, to relinquishment of his or her rights and interests on the former land. Evidence of his or her former rights and interests on the suit land is however required before court is to believe his or her assertions.
- [21] In this case however, I find that it was not obligatory for the trial magistrate to decree the suit land to anybody having found that the plaintiff had not proved his case on a balance of probabilities because the defendants had not counter claimed for a declaration that they are the rightful owners. It follows therefore, that it was within the trial magistrate's mandate to dismiss the suit and decline to decree it to anybody.
- [22] Secondly, the plaintiff had pleaded in **para 4(a) & (b)** of the plaint that he had
“lived and utilized the suit land by way of carrying out agricultural activities thereon, leasing, hiring and renting some to some of the tenants among other activities without any interruption. That there are residential houses, mizoloyi trees, ... and part of the suit land is hired to a Tele-communication company that has a mast.”
- [23] It was upon the plaintiff to present evidence to back up the above claims. The plaintiff testified on how he had been leasing, hiring and or renting the suit land including hiring the suit land to Airtel Tele-Communication company that has a mast thereon and this evidence was not challenged at all during cross examination.

- [24] At locus, the plaintiff was able to point to the trial magistrate evidence regarding his claims as pleaded in the plaint and as per his testimony in court. Court was shown acacia trees, grass thatched houses and the Airtel booster. The defendants on the other hand explained that those houses are not in the disputed land but conceded that they were on the plaintiff's land. That his land neighbored the suit land re-occupied by the defendants. The defendants therefore conceded that they had no interest whatsoever in that portion of land that has acacia trees and grass thatched houses including where the Airtel booster was located.
- [25] On his part, the trial magistrate found that what he observed at the locus as the disputed land, there were no developments at all, save for "only the oil well" which was fenced off. He concluded that neither the plaintiff nor the defendants had any developments on the suit land and therefore, he ended up dismissing the plaintiff's case. The plaintiff had however ascertained clearly the suit land or described it to include the Tullow Oil Well in his evidence in court when he testified that when Tullow was drilling oil, that is when the defendants returned and started demanding for the land. Surely, the houses, the Airtel booster and the Oil Well as pointed to by the plaintiff during locus proved his claim over the suit land.
- [26] As a result of the foregoing, I fault the trial magistrate in his conclusion of the suit that neither the plaintiffs nor the defendants had any developments on the suit land. Evidence on record revealed that the plaintiffs had developments on the suit land. It is the defendants who had no developments on the land. This ground of appeal has merit and it accordingly succeeds.
- [27] As regards the 2nd issue, ie, whether the defendants are trespassers, the defendants pleaded in their Written statement of defence (WSD) that the land in dispute belongs to estate of their late father and grandfather **Mukamba Yostansi** respectively who held it under customary tenure and therefore, they are beneficiaries of the said estate. At locus, there was no evidence to support this claim. In his testimony, the 1st defendant claimed that on the suit land there were perennial crops like coffee, trees and graves of his relatives. At locus, none of these perennial crops and graves were located and shown to the trial Magistrate. In the premises, I find that the defendants had no interest at all in the suit land and therefore, they were trespassers.

- [29] As regards ground 2 of the appeal, counsel for the Appellant complained that the trial magistrate relied on court/locus/independent witnesses in determining the suit. Under **O.16 r. 7 CPR** court is entitled to require any person present in court to give evidence and record evidence of any witness found to be material to the case and this is permissible at locus as long as the witness is not intended to bolster up the case of either party. Proceedings at locus were part of the trial of the suit. What is important is that court must ensure that the evidence is essential to the just decision of the case and the evidence must be on oath and subjected to cross examination. This is exactly what the trial magistrate did. In the premises, I am unable to fault him on this aspect of locus.
- [30] The court witnesses at locus referred to by the trial Magistrate as independent witnesses were merely to confirm and clarify the evidence already received in court. The trial Magistrate in the circumstances did not flout the principle in the **REGISTERED TRUSTEES OF THE ARCHDIOCESE OF TORORO VS WESONGA & 5 ORS MBALE, H.C.C.S NO.96/2009** that,
“once court visits, evidence at locus is conducted as part of the trial. There is no adding to or closing gaps at the locus. The evidence only clarifies what has already been testified in court.”
- [31] In view of the foregoing, I find that this appeal generally has merit and it is accordingly allowed with orders that the plaintiff/Appellant is the rightful owner of the suit land located at Bikongoro village, Kisansya parish, Kigwere Sub County, Bullisa district. No order as to costs considering the history of the suit land and the parties who once together, lived in harmony.

Dated at Masindi this 22nd day of **April, 2022.**

Byaruhanga Jesse Rugyema
JUDGE.