

1.BALUKU JONAN

2.MUHINDO YOWERI

3.BUKOMBI JORDAN :::::::::::::::::::: APPELLANTS

VERSUS

AMARA PETER :::::::::::::::::::: RESPONDENT

- [4] He further averred that on several occasions, he requested the defendants to vacate his land in vain and that the actions of the defendants caused him loss and damages as he could not use his land.
- [5] In their Joint Written Statement of Defence (**WSD**), the defendants denied the plaintiff's allegations, contended and counter claimed against the plaintiff, that they are owners of a Kibanja land situate at **Mambugu village, Mambugu Ward, Kagadi Town Council, Kagadi District** which they occupied and used since the 1960's. That the defendants were born and raised on the disputed land which has also been used as an ancestral burial ground by the 1st defendant's family.
- [6] The trial magistrate heard the matter and upon evaluation of the evidence adduced by the parties, found that the plaintiff had proved his case of ownership of the suit land on the balance of probabilities. As a result, the court gave judgment in favour of the plaintiff/Respondent and the defendants were therefore found to have trespassed on the plaintiff's land.
- [7] The defendants/Appellants were dissatisfied with the trial magistrate's decision and orders and filed this appeal wherein their grounds of appeal as per the memorandum are;
- 1. That the learned trial Magistrate erred in law when he wrongly evaluated the evidence and arrived at a wrong conclusion.*
 - 2. That the learned trial Magistrate erred in law and fact when he adopted a wrong procedure at locus visit by permitting cross examination of witnesses.*
 - 3. The learned trial Magistrate erred in law and fact when he failed to properly interpret the exhibits/documents.*

Counsel Legal representation

- [8] The Appellants/defendants were represented by **Counsel Susan Zemei of M/s Zemei, Aber Law Chambers, Masindi** and the Respondent/defendant was represented by **Counsel Wosama Emmanuel of M/s P.Wettaka Advocates, Kampala** . Both counsel filed written submissions as permitted by this court, for consideration in the disposal of this Appeal.

The Law

- [9] 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.”
- [10] 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 such that the plaintiff/Respondent 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.
- [11] 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.**

Determination of the Appeal

Ground 1: That the learned trial Magistrate erred in law when he wrongly evaluated the evidence and arrived at a wrong conclusion.

- [12] Counsel for the Appellants argued that from the record of the lower court, it was the uniform evidence of the defence witnesses **DW1, DW2, DW3, DW4 & DW5** that the suit land forms part of land owned by the late **Israel Bukombi** who bought the same from a one **Kapalanyi** in the 1970's. That the family of the late **Bukombi** lived and utilized the suit land which stretched up to the swamp, by planting tobacco, eucalyptus trees and other perennial crops. He submitted further that **Lawrensio Lukwago** (PW3) aged 83 years old from whom the sub county bought the suit land, testified selling the suit land which ends at the swamp to the sub county and that his evidence of a forest corroborates usage by

the Appellants' witnesses who informed court that the late **Bukombi** planted eucalyptus trees on the portion he bought from **Kapalanyi**. Counsel concluded that had the trial Magistrate properly given attention to the defence evidence, he would have decreed the suit land to the defendants considering that **PW2** contradicted **PW3's** evidence when he testified that the boundary of the suit land ends at the stream and not the boundary being the swamp. That the contradiction as to the boundaries would have been used to favour the defendants since the gist of the conflict was on the boundary.

- [13] In addition, counsel submitted that **PEXH.1**, the sale agreement of the Respondent/plaintiff does not specify the size of the land and it lacks a sub county seal hence raises question to its authenticity. That whereas it was suggested that there was a council resolution to sell government land, there was no minute tendered in court showing authorization of the sale of the suit land to the Respondent/plaintiff
- [14] Counsel for the Respondent in reply submitted that the trial court properly captured and evaluated the parties' evidence and decided the suit in favour of the Respondent. That **PW1** testified to had bought the suit land from Kagadi sub county and adduced a sale agreement which was admitted as **PEXH.1**. That **Lawrence Lukwago** (**PW3**) testified to had sold the suit land to Kagadi Sub county which later sold it to the Respondent. That the late **Bukombi** from whom the defendants derive their interest had no land there. All plaintiff's witnesses clearly identified the boundary of the suit property as the stream. As to the contradiction, counsel submitted that the contradiction was minor and did not go to the root of the case as the agreement clearly states that the boundary in the west is the wetland/river.
- [15] He submitted further that court relied on the document marked PID1 which was admitted as **PEXH.1** and the size of the suit land was not contested at trial and therefore cannot be raised on appeal. Counsel further submitted that court considered the testimonies of **PW2, PW3, PW4 & PW5** who were the previous owners/occupants of the suit property and were very familiar with the size and or boundary of the suit land. That **PEXH.1**(purchase agreement) and **PEXH.2** (LC1 letter) clearly specify the boundaries of the land in the west as wetland/river/swamp. As regards the authenticity of the agreement **PEXH.1**, counsel stated that **PW5**, the Chairperson LC3 Kagadi Sub

county testified to its authenticity and the Appellants/defendants did not contest its authenticity at the trial.

Evidence

[16] On page 5 of the typed proceedings, Amara Peter (PW1) states this in cross examination;

"I sued the three defendants trespassing on my land... It was on 7/07/2015 I bought it from Kagadi sub county, sales agreement was entered and shows the boundaries...boundaries are east Idi Mugenyi, west, Mambugu prisons, wetland swamp north, east, mugenyi soth sewante Astoni...There was a letter form the chairperson clarifying the sales...I requested the seller to avail me with documents where they bought from and the one Lawrence sold to the sub county purchased the suit land on 7/05/2003." (Sic)

PW3, Lawrence Lukwago at page 9 of testified in cross examination as follows;

"They told me to come and give evidence on this land. There is land I had bought there and I sold again but the problem was not for boundary. I sold to the representative of the sub county to dump garbage. It was Kagadi Sub county. I know the boundary; down there is swamp, Idi and prison Kagadi...I sold to the sub county bse of the town and they decided to dump upper side... I know Israel Bukombi he was chairperson of Ikuma LC1. It was kind of forest land separates me with him. Boundary there is prison; there is swamp and brother to one who sold to me... I had no problem with Bukombi until he died..." (Sic)

PW5, Birungi Matia, vice chairperson LC3 Kagadi sub county testified on page 11 thus;

"Am a witness for Amara Peter. I was present when the plaintiff was buying this land. It was located at Mambugu. I can identify the document and my signature. It was dated 7th/7/2015. The parties to the agreement Amara Peter and Sub county Kagadi. It was five acres located at Mambugu LC1...Am currently the chairperson of kagadi town council. There are two ways of sell...The sub county passed a resolution it was on 27/March/2014, the council...I can tell the boundary of the land on the sun rise there is Idi Mugenyi, sunset there is Kagadi prison and a stream...We had not known

Israel Bukombe. *The Sub county used the land and planted eucalyptus trees and Kagadi prison used to rent the suit land."*

Court admitted the council minutes as **PEXH.3** and there was no objection from the defendants/Appellants.

[17] On the other hand, the key defence witnesses **DW1, DW2 and DW3** testified as follows;

DW1, Baluku Jonan aged 38 years testified on **page 14** thus;

"I stayed on this land I was born there by late father Israel Bukombi. He died in 2009. We lived on this land without any encumbrance till 2015...I did not have any chance of looking at the agreement of my father how he bought his land. What I know he bought it from late Kapalanyi..."

In cross examination, he revealed thus,

"None of the relative is buried on the suit land...It was a typing error that it is our burial ground..."

We removed the boundary of recent...I know Lukwago, he owned land there. He no longer owns it, and I know his land currently Amara Peter is the one using the land."(Sic)

DW2, Muhindo Yoweri aged 65 years testified on **page 15** thus;

"The 1st defendant and 3rd are my sons to my brother. The land is situated in Mambugu LC1. The disputed land is for my elder brother Israel Bukombe."

During cross examination, he stated thus;

"Israel Bukombe who died in 2009 was buried in Ikuma Mambugu ward, kagadi town council. He was not buried on the suit land."

We have never buried there any one."

We have a burial site. It was an error that it was a burial ground. My brother told me he bought the land from Kapalanyi."

*Kapalayi passed on... **The plaintiff slashed our land. We did not report the plaintiff...**The natural boundaries between Mambugu LC1 and Ikuma there is a river."*(Sic)

DW3, Bukumbi Jordan 24 years at **page 16** stated that;

"The 1st defendant is my brother my father is late Bukombe Israel... I was born there and found the land there. My father was using the land and cultivating there. There was no dispute until death..."

During cross examination, he stated thus;

"I know where my father is buried. He is not buried on the suit Land. The s/c owned land in that area. They sold it. I know the person who bought. He is Amara Peter. It is the land the plaintiff is occupying. When they slashed my crops I did not have time to enter into the matter..."

During cross examination, **DW4** testified that he knew **Lukwago** who sold to the sub county and that the sub county sold it to the Respondent/plaintiff who is using the land.

[18] From the foregoing arguments by both counsel and evidence as adduced on record, I find that the defence witnesses i.e, **DW1, DW3, DW4** and **DW5** respectively appear to agree in their evidence that the previous occupant/owner of the suit land was **Mr. Lawrence Lukwago** who testified in the trial court as **PW3**. His evidence as shown above, reveals that he (**PW3**) sold his land (the suit land) to Kagadi sub county which later sold the land to the Respondent/plaintiff; See **PEXH.1**. This evidence is corroborated by the evidence of **Birungi Matia** (**PW3**), the LC3 Vice Chairperson Kagadi Sub county who witnessed the sale agreement between the Sub county (Kagadi) and the Respondent/plaintiff. Though the Appellants appear to claim that the Respondent owns the neighbouring land, **PW3** clearly revealed that the Appellants are wrongly utilizing the suit land.

[19] I find the defence witnesses not credible and inconsistent in their evidence. For instance, **DW1, DW4 & DW5** do not dispute that **PW3 Lawrence Lukwago** sold the disputed land to Kagadi sub county which later sold it to the plaintiff. The LC.1 letter of Mambugu clarifies and shows the boundaries of the land which had been previously occupied and or owned by **PW3**. The trial court admitted the letter as **PEXH.2**. There is no satisfying rebuttal evidence from the Appellants.

[20] On the other hand, none of the defence witnesses **DW1, DW2 & DW3** adduced any supportive material evidence to corroborate their testimony of ownership as given in court. They all testified that none witnessed the agreement between the late **Bukombi Israel** and **Kapalanyi**. The defendants and their witnesses; **DW4 & DW5** state they were told that a one **Kapalanyi** sold the suit land to the late **Bukombi Israel**. The defence evidence is nothing but hearsay and not backed by any material evidence. In their Joint Written Statement of Defence, the

defendants contended that they were born on the suit land which has been used as ***“an ancestry burial ground by the 1st defendant’s family”*** but their evidence in cross examination reveals otherwise and they claim it was just a ***“typing error”*** in the pleadings.

[21] In the instant case, not only did the defence lack material evidence to support their claim, their evidence was hearsay and in addition, they lied in their pleading/WSD that the suit land had graves of the relatives of the 1st defendant. It is also not right and not correct to attribute the averments made in their **WSD** as typing error because if it were so, they ought to have rectified or corrected it by way of amendment since he was ably represented by legal counsel. These are facts presumed to be well known to the parties and as such, the parties are bound by their pleadings; See **Struggle (U) Ltd Vs Pan African Insurance Co. Ltd. (1990) ALR 46 – 47**. It therefore follows that the trial court and this court could and cannot respectively believe the defendants’ testimonies because they lack credibility as their evidence do not support their claims as pleaded in the WSD. Contrary to the submission of defence counsel that the evidence given by the plaintiff’s witnesses was inconsistent and contradictory, I find rather, that, it is the defence evidence that is full of major inconsistencies and contradictions which render their evidence unreliable, for example, contending in the WSD that the suit land was a burial ground for the 1st defendant’s family whereas it is not true.

[22] The **Judgment of the trial court at page 7** reads thus;

“According to the evidence presented by PW2, PW3, PW4 and PW5 these witnesses had knowledge of the suit land in question since some of them lived there in the 70s and 80s, that to me shows that the defendants crossed from their family land and jumped the main river and took advantage of the swamp that forms part of the plaintiff’s land...I have reached this far after critically evaluating the evidence presented in respect of the disputed portion of land. I find that the testimony of the original owners/occupants of the suit land in possession of the plaintiff was convincing. They were able to show and describe the suit portion of land and its boundary line...for the reasons already explained this court holds the defendants liable for trespass by crossing the boundary line, the river and taking over approximately 2 acres...”

[23] The boundary which the parties refer to as a swamp, wetland and or river cannot be used against either party. The context within which the words were used refer to a waterbody, and as such, there are no contradictions. As a result, I find no fault with the way the trial Magistrate evaluated the evidence on record. The plaintiff presented witnesses whose evidence was coherent and credible in regard to the ownership and boundaries of the suit land as opposed the defendants' witnesses who gave evidence which supported the plaintiff's version. The court arrived at the proper decision after considering and weighing the evidence from both sides and the court further relied on exhibits that were properly admitted in court, hence the plaintiff proving his case on the balance of probabilities. Therefore, **ground 1** of the appeal lacks merit and it accordingly fails.

Ground 2; The learned trial Magistrate erred in law and fact when he adopted a wrong procedure at locus by permitting cross examination of witnesses.

[25] **Practice Direction No.1 of 2007** which set the procedure to be followed at locus by way of guidance clearly provides for "cross examination by either party or his/her counsel." It has therefore never been a wrong procedure at locus visit for court to permit cross examination of the witnesses by either party or his/her counsel.

[26] However, though in this case, both the typed and hand written script reflect that the matter was adjourned for locus on the **29/3/2018**, there is no record of the proceedings made at locus. In the premises, I would agree with counsel for the Appellant that the learned trial Magistrate erred in law and fact when he made observations in the Judgment regarding locus when the record does not reflect such observations. Nevertheless, as correctly submitted by counsel for the Respondent, the learned trial Magistrate did not entirely rely on evidence purported of locus in reaching his decision. There was available record of other credible evidence by the Respondent and his witnesses which the trial Magistrate relied on thus arriving at the decision he arrived at. The Appellants failed to establish that they are the rightful owners of the suit property/bibanja.

[27] I find that there was sufficient evidence on record for court to reach the decision it reached. This ground of appeal accordingly fails.

Ground 3; The trial Magistrate erred in law and fact when he failed to properly interpret the exhibits/documents.

[28] It is true the sale Agreement between the Respondent and the Sub county lack a sub county seal. The failure by the Sub county to place a seal on the sale Agreement did neither invalidate the Agreement nor conferred any interest to the Appellant who was not a party to it. The same apply as regards whether the sub county followed the Public Procurement & Disposal of Assets Procedure or not.

[29] In this case, **Birungi Matia** (PW5), Vice Chairperson L.C3 Kagadi Sub county who witnessed the sale testified to the authenticity of the said Agreement (**PEXH.1**). The Appellants neither raised any objection as to the authenticity of the Agreement (**PEXH.1**) nor cross examined PW5 on its authenticity. As **PW5** was not cross examined on this piece of vital evidence, the trial Magistrate was entitled to rely on this un challenged evidence; **Prince Mpuga Rukidi Vs Prince Solomon Iguru & Ors, SCCA No.18/1994**. Besides, the sub county council Resolution in the Minutes of the Council (**PEXH.3**) which authorized the sale of the land in question fully legalized the acquisition of the land by the Respondent. This last ground of appeal also accordingly fails.

[30] In premises, the judgment and orders of the trial court are upheld. On the whole, the Appeal fails and is accordingly dismissed with costs to the Respondent.

Dated at Hoima this 21st day of **March, 2023**.

Byaruhanga Jesse Rugyema

JUDGE.