THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 07 OF 2023

(Formerly Masindi Civil Appeal No. 39 of 2019)

(Arising from Hoima Chief Magistrate's Court, C.S No.50 of 2013)

1.NTEIRAHO EZEKIEL
2.MWESIGWA GRACE :: APPELLANTS

VERSUS

1.KABAGAMBE DAVID
2.MBABAZI SAUL AKIIKI
3.BUSINGE K.LULE
4.KUTEGEKA LOY
5.KABAGAMBE BYONA :: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This an appeal from the judgment and Decree of the Chief Magistrate's court of Hoima before H/W Atim Harriet Esq.Magistrate Grade 1 dated the 10th of August, 2019.

Facts of the Appeal

[2] The Respondents are children and administrators of the estate of their late father, **Kabagambe Langton,** the initial plaintiff in the lower court. The 1st Appellant is a brother to the late **Kabagambe Langton,** the father of the Respondents both being the children of the late **Beyamya Philip.** The 2nd Appellant is a daughter in law of the family.

[3] The Respondents' claim against the Appellants was for a declaration that they were the rightful owners of the suit land and that the Appellants were trespassers.

[4] It was the Respondents' case that their father, the late **Kabagambe Langton** and his brother **Nasanaire Aliwawe** lived and stayed together on their father's (the late **Beyanya Phillip**) land situate at Kijajali-Karungu, Kyabigambire Sub county, Hoima District. Each family was adjacent to each other. The late **Beyamya Phillip** had in turn inherited the suit land from his late father a one **Majajali**.

[5] In around 1995, the 2 families developed misunderstandings and with the involvement of the 1st Appellant/defendant, a clan meeting was convened whereby the families' respective portions of land were confirmed and or demarcated. The 2 families continued to live together peacefully until in around April 2012, when the 2nd Appellant/Defendant who had settled on **Nasanaire Aliwawe's** land, with the help of the 1st Appellant/Defendant crossed the boundaries and entered upon the plaintiffs' part of the land measuring less than $^{1}/_{4}$ of an acre, planted thereon sweet potatoes and bananas thus trespass.

[6] On the other hand, the 1st Appellant/Defendant claimed that he had been in occupation of the suit land by way of cultivation of crops. That the suit land forms part of the Estate of the late **Beyamya Phillip** of which he and the Respondent's father have a beneficial interest.

[7] As regards the 2nd Appellant/defendant, she contended that she has no interest in the suit land but had been utilizing the land with permission of the 1st Appellant/defendant.

[8] On her part, the trial Magistrate while at locus, found that the 2 families of the late **Kabagambe Langton** and **Aliwawe Nasanaire** stayed opposite each other and the disputed portion of land is about ¼ of an acre. She also in addition, found that the families/clan meeting which was convened in 1995 when misunderstandings between the 2 families arose resolved and demarcated boundaries between the 2 families thereby recognising interests of the various parties including the 2 families by their possession,

occupation and continuous usage. She concluded and decided that the suit land did not belong to the estate of the late **Phillip Beyamya** but to the father of the Respondents, **Kabagambe Langton** and therefore, the Appellants/Defendants were trespassers on the suit portion of land.

[9] The Appellants/Defendants were dissatisfied with the decision of the trial Magistrate and filed the present appeal on the following 6 grounds as contained in the memorandum of appeal:

1. *That the learned trial Magistrate erred in law and fact when in evaluation of evidence failed to consider and/or ignored the evidence of the appellants and thereby came to a wrong conclusion that the suit land did not belong to the estate of the late Beyamya Philip distributable amongst all his 5 children.*
2. *That the learned trial Magistrate erred in law and fact when in evaluation of evidence found that by P.Exh.1, minutes of the clan meeting dated 23.9.1995 divided the land at Karungu village between Nasanairi Aliwawe and Kabagambe Langton and thereby came to a wrong conclusion that the suit land which was given to Kabagambe belonged to the Respondents.*
3. *That the learned trial Magistrate erred in law and fact when he found that the Respondents and their father Kabagambe Langton had been in possession of the suit land since 1960s uninterrupted by reason of which they acquired a protectable interest by adverse possession.*
4. *That the learned trial Magistrate erred in law and fact when he held that the appellants were trespassers on the suit land to which they have an interest as beneficiaries to the estate of the late Beyamya Philip.*
5. *That the trial Magistrate erred in law and fact when she ignored major inconsistencies in the Respondents' case but nonetheless found for the Respondents as lawful owners of the suit land measuring approximately ¼ an acre thereby prejudicing the appellants.*
6. *That the trial Magistrate erred in law and fact when she failed to conduct the locus in quo according to the prescribed principles thereby leading to a miscarriage of justice to the appellants.*

Counsel legal representation

[10] The Appellants are represented by **Mr. Simon Kasangaki** of **Ms/ Kasangaki & Co. Advocates, Masindi** while the Respondents are represented by **Mr. Irumba Robert** of **M/s Tumusiime, Irumba & Co. Advocates, Kampala**. Both counsel filed their respective written submissions as permitted by this court.

Duty of the 1st Appellate court

[11] The duty of the 1st Appellate court is to review the evidence on record for itself in order to determine whether the decision of the trial court should stand. In so doing, court must bear in mind that an appellate court should not interfere with the discretion of a trial court unless its satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result there has been a miscarriage of justice; **Stewards of Gospel Talents Ltd Vs Nelson Onyango, HCCA No. 14 /2008, NIC Vs Mugenyi [1987] HCB 28.**

[12] This being a first Appellate court, it therefore has a duty to re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw own conclusion of fact and determine whether on the evidence, the decision of the trial court should stand; See also **Pandya Vs R (1957) EA 336**.

Grounds of Appeal

[13] Counsel for the Appellants argued grounds 1-5 together and the 6th ground separately. I shall also resolve them following the way they were argued by counsel for the Appellants. Grounds 1-5 relate to how the trial Magistrate evaluated the evidence before her.

Grounds 1-5: Evaluation of Evidence

[14] Counsel for Appellants submitted that the original parties to the land in dispute were siblings and children of the late **Beyamya Phillip**, the initial owner of the suit land. That while the defendants/Appellants contended that the suit property forms part of the estate of their late father distributable equally amongst all the children of the late **Phillip Beyamya,** the contention of the plaintiffs/Respondents (i.e Kabagambe Langton and his successors) is that the suit land belongs to their father, that the other children of **Beyamya Phillip** acquired parcels of land elsewhere and shifted leaving **Kabagambe Langton**, the father of the plaintiffs/Respondent, and his brother **Aliwawe Nasanairi** who have settled on the land since the 1960's to date.

[15] Counsel concluded that there was no proof adduced in court that the late **Beyamya Phillip** gave **Kabagambe Langton** or and **Nasanairi Aliwawe** land out of his estate by **WILL,** Grant inter vivos otherwise. That the minutes of the family meeting held in 1995, **P.Exh.1** did not support the Plaintiffs'/Respondents' version. Instead, it affirmed that the late **Phillip Beyamya** left his property undisputed and the same was supposed to be distributed amongst all of his children equally.

[16] Counsel for the Respondents on the other hand submitted that the claim by the Appellants that the suit land forms part of the estate of their father, **Phillip Beyamya** and that they have a beneficial interest is untenable because, in the first instance, they neither filed a counter claim for the same nor pleaded those facts. That under **O.6 r.7 CPR**, the Appellants could not depart from their pleadings without leave since their defence was a mere general denial without a counter claim.

[17] However, upon perusal of the amended WSD, I do not find as claimed by counsel for the plaintiffs/Respondents that the defence was merely evasive as explained in **O.6 r. 10 CPR.** The defence was clearly a denial and sufficiently traversed the plaintiff/Respondents' claims answering the points of substance. **Paragraphs 7-10 of the WSD** is to this effect:

> *"...the 1st defendant contends that he has been in occupation of the suit land by way of cultivating gardens therein and has*

*never relocated... it is not true that the suit land forms part of the estate of the late **Majajali** but forms part of the estate of the late **Beyamya Phillip** as by the time **Beyamya Phillip** died, the suit land was his being his share from the estate of the late **Majajali** and **Beyamya Phillip's** estate has never been divided... the defendants contend that they have never participated in any meeting that allocated land to any one..."*

[18] Clearly, the above excerpts of the defence show that the WSD in question in no way offend **O.6 rr.6, 8 & 10 CPR.** It is neither evasive nor frivolous and vexatious. In **Joshi Vs Uganda Sugar Factory Ltd [1968] EA 570,** the Court of Appeal for East Africa dealt with such issue as follows;

"A defendant is perfectly entitled, if he wishes, to adopt an entirely negative attitude, putting the plaintiff to proof of his allegations, and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions. On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings he will not be allowed to conduct his case on a different footing, or at least only on terms."

[19] It can be seen that the reasoning here supports the view that a defendant is entitled to file a WSD in the form it has been filed in this suit. 2ndly, it is not true as counsel for the Respondents claims in his submissions that issues of whether the suit land forms part of the estate of the late **Phillip Beyamya** and whether the estate of the late **Beyamya Phillip** including the suit land should be distributed were not pleaded in the Appellants' WSD. The plaintiffs/Respondents pleaded the 23/9/1995 family meeting and the distribution of land, the defendants/Appellants on the other hand denied participation in the meeting and distribution of the land or estate of the late **Beyamya Phillip**.

[20] In my view, both the pleadings are proper and therefore acceptable and none of the parties in their evidence departed from their pleadings.

[21] As regards the merits of the Appeal, it is not in dispute that the late **Phillip Beyamya,** father to the Respondents' father **Kabagambe Langton** and the 1st Appellant, died intestate in 1979. There has never been administrators

for his estate and as a result, the estate has never been formally distributed among his beneficiaries. The deceased **Phillip Beyamya** left behind 6 children, **Kabagambe Langton** (father of the Respondents), **Aliwawe Nasanairi, Yuneki, Byarufu, Nteiraho Ezekiel** (1st Appellant) and **Kabalimu.**

[22] Though the late **Phillip Beyamya's** estate has never been distributed, it is however apparent that the parties recognised the occupation and utilisation of the disputed portion of land by the Respondents' father **Kabagambe Langton** and his brother **Aliwawe Nasanairi** as was later reflected in the clan family meeting of 23/9/1995 **(P.Exh.1).** In recognition of **Kabagambe** and **Aliwawe's** interests in the estate of the late **Phillip Beyamya,** the 1st defendant/Appellant **(DW3)** stated in his sworn witness statement as follows;

> *"That the suit land (¼ of an acre allegedly trespassed upon) neighbours with the following people's land...*
> *(a)North – estate of the late Kabagambe Langton*
> *(b)South – Aliwawe Nasanairi."*

[23] During cross examination in court, **DW3** revealed at **p.2 of the typed proceedings** the following;

> *"we held a family meeting on 23/9/1995. I was not the chairman but I was mobilising people for the meeting. I am aware of the minutes made. Minutes were written by **Asiimwe Nathan**... We accepted to be bound by the minutes that time...We were to join 2 families of **Kabagambe** and **Nasanairi Aliwawe**.*
> *We talked about the trenches on the land. They were not boundaries. I do not agree that the trenches can make a boundary. We wanted to know why the 2 families were fighting and open up boundaries since boundaries were cross crossing...I have never disputed these minutes."*

Then in re-examination, he states:

> *"My brothers were using other portions as children."*

[24] Clearly, the above supports and corroborated the evidence of the Respondents that the disputed portion of land is comprised of the area between **Kabagambe** and is brother **Aliwawe** which was the subject of the

family/clan meeting on 23/9/1995 **(P.Exh.1).** It was also alluded to by **DW1** though he denies that the meeting was for distribution of Beyamya's Estate.

[25] The salient features of the family/clan meeting of 23/9/1995 **(P.Exh.1)** which in my view bind the 1st defendant/Appellant as he was party to it and is the one who mobilised members to attend it, are:

At page 3: Decisions by the committees

"a) The committee to go and visit, inspect the boundaries and it accepted that Mzee Aliawawe requested that no one will be removed from where they had been working from since childhood.

b) The uncultivated gardens of late Firipo Beyamya's siblings be shown to the committee and be handed to the owners i.e, Mzee Nteiraho and late Byarufu's children.

c) The committee requested to see the Kyakatuha land at this point and the uncultivated piece be divided into 5 pieces/parts each of late Firipo Beyamya's family to get a share."

Then at Pages 6 – 8

Distribution

"Committee decided that:

(a) ...

(b) ...

(c) ...

(d) ...

*(e) On the uncultivated land belonging to mzee **Nteiraho** and late **Byarufu,** the committee decided that each takes back their share. These uncultivated gardens are neighbouring Nganda. Here mzee **Nteireho** explained that, his part is the last one and it neighbours the late **Nganda**...*

1. ***Min 6/95 inspecting the boundaries and Distribution;***
   The committee went to inspect as shown and this is what guided them.
   1...
   2...
   3...
   *4. Trenches between **Mzee Aliwawe** and **Kabagambe**. Here the trench separating **Mzee Aliwawe** and **Mzee Kabagambe** was inspected and worked upon. And all of them were in agreement."*

[26] The meeting concluded, due to constricts of time, without inspecting the boundaries and considering distribution of land at **Katatahwa** and coffee left by the deceased **Phillip Beyamya.**

[27] From the foregoing, it is clear in my view, that the family/clan distributed the entire estate of the late **Beyamya** to all the beneficiaries including the Respondents' father **Kabagambe Langton** and the 1st Appellant **Nteiraho Ezekiel** during the meeting of 23/9/1995 save for the deceased's land at **Katatahwa.** It is therefore not correct as the Appellants claim that the estate of the late **Beyamya** has never been distributed or that the beneficiaries have never acquired their shares of the estate. The family/clan settled the issue of distribution of the estate of the late **Beyamya** and it cannot in the circumstances be revisited again.

[28] From the entire evidence on record, it is however apparent that what is in dispute is not the entire estate of the late **Beyamya** but only that portion which the trial Magistrate found to be about ¼ of an acre between **Aliwawe's** share of the land, being utilized by his daughter in law, the 2nd defendant and **Kabagambe's** share from where the 2nd defendant was, as found by the trial Magistrate, a trespasser (crossed the boundary and entered **Kabagambe's** land). The boundary is in form of trenches which were established by the family/clan meeting of 23/9/1995.

[29] Still, I find that the trial Magistrate properly evaluated the evidence before her and came to the correct decision that the suit portion of land belongs to the Respondents and therefore, the intrusion into the suit land and cultivation of the ¼ acre therein constituted trespass by the Appellants. As a result, I find the 1st -5th grounds of appeal devoid of any merit.

Ground 6: The trial Magistrate erred in law and fact when she failed to conduct the locus in quo according to the prescribed principles thereby leading to a miscarriage of justice.

[30] Counsel for the Appellants while relying on the authority of **Rose Muwangale Vs Nabirye, HCCA No.63/1987** at Jinja where Mpagi J.stated that the procedure at locus in quo is that the parties and witnesses should be present and the evidence taken there together with any observations by court which should be written as part of the court record. This is also in line with the guidance on the procedure to follow at locus outlined in **Practice Direction No.1/2007** on locus visits.

[31] In particular, among other things there has to be a record of any observation, view, opinion or conclusion of the court, including drawing of a sketch plan, if necessary. As correctly argued by counsel for the Respondents, the drawing of the sketch plan is not mandatory because it may not be necessary in the circumstances of a case. Failure therefore to have a sketch plan is not necessarily fatal to locus proceedings depending on the case. In the instant case however, I found that the hand written script of the record have a sketch plan which was drawn by the trial Magistrate.

[32] In the instant case, the trial Magistrate did not however record any observations, views, opinion or conclusion of the court but in her judgment referred to ovacados, mango trees and an old house on the part of the plaintiffs'/Respondents' land and then the 2nd Defendant/Appellant's sweet potatoes planted on the suit land.

[33] The locus in quo proceedings are found definitely inadequate and scanty. They ought to have captured and therefore missed the "trenches" that were the subject of the boundary marks and the developments by the parties in their respective portions of land. The trial Magistrate's observations in her judgment however were sufficiently reflected on the sketch plan/map. The defect by the trial Magistrate's failure therefore to capture and or comment about the existences of the "trenches" which were the basis of the boundaries is not nevertheless fatal to the locus proceedings and therefore the suit. The same did not occasion any miscarriage of justice to the Appellants because during trial, the Appellants did neither deny the existence of these trenches nor the 2nd defendant/Appellant's crossing and cultivating the portion of land across the trench. The Appellants' merely justified their actions (including the trespass) on the grounds that the suit

portion of the land formed part of the undistributed estate of the late **Beyamya** and therefore they were entitled to utilize it, which court found wrong.

[34] In the premises, the 6th ground of appeal is also found devoid of merit and it accordingly fails. The entire appeal is as a result found lacking merit and it is in the premises dismissed with costs. The orders of the trial Magistrate are accordingly upheld.

Signed, Dated and Delivered at Hoima this **20th day of January, 2023.**

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Byaruhanga Jesse Rugyema
JUDGE.