

KATEEBA LEO ::: APPELLANT
VERSUS
LUCIA KABAROZI ::: RESPONDENT
BEFORE: HON. JUSTICE VINCENT EMMY MUGABO

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The respondent first filed a case against the appellant in the LC 1 court which ruled in the appellant's favour. She appealed to the LCII court which also upheld the position of the LC1 court. She further appealed to the LCIII court which resolved the case in her favour. The appellant took the matter to the Chief magistrate's court which ordered a retrial. Civil suit No. 021 of 2005 was then filed by the respondent against the appellant.

At the trial in the court below, the following issues were framed for determination;

- i. Who is the rightful owner of the suit land?
- ii. Whether the defendant (appellant now) is a trespasser on the suit land
- iii. What remedies are available to the parties?

The learned trial magistrate resolved the matter in favour of the respondent and found the appellant to be a trespasser. Being dissatisfied with the judgment of the trial magistrate, the appellant appealed to this Court with 3 grounds in the Memorandum of appeal, namely;

- 1.** That the learned trial Magistrate Grade 1 failed to and did not properly or at all evaluate the evidence on record and as a result he came to a wrong and erroneous decision.
- 2.** That the learned trial Magistrate Grade 1 erred in law and fact in finding and holding that the suit land belonged to the respondent.
- 3.** That the Judgment and decree of the learned trial magistrate caused a miscarriage of justice in so far as the same had the effect of depriving the appellant of his land which had been given to him by his father, the late Lawrence Kihika

Representation

The appellant was represented by Mr. Cosma A. Kateeba of KRK Advocates while Mr. Businge A Victor of Ngaruye Ruhindi, Spencer & Co. Advocates represented the respondent. Both parties filed written submissions which I have considered herein.

Duty of this Court.

As the first appellate court, the duty of this court is to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. **(See: *Father Nanensio Begumisa & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236*).**

The first appellate court does re-evaluation on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. **(See: *Uganda Breweries v Uganda Railways Corporation 2002 E.A*)**

The evaluation of evidence must be approached as a whole. Court ought not to consider the plaintiff's story in isolation of the defendant's story before it finally decides on the balance of probabilities, which of the two to believe.

Consideration of the Appeal

Counsel for the appellant argued grounds 1 and 2 together and then ground 3 separately. Counsel for the respondent followed the same order. I will resolve all the grounds of appeal together.

Grounds 1 & 2: failure to properly or at all evaluate the evidence on record thereby arriving at a wrong decision.

The gist of all the grounds of appeal is that the trial magistrate did not properly evaluate the evidence on record thereby making wrong conclusions of fact and law, which in turn led to a miscarriage of justice to the appellant.

Submissions

Counsel for the appellant submitted that the trial magistrate failed to put to scrutiny Exhibit **PE2**, the Agreement of sale between Dr. Mputto and William Kasaija and relied on it and yet it had numerous inconsistencies. He stated that the body of the agreement and the last paragraph describing the boundaries were written in different ink and entered at different times. To counsel, the description of the boundaries of the land purchased was inserted after all the signatures were put on the document.

Counsel also submitted that **PW5** Mustapha Bin Said Itaralemwa, who was the only witness to the agreement did not know where the land was situated but merely signed the agreement and that **PW1** Lucia Kabarozi contradicted herself when she said that the suit land was bought with eucalyptus trees, bamboo trees, Gabriel's kraal and a semi-permanent house and later said that the trees were planted by Biretwa and herself.

Counsel submitted that the appellant's evidence shows that the suit land has always been in the appellant's possession for generations and that the evidence of **DW2**, Kasegu Eric pointed to the appellant's family owning the suit land. Counsel referred also to the testimony of the respondent where she mentioned the appellant making bricks on the suit land which was later confirmed at the locus in quo where a brick pit was seen.

Counsel for the appellant also referred to the evidence PW4 Birungi Leonia, who stated that the land opposite that of the respondent is occupied by the appellant's mother Nyindombi and was left by the appellant's father Kihika, which land she was using even before the death of Kihika. To counsel, the

respondent is interfering with the appellant's family land which has been in their possession for generations, his father Kihika having inherited it from their grandfather. Further that the disputed land is a separate piece of land which they also own located below the road. To counsel it's clear that the suit land is different from the land described in the sale agreement from which the respondent claims.

In response, counsel for the respondent submitted that the trial magistrate rightly considered and analyzed evidence adduced by the Respondent which was never rebutted by the Appellant. That the Respondent led evidence through **PW1** to the effect that her late son purchased the suit land from Dr. Mputto who had earlier purchased the same from Gabriel, who had also acquired the same from Bireetwa. That a sale agreement tendered in as **PE2** and PW5 Mustapha Bin Said Itaralemu clearly identified it and stated to have witnessed it.

Counsel for the respondent argued that the issue of the different ink on the agreement complained of by the appellant is protected under **section 30 of the Evidence Act**. That the trial magistrate did examine the evidence of the Appellant and his single witness and found it lacking. That none of the Appellant's siblings or family members came to testify. Further that the Appellant informed court that no one owns land at both sides of the road but this was found to be false during locus where it was established that Karamagi Tadeo owned land on both sides of the road. That the Appellant relies on contradictions which do not go to the root of the matter and prayed that the same be treated as minor.

In Rejoinder, counsel for the Appellant argued that the boundaries in the agreement contradict the boundaries as stated by all the Respondent's witnesses and what is actually on ground. That **PW1** testified that she bought the suit land from one Gabriel Karamagi but no agreement of the

said transaction was exhibited. That the absence of the said agreement meant that it is difficult to ascertain the boundaries of the land the Respondent bought from Dr. Mputto and the boundaries in exhibit **PE2** were added long after the exhibit was signed because they were written in different ink from the rest of the agreement, written at the bottom after everyone had signed and lastly they are not followed by the signature of the persons who were present or wrote the agreement.

Consideration by court.

Ownership and possession

At trial, the Appellant stated the suit land is his family land owned jointly with his family members which they inherited from their father Lawerencio Kihika who also inherited it from his father Kabuluza Mpuhuka. He stated that the suit land was being utilized by his late father and his uncle Rwakajote and that his uncle Rwakajote built a house thereon. He stated that before his father's death in 1996 he was the one utilizing the land for grazing, cultivation, brick making until in 2007 when the respondent fenced off a part of the suit land. He stated that the land Biretwa sold to Gabriel Karamagi is not the suit land but land on the upper side of the suit land that part of the suit land is fenced off by barbed wire and was fenced off by the respondent.

The respondent who was PW1, in her evidence told court that her late son Kasaija purchased the suit land from Dr. Mputto. She stated the former owners of the suit land to be Gabriel Karamagi, the late brother to her husband who also purchased the land from one Biretwa Muganzi. She stated that at the time of buying the land there were eucalyptus trees, bananas, bamboo trees, a kraal which was owned by Gabriel Karamagi Kutambaki and a semi-permanent house for a herdsman. That the trees

mentioned were planted by Biretwa, however she also planted more trees and made bricks on the land. Prosecution Exhibit P2, the sale agreement show Kasaija as the purchaser and Dr. Mputto as the vendor.

PW2 Karamagi Valeria and **PW3** Jane Zahura gave evidence of the history of ownership of the suit land. They both stated that the suit land was originally owned by Biretwa Muganzi who later sold it to Gabriel Karamagi Kutambaki. They stated further that Gabriel sold the land to Dr. George Michael Mputto and at the time of selling the land it had a kraal and banana plantations. He stated that Dr. Mputto sold the land after two years to William Kasaija.

PW5 Mustapha Bin Said Itaralemwa stated he knew Dr. Mputto as his neighbor who sold the suit land to William Kasaija and that he was present at the time the same and witnessed the sale agreement. **PExh 2.**

The only other defence witness DW2 Kasegu Eric also told court that William Kasaija bought land from Dr. Mputto at Katoosa around 1979 and took possession of the suit land. He stated further that the eucalyptus trees on the suit land were planted by Biretwe Muganzi the original owner of the suit land. He added on that Muganzi sold the suit land to Gabriel Kutambaki who later sold the land to George Mputto. During re-examination he stated that he was around when Dr. Mputto was selling the land to Kasaija.

The position of the law that for anyone to lay a claim on any piece of land, such a person must ensure that he or she acquired that land from the person who previously had a legitimate interest on the same, He referred to the case of ***Ojwang V. Wilson Bagonza CACA No. 25 of 2002***

In the case of ***Kaggwa Micheal Vs Apire John, Civil Appeal No. 0126 of 2019, Mubiru J*** held that:-

“..It is trite that any chain of ownership of or title to property must have a first link. The rule is that possession lies at the root of title. According to section 110 of The Evidence Act, when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner....

The legal position is that the plaintiff in a suit for declaration of title and possession can succeed only on the strength of his or her own title. The plaintiff has to succeed only on the strength of his case and not on the weakness of the case set up by the defendant in a suit for declaration of title and possession. That can only be done by adducing sufficient evidence to discharge the onus, irrespective of the question whether the defendants have proved their case or not. The burden in the suit was on the appellant to prove that the respondent was not the rightful owner, despite his being in possession.

Possession of land is in itself a good title against anyone who cannot show a prior and therefore better right to possession (see Asher v. Whitlock (1865) LR 1 QB 1). Possessory title is not based on a documentary title but on the exclusive occupation of the land (or receipt of rent from the land) for a period of time”

The evidence presented by the respondent shows that she has been in possession of the suit land for a long period of time. It was her evidence that she planted eucalyptus trees on the suit land which was seen at locus. The appellant also confirmed this fact in his evidence when he stated that the plaintiff has fenced off part of the suit land. This evidence of the respondent’s possession coupled with the transactional history of the suit land showing the respondent’s interest is sufficient proof of ownership of the suit land.

Counsel for the appellant also contested the admission of **PExh2** for reasons that the body of the agreement and the last paragraph describing the boundaries were written in different ink and to counsel, the description of the boundaries of the land purchased was inserted after all the signatures were put on the document. The trial magistrate in his judgment found that this agreement was 30 years old and as such it is presumed to be authentic pursuant to the provisions of the **section 90 of the Evidence Act**. The said provision states as follows:-

“when any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, is in that person’s handwriting and, in the case of a document executed or attested, that it was duly executed attested by the persons by whom it purports to be executed and attested”

I have looked at **Pexh2** closely. When the last witness was signing, it appears that the ink became faint and his signature was not very visible. The signature was completed with another pen with different ink which was then continually used to state the boundaries of the land. I don’t find this a problem. The trial magistrate considered counsel’s objection to admission of PExh2 and found that the appellant did not challenge the authenticity of the said document. I have no reason to depart from the same.

Counsel for the respondent found the evidence of PW1 Lucia Kabarozi contradictory when she stated that the suit land was bought with eucalyptus trees, bamboo trees, Gabriel’s kraal and a semi-permanent house and later stated that the trees were planted by Biretwa and herself. I do not consider this contradictory evidence to warrant the evidence of the witness being disregarded. The witness stated that she found trees on the

land on taking possession but also planted some. I find no contradiction or inconsistency in the evidence of PW1.

The appellant contends also that the land that Gabriel sold off to Dr. Mputto and eventually sold off to Kasaija is a different portion of land. He stated the boundaries/neighbors of the suit land to be a road from Kinyara-Kagadi road joining Kampala road to the north, Tadeo Karamagi to the East, Kasegu Eric and a swamp to the south, and to the west is his own land. On the upper side he stated the neighbors to be Nyangoma and Asimwe Dick.

The respondent and her witnesses described the neighbors to the suit land as Tadeo Karamagi in the east, the late Rwakajote in the west, on the upper side, and a swamp called Kamagadi on the lower side.

The trial magistrate evaluated the evidence of ownership presented and found the suit property belonged to the respondent. The evidence of the respondent on the history of ownership of the suit land is well corroborated by the evidence of all plaintiff witnesses and DW2. Her evidence coupled with the PExh2 points to proof of ownership as compared to the evidence presented by the appellant. The appellant presented no evidence to prove that the suit land belonged to him or his family. He listed several family members who he allegedly jointly owns the suit land with but none came to court to prove their claim and neither did he explain why the other joint owners of the land were not involved in the proceedings at all. I have re-examined the evidence adduced at trial and I find that the trial magistrate rightly found that the suit land belongs to the respondent.

The trial magistrate therefore properly evaluated the evidence on record and came to the right conclusion that the suit land belongs to the respondent. There is also no miscarriage of justice occasioned to the appellant. These grounds of appeal fail.

Accordingly, this appeal is dismissed with no order as to costs

It is so ordered

Dated at Fort Portal this 31st day of May 2023. .

A handwritten signature in dark ink, appearing to read 'Mugabo', with a stylized initial 'V'.

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

A handwritten signature in dark ink, appearing to read 'Mugabo', with a stylized initial 'V'.

Vincent Emmy Mugabo

Judge

31st May 2023.