THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 118 OF 2013

(Arising from Civil Suit No. 0027 of 2007 of the Chief Magistrates Court of Iganga at Iganga)

KHALID MUNNU MUTAGOBWA :::::::::::::::::::::::::::: **APPELLANT**

VERSUS

HAJJI KHALID NYENDE :::::::::::::::::::::::::::: **RESPONDENT**

BEFORE: THE HON MR JUSTICE MICHAEL ELUBU

JUDGMENT

This is an Appeal arising from the Judgment and Orders of Her Worship Karamagi Pamela in **Civil Suit No. 0027 of 2007** of the Chief Magistrates Court of Iganga at Iganga.

Background

The Respondent, **Hajji Khalid Nyende,** was the plaintiff in the lower Court while the Appellant, **Khalid Munnu Mutagobwa** was the Defendant/Counterclaimant.

The Respondent's claim was for a declaration that he is the lawful owner of the suit land; a declaration that the purported agreement hiring out the suit land to Lubega Fred was null and void; general damages for undue interference with the

Respondent's quiet enjoyment, possession and use of the suit land; a permanent injunction restraining the Appellant/his agents or servants from any further interference of the suit land; and costs of the suit.

Hajji Nyende (Plaintiff and counter defendant) called five witnesses. It was his case that Khalid Munnu Mutagobwa is his uncle and was grabbing his land, 55 acres in area, which is located in Budebera found in Mayuge District. That in 1970, the respondent was given the land by his aunties **Aziza, Azena, Abiba** and **Bitaminsi** (PW2).

The evidence is that the aunties, all sisters, together with the appellant, their brother, were in 1934, all given land by their father - one Musa Mutagobwa. There was no written document giving the land but the respondent was informed that the sisters had obtained the land through a will from their father.

It was stated that the Appellant disappeared from home for over 20 years, was presumed dead and his last funeral rites conducted. Each auntie gave her children land. The respondent's mother Bitaminsi Wotanajja (PW2) gave her piece to the respondent. Three others Abiba, Azena and Aziza gave the respondent more land in the swamp, out of their share. The Appellant's daughter was given her fathers' share.

That the respondent took up possession of the suit land. He dug a borehole and a cattle dip for animals. He then fenced off the land and has been in possession since 1979.

In 2002, the Appellant who had been missing since 1975 reappeared. PW 2, Bitaminsi called the respondent and introduced the Appellant to him as his uncle.

On the 26th of October 2003, PW 2 summoned all of them and informed the Appellant that the land had been distributed with his share given to his child. That the Appellant did not raise any objection and asked to be taken around the land.

They all moved around the land together and some boundary marks (Birowa) were planted to put the boundaries right. An agreement dated the 26th of October 2003 was made and signed by both the Respondent and the Appellant.

The respondent started processing a certificate of title. On the 23rd of January 2007, he took the forms to the Local Council for signing. The Appellant also signed a document signifying consent dated the same 23rd of January 2007. That document was executed in Budebera village at the home of Khalid Muwonge. The Appellant signed in the presence of several witnesses including: Egesa; Yenusu; Sheik Hussein; Okumu; Ogutu; the LC1 Chairman - Kakaire Hamuza; and Okello Daudi the Chairman LCII. It was the LC1 Chairman who drafted the document.

The respondent started processing a certificate of title. That the District land board gave the respondent a lease/sublease offer after the document. That was permission to lease his land.

After two weeks when he returned to inspect the land, the Respondent found that the Appellant had hired out 10 acres to one Fred Lubega who had planted sugar cane. Lubega had an agreement dated the 26th of March 2007 by which he hired the 10 acres at Ugx 160,000/= from the appellant.

That Fred Lubega was still on the portion that had the sugar cane plantation. That the respondent's fence was cut down and his cattle had nowhere to graze. When the respondent approached the Appellant, he told him that he (the respondent) did not have any land there.

That the Appellant became hostile and when the respondent took surveyors to the suit land the Appellant chased them away.

As a result, the respondent failed to process his certificate of title as a result of the Appellant's actions.

The Appellant (as the defendant) opposed the Respondent's claim and also set up a counterclaim.

In his Counterclaim, the Appellant prayed for the dismissal, with costs, of the main suit; for declaratory order that the purported giveaway of the suit land to the Respondent by Hajati Bitaminsi was illegal, null and void; a declaratory order that the suit land is the property of the Appellant or that he has beneficial interest in the

suit property; that the Respondent as counter defendant, his employees, agents and family members be evicted from the suit land; a permanent injunction restraining the respondent as counter defendant from further re-entry on the suit land or from trespassing on the same; and costs of the suit.

The Appellant, Khalid Munnu Mutagobwa, was the sole witness for the Defence.

It was his case that the late Musa Mutagobwa now deceased was his father. That he (the appellant) is also the uncle of the respondent.

That the Appellant is now the proprietor of his father's land at Budebera village where he has constructed a house. That they were 11 children and each son was given his own portion of land. One Amiri got land at Ikaaba village, Tenywa was given land in Namalena village, then Paulo received a portion in Namunyumya and finally Amisi got land at Ikaabe.

He stated that the he (the appellant) received the suit land together with the girls. That he is the last born among the children. That he was only 2 years old by the time his father died. He constructed a house on the land and went to work elsewhere leaving his wife on the land.

That in 1975, when the Appellant went to work in Kenya he ended up imprisoned for the next 27 years. In that time the Appellant would send emissaries to Bitaminsi (his sister) and Paul Waiswa (his brother). There were more than 20 messengers altogether, including former inmates such as one Hajji Kamoga. He received no feedback.

That he was eventually released in the year 2003 following a pardon by the former Kenyan Head of State Daniel Arap Moi. He thereafter returned to Budebera where he found that his sister Bitaminsi had given out all his land to the respondent and others.

The appellant stated that it was one Katono and not Bitaminsi who was the respondent's mother. She passed away in a place called Butaba.

That Bitaminsi told the Appellant that she had temporarily given out the land to different persons to use. When the Appellant was informed about this, he extended the use in some places. Then the Respondent complained that the Appellant that he was encroaching on his land.

That it is not true that the Appellant had ever made any document giving away the land. Instead the respondent made a request to the appellant that he wanted to be given some land. That the Appellant requested the respondent to construct him a house and also give him some money to start a business. That when the respondent refused the Appellant could not and did not give the respondent land.

That the respondent brought surveyors to the suit land without the Appellant's knowledge and the Appellant chased them off the land.

The appellant states farther, that the suit land was given to him together with his sisters. However, because girls cannot own land, the suit land belongs to the Appellant alone. His sisters do not therefore have any land. That the land given to other people also belongs to the Appellant. In addition to that, the land given to the Appellant's daughter also belongs to the Appellant.

The Appellant also stated that he does not have any information regarding whether his sisters had got any authority to distribute his land as a missing person.

It was his case that all that land stretching from Bunya SS in the east to Wibule Swamp in west, then to Kavule in the south and finally Kyebando village in the north is the suit land and it is his.

The Trial Magistrate entered Judgment in favour of the Respondent. The Appellant being dissatisfied with the findings of the Trial Magistrate filed this Appeal with 4 grounds namely:

1. The Learned Trial Magistrate erred in law and in fact when she held that the suit land belonged to the Plaintiff.

2. The Learned Trial Magistrate erred in law when she decided the case without visiting the locus in quo.
3. The Learned Trial Magistrate erred in law and in fact when she failed to evaluate the evidence before her and as a result reached a wrong decision.
4. The Learned Trial Magistrate erred in law and in fact when she awarded General Damages of Ugx. 1,000,000/= without evidence.
5. The decision of the Learned Trial Magistrate is tainted with fundamental misdirection and non-direction in law and in fact and as a result has led to a miscarriage of justice.

Submissions

The parties were granted leave to file written submissions which are on court record and will not be reproduced here.

This court is reminded however, that being a first appellate court, it must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. (See **Uganda Breweries Limited v Uganda Railways Corp SCCA No. 6 of 2001**).

In civil matters, the degree (standard) of proof is on a balance of probabilities. (See **Miller v Minister of pensions [1947] 2 All ER 372**). In addition, the Respondent bore the burden to prove his claim against the Appellant while the Appellant bore the burden to prove his counterclaim against the Respondent.

Grounds 1 and 3.

The Learned Trial Magistrate erred in law and in fact when she held that the suit land belongs to the Plaintiff.

The Learned Trial Magistrate erred in law and in fact when she failed to evaluate the evidence before her and as a result reached a wrong decision.

These two grounds of appeal are related and I have elected to resolve them jointly.

On Ground 1, the Appellant's complaint is that the trial magistrate found that the respondent acquired the suit land as a gift *intervivos*. It is submitted that his sisters from whom the respondent claims to have acquired the suit land had no authority to distribute the said land.

That although PW 2, Bitaminsi Wotanajja, stated that she acquired the land through a Will from her late father Musa Mutagobwa, it was not tendered in court. That the law provides that one has to obtain letters of administration before they can deal with the estate of a deceased person. Where there is a will, the executors of the will have to first obtain a grant of probate under the succession laws. That the non-compliance with these mandatory provisions in this case rendered the distribution of the land to the Respondent an illegality and once an illegality is brought to the attention of the Court it overrides all else (see **Makula International vs His Eminence Cardinal Nsubuga (1982) HCB 11**).

Secondly, PW2 told the court that the suit land is still hers. That for a gift *intervivos* to take root, the donor must intend to give the gift, deliver the property and the donee must accept the gift. In support of these arguments, the appellant cited the decisions of **Sajjabi John vs Zziwa Charles Civil Appeal No. 50 of 2012** and **Joy Mukobe v Willy Wambuwu HCT-04-CV-CA-0055 OF 2005**.

The Respondent's reply to Ground 1 was that the omission to exhibit or produce the will in evidence was immaterial and unnecessary in the circumstances of this case and could not have occasioned a miscarriage of justice.

That the six sisters acquired the suit land by customary inheritance and/or as a gift way back in 1934 when their father Musa Mutagobwa died. At that time, the provisions of Section 180 of the **Succession Act** had not come into effect. In any event, by 1970 the sisters had had effective possession and use of the suit land for 36 years.

Under customary law, there is no requirement to obtain letters of administration before dealing in the estate of a deceased person. That being the case, the gift *intervivos* or donation of the suit land to the Respondent, by his Aunties was lawful since they had customarily acquired good title from their father.

That the alternative submission was that the sisters acquired interest in the land by prescription or occupation.

That all the above notwithstanding, the challenge on the basis that the sisters did not have authority to deal with the land is self-defeating to the Appellant, because it would mean the land could not have passed to the Appellant himself. In that case the cited case of **Makula (Supra)** would apply.

On the second complaint by the Appellant it is argued for the respondent that the transaction with his Aunties is on all fours and within the meaning and definition of a gift *intervivos* and one which was validly executed.

On Ground 3, it is the submission for the Appellant that the decision of the Trial Magistrate was not based on the evidence adduced by the Appellant. That the trial Magistrate relied heavily on the respondent's witnesses whose evidence was doubtful as none of them was present at the time when the distribution of the property was done.

The Respondent's reply to Ground 3 was that the Trial Magistrate properly evaluated the evidence on record and reached a just decision. That if the court is to find some

inconsistencies in the evidence of the respondent's witnesses, then they were very minor and did not affect the credibility of the evidence of the witnesses. In any event, it should be noted that the bulk of the events occurred over 40 years ago and minor lapses are bound to occur as most of the witnesses were over the age of 67 years (see **Shokatali Dhalla v Sadrulin Mwaralli SCCA No.32 of 1994**).

Determination

These two grounds of appeal turn of the evaluation of the evidence on record.

It is common ground that the suit land originally belonged to Musa Mutagobwa who died in 1934. He is the father of the appellant and grandfather of the respondent. It is also uncontested that the respondent's claim stems from the gift he received from his aunties, the six sisters listed as Aziza Tibitondwa, Amina Watama, Azana Kyotalima, Abiba Kauda, Aisa Matama and Bitaminsi Wotanaja (PW2 - the only surviving sister of the Appellant).

By his own admission the appellant was incarcerated in Kenya for over 27 years. In that time, he was presumed dead by the family who gave his share of the land to his daughter. The family also held his funeral rites for him.

The appellant first of all challenges the takeover over of Mutabogobwa land by the PW 2 and her sisters. I will dismiss this assertion outright because it is the very basis of the claim made by the appellant. Just like PW 2, he does not hold either probate or letters of administration but declares that the land in dispute is his. His claim is clearly based on custom and the declaration by his father that the land was given to both the appellant and his sisters.

I have already held that the sisters held the land from 1934 up to the 1970s. There is no evidence to dispute that each held a portion in their own right. The appellant states that he had a share which he left with his wife. He does not state what the fate of that land was. It was his own testimony that by 1970 he had his own portion of land.

In spite of the appellant admitting that his father gave his sisters land, he states that they could not own land according to custom and thus the land belongs to him. In effect he intends to grab the portions given to the sisters by Mutagobwa for himself.

The evidence as I see it, appears to show that the sisters held the land from the 1930 when they inherited to at least 1970.

In law, possession confers a possessory title upon a holder of land and a recognisable enforceable right to exclude all others but persons with a better title. 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 for a period of time. (See **Kaggwa Micheal v Apire John Civil Appeal No. 0126 of 2019**).

The appellant could only disentitle the respondent's aunties if he could establish a superior title to them. As it stands they all held equal right to the land and each had title to their own portion. Their long possession, apart from the father's bequest, conferred good title of the land, to them.

PW 2 stated that they chose to give part of their portion of the land to the respondent. The appellant argued that the evidence shows that PW 2 stated that she retained her portion.

It is a principle of the evaluation of evidence that it must always be done as a whole. PW 2 evidence should be examined in its totality and against the rest of the evidence adduced by both parties.

It is clear from all the evidence adduced by the plaintiff that PW 2 and her sisters, who are the respondent's aunties, gave him a portion of their land. The respondent had a portion that his wife had settled on. There is also a portion given to his daughter Fatuma Oyang. He states all that is now his land because, as girls, and therefore women, his daughter and sisters, cannot own land in their clan. This claim is counter

intuitive because the appellant himself states that it was his father who gave the girls the land. The other leg, is that such an argument is against public policy.

The Appellants sisters having agreed and gifted their land to the Respondent, the respondent has a superior title to the suit land than the Appellant.

The question therefore is whether the Respondent acquired the land as a gift *intervivos*.

In **Joy Mukobe v Willy Wambuwu HCT-04-CV-CA-0055 of 2005**, the Court held that for a gift *intervivos* to take irrevocable root, the donor must intend to give the gift; the donor must deliver the property; and finally the donee must accept the gift.

The land here was given to the Respondent by his aunties. He took possession and proceeded to develop the land by building a cattle dip and fencing it the started rearing cattle on it. By the time the Appellant took possession the Respondent had commenced on the process of bringing the land under the **Registration of Titles Act**: that is, he was processing a certificate of title.

These are all actions that demonstrate that the donors, or sisters (his aunties) gave the respondent the land, he accepted and took possession.

In his evidence the appellant challenges the respondent for calling PW 2 his mother. He states that she was not his biological mother. This in my view is immaterial. There is no limit to whom a gift of land can be made. It need not be to a direct lineal descendant.

In view of the foregoing, the respondent clearly had better title and the two grounds of appeal lack merit and cannot stand. They accordingly fail.

Ground 2

> **The Learned Trial Magistrate erred in law when she decided the case without visiting the locus in quo.**

The Appellant states that the trial magistrate did not visit the locus in quo. That this suit raised issues regarding boundaries and as such a locus in quo visit was imperative to determine who was in possession of the suit land.

The Appellant relied on **Practice Direction No. 1 of 2007** and the decisions in **Waibi v Edisa Lusi Byandala [1982] HCB 28** and **Registered Trustees of the Arch diocese of Tororo v Wesonga Reuben Malaba & Ors HCT-04-CV-CA-0096 of 2009**.

On the other hand, the Respondent conceded that the Court did not visit locus. It was argued however that considering the circumstances of this case it was not necessary as there was no justifiable reason to do so.

Determination

Paragraph 3 of the **Practice Direction No.1 of 2007** states:

> The Courts should take interest in visiting the locus in quo and while there record all proceedings at the locus in quo.

The Courts have over the years discussed the reasons why a court may conduct a site or locus in quo visit.

For example, it has been held that the purpose of a Trial Court conducting a locus in quo is to appreciate the physical aspects of evidence as stated by the witnesses in court and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to test the evidence on those points only. A locus in quo is meant to check on the evidence as stated to court by the witnesses, and not to fill gaps in testimony of the witnesses otherwise the Court would run into a risk of turning itself into a witness in the case. (See **Fernandes Vs**

Noroniha [1969] EA 506; Nsibambi Vs Nankya [1980] HCB 81; Yeseri Waibi Vs Edisa Lusi Byandala [1982] HCB 28)

The respondents claim was essentially for a declaration of ownership stemming from a bequest to his aunties who gifted parts of the land to him. While this court concedes that it may be vital for a court to visit the locus in order to appreciate the dispute between parties, particularly where determination of the boundaries is vital, that however is not the case in every matter.

Each case has its own unique attributes. Here the physical demarcations or boundaries were not in dispute. Even possession of parts of the land by the appellant was not disputed as he admitted to chasing away surveyors and renting out part of the land.

This dispute was essentially over who, on the facts or evidence, had better title to the disputed land. A locus visit would not add value to the courts appreciation of facts regarding succession or the gift by PW 2 and her sisters to the Respondent.

In the result no injustice was visited on either party by the trial courts failure to conduct a locus in quo visit.

In the result this ground of appeal has no merit and fails.

Ground 4

The Learned Trial Magistrate erred in law and in fact when she awarded General Damages of Ugx 1,000,000/= without evidence.

It is contended for the Appellant that there is no evidence adduced by the Respondent to justify the award of General Damages.

It was argued for the Respondent that the evidence on record was sufficient to warrant the award of General Damages by the Trial Magistrate. That the Respondent stated that the Appellant interfered with his possession by hiring out the

Respondent's land to one Fred Lubega. In addition, that the Appellant frustrated the respondent's efforts to process a certificate of title for the suit land.

Determination

The principle is that general damages are awarded to compensate a claimant who has suffered a loss as a result of the breach/act complained of. The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered (see **Robert Coussens vs. Attorney General, SCCA No. 08 of 1999).**

It should also be noted that general damages are awarded at the discretion of the Court. The plaintiff must plead any material facts giving rise to a claim for the award of the general damages, and must provide such evidence as is necessary and appropriate to support such a claim.

In the respondent's testimony, it is clearly stated that the Appellant frustrated the surveying of the suit land. He chased away the surveyors and became violent towards them. He also hired out part of the suit land to one Fred Lubega, less than two weeks after he had given assurance to the respondent that he had no claim over the land. On this basis the trial court found it appropriate to award general damages in the sum of Ugx 1,000,000/-.

Ordinarily a court may only interfere with such an award if it finds that the award was illegal or based on a wrong principle. It may also intervene if the sum is manifestly high or low.

On analysis I do not find any of the foregoing to apply in this case. I shall therefore not interfere with the award of general damages made.

Ground 4 fails.

Ground 5

The decision of the Learned Trial Magistrate is tainted with fundamental misdirection and non-direction in law and in fact and as a result has led to a miscarriage of justice.

This ground is essentially premised on the appellant's counter claim. It is the contention that no authority to administer the estate of the deceased was adduced in evidence. The authority referred to is the Will itself.

Additionally, that the Trial Magistrate did not enter a decision on the Appellant's counterclaim. That a counterclaim is a cross action and an independent claim (suit).

It was argued farther, that the Trial Magistrate admitted exhibits **PEA** and **PEB** which were written in Luganda. That Luganda is not the language of the Court and the documents therefore contravened Section 88 of **the Civil Procedure Act**; and Order 8 Rules 2, 7 and 8 of **the Civil Procedure Rules** SI 71-1. This position was supported by the decision in **Kabonge Jane & Nansana Town Council v Semanda Paul HCCA No. 76 of 2014**.

For the Respondent, it is conceded that a Counterclaim is a separate action. However, it does not necessarily call for independent evidence to prove the issues that arise. That there was no need to frame separate issues under the counterclaim.

On the question of translation, it is stated for the respondent that the law does not prohibit the admission of documents that are not translated into the court language. However, it is good practice that such documents be translated into the language of the Court. That in the instant case, the omission to do so did not occasion any miscarriage of justice.

Determination.

I have already dealt with the question regarding the authority to administer the estate of the late Musa Mutagobwa and will deal no farther with it here.

I agree with the submissions of the Appellant that a counterclaim is a separate action within another claim. It is incumbent on a trial court where a counterclaim has been set up, to pronounce itself and make a finding on it.

In this case, the Trial Magistrate did not make such a finding in her judgment. This was an error on the part of the Trial Magistrate.

However, in light of my findings on Grounds 1 and 3 above, where I found the appellants case to be without basis, the Counterclaim in which he prayed for a declaration that the suit land was his, could not stand.

Next is the question regarding the untranslated documents exhibited as **PEA** and **PEB**.

This area is regulated by S. 88 of the **Civil Procedure Act Cap. 71** which stipulates as follows:

1) The language of all courts shall be English.
2) Evidence in all courts shall be recorded in English.
3) Written applications to the courts shall be in English.

It is true the Trial Magistrate admitted exhibits **PEA** and **PEB** into evidence without translation. These documents are both written in Luganda. In view of the above provision, this was a fundamental error. Documents admitted on the court record, which shall be relied on by the court should not be tendered without translation.

The above notwithstanding, it is also stated in S. 166 of the **Evidence Act** that:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial, or reversal of any decision in any case, if it shall appear to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

As can be seen from the findings of this court in the resolution of the grounds of appeal above, the evidence relied on was sufficient for this court to arrive at its decision without reference to any these two exhibits. They have not formed the basis of any of this court's decisions. Therefore, these improperly admitted exhibits **(PEA** and **PEB)**, shall be disregarded. In the end, their admission did not cause a miscarriage of justice.

Accordingly, the 5th ground of appeal fails.

In the result this appeal is dismissed with costs.

The orders of the trial court are hereby confirmed.

.....

Michael Elubu

Judge

30.4.2023