

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL APPEAL NO.017 OF 2021
ARISING FROM NAKASONGOLA CIVIL SUIT NO.004 OF 2017

MUGABI JACKSON ----- APPELLANT

VERSUS

1. GAWEERA GERALD

2. NAKIVUMBI ROSE

3. NABULYA AGNES ----- RESPONDENTS

4. NAKAMYA FLORENCE

5. BABIRYE ALICE

6. NAKIWALA

JUDGMENT

BEFORE HON. LADY JUSTICE KANYANGE SUSAN

This is an appeal against the judgment of His Worship Tibayata Edgar – Tusiime – Magistrate Grade I Nakasongola Court.

The grounds of appeal are;

- i. The learned Trial Magistrate erred in law and fact to hold that the respondents did not admit that the appellant was a lawful occupant of the suit land since 1972
- ii. The learned Trial Magistrate erred in law and fact when he did not properly scrutinize and evaluate both the oral and documentary

evidence adduced on the suit before finding and holding that the appellant was a trespasser on the suit land

- iii. Alternatively the learned Trial Magistrate erred in law and fact to ignore the material contradictions in the respondents pleadings and evidence and hence reached a wrong conclusions of fact and law
- iv. By substituting the evidence of the witnesses in court with what the learned Trial Magistrate claims to have seen during his inspections of the disputed land, the learned Trial Magistrate erred in law and fact
- v. Alternatively the learned Trial Magistrate did not approach the visit to the locus judiciously and thus occasioned a miscarriage of justice to the appellant.

He prayed that the

- a. Appeal be allowed with costs to the appellant
- b. Judgment be entered in favour of the appellant in Nakasongola Civil Suit No.004/2017 with the reliefs as prayed in the plaint

Background

The plaintiff /appellant Mugabi Jackson sued the defendants in Nakasongola Magistrate's Court. He claimed that since 1972 he was a legal occupant of a kibanja on land described as Buruli block 206 plot 23 at Kasanga village Katuugo parish Kakooge sub-county Nakasongola District.

That the defendants from 21st July 2017 without his permission entered onto the suit land which was in his possession.

That as a result of the said trespass he incurred loss and damage. He prayed for declaratory orders, eviction orders, costs, general damages and permanent injunction. In their defence the defendants averred that the suit kibanja is a family land since 1890s when it was settled on by Mubi the father of the late Majara Alexander. Majara Alexander produced late Augustine Lutaaya and Kavuma who also settled on the land and they produced the defendants.

That the plaintiff is a son of late Kabogoza Eliasafu who had a neighbouring kibanja to late Augustine and Kevina. He by-passed 3 other kibanjas of their siblings to claim interests on their land. They denied being trespassers and have been an occupation and use of the land they inherited.

The trial Magistrate found that the defendants are not trespassers on the plaintiff's land and dismissed the suit of the plaintiff hence this appeal.

Representation

The Law Associates Advocates represented the appellants while M/s **Sibendire Tayebwa & Co. Advocates** and M/s **Abaine Buregyeya & Co. Advocates** jointly represented the respondents.

Resolution.

The duty of the appellant court was well exemplified in **Kifamunte Henry versus Uganda SCCA No.1 of 1997** where it was held that the first appellant court has a duty to review the evidence of the case and to consider the materials before the Trial Judge. The appellant court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

In **Father Nanesio Begumisa & three others versus Eric Tiberaga SCCA No.17 of 2000 (2004) KALR 236**) relied on by both counsel, it was held that "This being a first appeal, this court is under an obligation to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its own conclusion.

Preliminary objections

Counsel for the respondents raised three preliminary objections;

- a. Want of a certified copy of a decree
- b. Being filed outside prescribed time and without leave of court.
- c. None service of the Memorandum of Appeal

Counsel apart from stating them he did not submit on them though counsel for the appellant replied and submitted on them. Since counsel for the respondents did not elaborate on his points. I do not find it necessary to discuss them but will go on the merits of the Appeal.

Ground No.1

The learned trial Magistrate erred in law and fact to hold that the respondents did not admit that the appellant was a lawful/legal occupant of the suit land since 1972.

In his submissions counsel for the appellant submitted that the defendant in the written statement of defence admitted the contents of paragraphs 1 and 3 of the plaint and it settled the legal occupancy of the appellant and the court could not arbitrate over the same.

He referred to cases of **Kampala District Land Board and Anor versus NHCC SCCA No.2 of 2004** and **Stanbic Bank (U) Ltd versus Tinka Investments Ltd & 4 others HCCS No.468 of 2013**.

In reply the respondents submitted that all purported admissions in the said paragraph were only in respect to the plaintiff's address of the suit. Further to this that in their introduction they stated save as herein expressly admitted, the defendant denies each and every allegation of fact as contained in the plaint as is the same were set. Forth and specifically traversed serratum.

That the respondents led evidence to show that they have been occupation since the 1890s. In para 3(a), (b),(6) of the written statement of defence.

The Magistrate in his judgment on page 19 stated that "the plaintiff submitted in his final written submission on page 4 thereof that all the defendants admitted that the plaintiff has been a legal occupant of the suit land since 1972. The court searched for the admission in the written statement of defence or in the testimonies given during the hearing of this matter and found no inkling of the same.

In the plaint paragraph 1 the plaintiff stated his address and added "Since 1972 he is a legal occupant of a piece of land (kibanja) on the land formerly described as Buruli Block 206 plot 23 at Kasanga village Katuugo parish Kakooze sub-county Nakasongola District.

In their written statement of defence the defendants in para. 1 stated that without prejudice to the forgoing the defendants admit the contents of paragraphs 1, 2 and 3 of the plaint. While in 3(b) they averred that the late Mubi the father of the later Majara Alexander settled and occupied kibanja at Kasanga including the suit kibanja in 1890s produced children thereof including Majara Alexander who died in 1950s.

Under Order 6 Rule 8 of the Civil Procedure Rules it provides that, it shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim or for the plaintiff in his or her written statement in reply, to deny generally the grounds alleged in a defence by way of counter claim but each party must deal specifically with each allegation of fact of which he or she does not admit the truth except damages.

In the case of **Ssenyonjo versus Bunjo civil suit No.180 of 2012 (2013) UG HCCD 127(24)**. The court held that an admission has to be clear and unambiguous and must state precisely what is being admitted.

In instant case, I find that though the defendants admitted paragraph 1,2, and 3 but, in their introduction they stated and denied every fact. They went ahead in paragraph 3(b), and stated when their claim arose as occupants in 1890's. Counsel for the plaintiff/appellant ought to have read the whole Written statement of defence. The admissions of paragraph 1,2,3 were general but the defendants specifically denied the legal occupancy of the plaintiff in their defence in paragraphs 3(b).

I thereby find that the trial magistrate did not ere in law and fact to hold the respondents did not admit that the appellant was a legal occupant of the suit land since 1972.

Grounds 2 and 3

2 – The learned Trial Magistrate erred in law and fact when he did not properly scrutinize and evaluate both the oral and documentary evidence adduced in the suit before finding and holding that the appellant was a trespasser on the suit land.

3 - Alternatively the learned Trial Magistrate erred in law and fact to ignore the material contradictions in the respondent's pleadings and evidence and hence reached wrong conclusions of fact and law.

Trespass to land was defined in the case of **Justine EMN Lutaaya versus Stirling Civil Engineering Co. Ltd SCCA No.11 of 2022** also relied on by counsel for appellant "When a person makes unauthorized entry upon land and thereby interferes or pretends to interfere with another person lawful possession of that land, needless to say the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land.

Court in that case also added that the tort is committed not against the land but against a person who is in actual or constructive possession of the land. In **Sheik Muhammed Lubowa versus Kitara Enterprises Ltd CA No.4 of 1987** the court noted that "In order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land.

While the law of contradictions and is that where grave inconsistency occur the evidence may be rejected unless satisfactory explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness. See case of **Uganda versus Abdallah Nassur 1982 HCB.**

PW1- Mugabi Jackson the plaintiff testified that he has been in possession of a kibanja since 1972 which formerly belonged to his late

father Kabogoza Eliasafu. That it is separated by a road from the late Augustine Lutaaya's kibanja ,but in 2015 he was sued by Mr. Senyange for criminal trespass and was acquitted. On the 21st July 2017 the 1st defendant and the rest of the defendants forcefully entered into his kibanja which he had cleared for planting and damaged his boundary fence. He reported to the LC Chairman. The Gombolola Agriculture Officer assessed what was damaged. That there is no kibanja in Kasanga formerly jointly owned by Lutaaya and Namande.

PW2- Andama Charles Ajune assessed the damage and found the extent of damages valued at Shs.5,500,000/=

PW3- Kayendeke Grace a grand child of Bbosa testified that the plaintiff came looking for the relatives of the late Christopher Bbosa.

That the late Christopher was the registered owner of the land described as Buruli Block 206 plot 23 at Kasanga on which the plaintiff's kibanja is situate. That Senyonga is currently the registered proprietor of the land as he changed registration. That he owns a kibanja on the land and had sued the plaintiff for trespass but he was acquitted.

PW4- Magunda Milly testified that the defendants started trespassing on the land on 21-07-2017 and planted cassava and matooke. That it is the same land Senyonga had claimed against the plaintiff and he was acquitted. That he was a witness in that criminal case and that Mugabi was in possession of the land.

PW5- Namugga Rebecca a sister to the plaintiff testified that the plaintiff is residing on the kibanja of their late father Kabogoza Eriasafu, and Lutaaya Augustine was a neighbor. That on 21-07-2017 the defendants entered onto the garden of the plaintiff. That she had testified in his favour

in the criminal case and he won. He had fenced off the land in 2007. In 2013 Senyonga and the defendants had tried to subdivide the land but the plaintiff refused and he was sued. That Namande had no portion of kibanja at Kasanga.

PW6- Sekatte John an Agricultural Officer visited the site saw the cleared land with cut trees and the plaintiff told him that the defendants had caused loss. He took photographs in August 2017 and made his report on 08-08-2017. That the estimated loss was about Shs.5,180,000/=. The court struck off his report.

DW1 – Gawera Gerald testified that he is using the suit land with D2 Nankumbi Rose and D4 Nakamya Florence.

That D3 Nabulya Agnes has never been in occupation. That he was left the suit land by his mother Kevina Namande. That Augustine Lutaaya and Kevina Namande bibanjas were neighbouring one Kabogoza the father of the plaintiff and separated by a road. He denied being a trespasser and that the kibanja is on mailo land of Senyonga.

DW2- Nakivumbi Rose also testified that she is utilizing the suit kibanja for grazing cattle and it was given to her by Lutaaya Augustine the father. That in 2017 plaintiff and D1 were disputing over the suit land, and that she had a dispute with plaintiff in 2015 when the plaintiff and Senyonga arrested her.

DW3- Babirye Alice a daughter of Augustine Lutaaya testified that she has never occupied the suit land but that father's land was separated by a road with that of a neighbor Kabogoza. That the land does not reach the fence of the forest of NFA. That the plaintiff crossed the road and planted orukoni in Lutaaya's life time and after his death. In cross-examination

she said she used to cultivate on the suit land, but the plaintiff sent cows that ate her crops so she stopped.

DW4- Nakiwala Margret also testified that she has no interest in the disputed land and that since she was born, it is occupied by the 1st , 2nd and 4th defendants. In cross-examination she testified the D1 planted a cassava garden there about 2 years ago and that he found the plaintiff and D1 quarreling .

DW5-Semanda Richard a neighbor to the suit land testified that the plaintiff is occupying the land of his father Kabogoza and D1 is occupying land of Augustine Lutaaya. That before it was Lutaaya Augustine utilizing the land and that the plaintiff has never carried out any activity on the land. That the kibanja of Kabogoza and Lutaaya has a road marking the boundary.

DW6- Henry Sebowe testified that he knew kibanja of Kabogoza Eriasafu and late Augustine Lutaaya at Kasanga. That in 1980 he cut down 3 Mivule trees on the suit kibanja which he bought from Augustine Lutaaya. That a small road separates the bibanjas of Kabogoza and Lutaaya. That it is not true kibanja was for Kabogoza Eriasafu.

DW7- Nakamya Florence a daughter of Augustine Lutaaya testified that disputed kibanja was given to Sejjemba Hannington and she has no interest in it.

DW8- Nabulya Agnes also testified she has no interest in suit kibanja as hers is 2km away.

DW9- Sembuze William testified that he is a brother to the late Kabogoza Eriasafu. That land in dispute was from the late Augustine Lutaaya and he distributed portion to Nakamya and Nakivumbi and they started utilizing it. That a road separates Kabogoza and Lutaaya's land. Further to this that he left his grass thatched house to Muganga who also left it to Semanda and later it was occupied by the plaintiff Mugabi who demolished it and put a permanent house.

That area claimed by Mugabi does not belong the late Kabogoza but it was for Augustine Lutaaya.

In his judgment the trial Magistrate relying on evidence of DW9 the brother of Kabogoza found that the boundary mark ,a road existed on the portion pointed out by DW9 which now contained a fence and was separating the land claimed by one Semanda and the plaintiff. That this evidence makes it more likely than not that the suit land is the property of the 1st, 3rd and 4th defendants than it is likely to be the property of the plaintiff. That the plaintiff went beyond the boundary of the kibanja of Kabogoza and entered onto Augustine Lutaaya's kibanja. Thus he is a trespasser. He also found the defendants were not trespassers on the plaintiff's land.

Counsel for the appellant submitted that it was the appellant in possession before 2017, had cleared the land to plant when the respondents entered onto the land. That further to this the respondents departed from their pleadings where they claimed that, there were all in occupation whereas not. He mentioned different contradictions in their evidence and that the trial Magistrate wrongly evaluated the evidence.

While counsel for the respondents submitted that even if it were true the respondent was in occupation of the suit land by 2017 the same occupation was not lawful as he was a trespasser. Further to this that he does not fall under the ambit of S.29 of the Land Act that defines a lawful occupant.

That counsel does not point out where the contradictions on the respondent's case arise, and it is true that minor contradictions must be ignored as long as they do not go to the root of the dispute. Counsel further submitted that no evidence was led to prove PW1 planted the orukoni and some was old and not planted in 2017.

When I analyse the evidence I find that D1 Gawera Gerald (DW1), and D2 Nakivumbi Rose (DW2) are the ones using the suit land in dispute. Though D1 Gawera said D4 Nakamya Florence is also utilizing the land, she denied this saying she had no interest in the suit land. DW1 Gawera said they cultivate on a portion and the rest is for grazing. At the locus in quo visit, the trial magistrate observed that the suit land is bushy with no sign of any activity being carried on but lemon claimed to have been planted by plaintiff or 1st defendants deceased brother Tebusulwa.

The Appellant testified he was in possession of the land until defendants trespassed on it on 21st July 2017. Dw1 Gawera claimed he retained kibanja in 1978 after his mother Namande Kevina left it with him and that by the time Lutaaya died he was in occupation of the Kibanja. While DW2 Nakivumbi Rose claims to have got about 4 acres from Lutaaya.

Its apparent from the evidence that there were two bibanjas one of Augustine Lutaaya and one of Namande Kevina who was a sister to Lutaaya. The appellant and Dw1 Gawera are settled on some portions of

land of their respective fathers which are not in dispute. DW3 Babirye Alice admits that plaintiff/appellant was planting Orukoni on the disputed kibanja in the life time of Lutaaya. This confirms appellants evidence that he was on the suit land before 2017. DW3 also testified that D1 put a garden on the suit land about 2 years ago. I agree with counsel for the appellant that there are contradictions in the defence case, which land is D1 actually occupying. Is it of Namande Kevina or Augustine Lutaaya. While he says it's for Namande Kevina, DW5 Semanda Richard says he is occupying Lutaaya Augustine's land. DW7 Nakamya Florence says the specific piece of his father's kibanja in dispute was given to Sejjemba Hannington and she has no interest in it. While DW9 Sembuza William testified that Lutaaya Augustine distributed that land to his daughters Nakamya and Nakivumbi. DW9 is the witness the trial Magistrate mentioned as a material witness since he was a brother to Kabogozza. He could only point out portions given to Sejjemba and Sentalo in Lutaaya's life time, but not other portions. The magistrate ought to have looked at the evidence in totality.

These contradictions are major as the trial magistrate based his decision on the boundary mark separating Kabogozza's land and Lutaaya's land. What about the boundary mark separating Namande's Kevina's kibanja from either Lutaaya's land or Kabogozza's kibanja.

The appellant was charged in NA 001CR 2851 2015 for trespass to land. The complainant was Senyonga Eriasafu and on that land Senyonga neighbours were Mr Gaweera D1, Mr Bantana and Semayobe and David Kyeyune, Senyonga claimed he had disputed over the same land with Nakivumbi D2 and won the case. PW2 Mugere Sunday said land was near forest and accused was occupying it. In the Sketch plan by Magistrate neighbours shown on disputed plot were Gaweera and Senyonga. Some

sides no neighbours were shown. The accused appellant was acquitted of trespass.

I believe this was the same piece of land in the present suit which Senyonga was disputing with Nakivumbi and it was proved in that case in 2015 that appellant was in possession

Since plaintiff/appellant was the one in possession of the land before 2017 having planted there Orukoni and since the defendants'/respondents evidence has contradictions, I find that it's the defendants/respondents who entered into land in possession of another and they are trespassers. The trial magistrate thus ignored the contradictions and erred in holding that the plaintiff was the trespasser.

Grounds 2 and 3 thus succeed.

Grounds 4 and 5

4- By substituting the evidence of the witnesses in with what the learned trial Magistrate claims to have seen during his inspection of the disputed land, the learned trial Magistrate erred in law and fact.

5- Alternatively the learned trial Magistrate did not approach the visit to the locus judiciously and thus occasioned a miscarriage of justice.

Practice Director No1 of 2007 provides for procedure which counts courts follow at locus in quo. It states that while there, court is to;

1. Ensure that all the parties, their witness and advocates if any are present
2. Allow the parties and their witnesses to adduce evidence at the locus in quo
3. Allow cross-examination by either party or his counsel

4. Record all the proceedings at the locus in quo
5. Record any observation, view, opinion, or conclusion of the court include drawing a sketch map if necessary.

The purpose of visiting locus in quo is to clarify on the evidence in court and to enable the court understand the evidence. See case of **Odongo Ochama Hussein Abdul versus Rajab civil appeal No.119 of 2018 (2021)**. The visit to locus in quo is also intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of oral testimony. See case of **Anna Acayo & 4 others versus Lodik Daniel Wareen Gulu civil appeal No.54 of 2017**.

In **Ahmed Zziwa Ssalongo versus Dr. Kajumba Luyirika civil appeal No.33 of 2012** it was held that the practice of visiting the locus in quo is to check on the evidence given by the witnesses and not to fill the gap for them or court may run the risk of making itself a witness in the case.

Counsel for the appellant submitted that the Magistrate erred in law to allow whoever was present to testify at locus without taking oath or to remind them that they took oath. Secondly by concentrating on or looking for evidence of ownership of the suit land and boundaries hence allowing evidence to be led at the locus in that regard yet the same were not in issue at the trial was an error.

In reply counsel for the respondents submitted that there was no evidence that the Magistrate followed the wrong procedure and that parties confirmed what they had stated in court. That at the locus in quo the trial Magistrate did everything humanly possible to resolve the vital evidential gap including drawing a sketch plan.

The locus visit was conducted on 25th October 2020. Counsel for the appellant was not present but that if the respondents was present. On record it does not show that the witnesses took Oath or were reminded of the of the Oath.

In the case of **Turyalikayo James and 2 others versus Ruremire Denis Kabale highcourt Civil Appeal no 83 of 2009**, it was held that **irregularity** in receiving evidence at the locus in quo does not per se render the proceedings a nullity provided that, the judicial officer, can make an effective practicable and workable decision that resolves the conflict on the merits.


I find that there was an error not to swear witnesses or remind them of the oath at the locus in quo but it did not affect the proceedings. The trial magistrate concentrated on evidence of witnesses at the locus in quo and also drew a sketch plan. He made a decision based on his finding both at the locus in quo and the evidence.

Grounds 4 and 5 thus fail.

In conclusion Grounds 1,4,5 fail but grounds 2 and 3 on evaluation of evidence succeeds. The Appeal partly succeeds with the following orders,

- a) The prayers in the plaint in civil suit no 004/2017 are granted to the appellant.
- b) The respondents to pay costs of the Appeal.

DATED AT KAMPALA THIS 28th DAY OF Sept 2023


KANYANGE SUSAN
AG JUDGE LAND DIVISION