

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 105 OF 2022
(Formerly MSD Civil Appeal No. 07 of 2015)

BYARUHANGA KIZIGE :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

SEREMOSI ASIIMWE KANAGA :::::::::::::::::::::::::::::::::: RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

- [1] This is an Appeal from the Judgment and order of the Chief Magistrate's Court of Masindi at Buliisa by **H/W Gaudense Okongo**, Magistrate Grade I dated the 29th day of January, 2015.

Background of the Appeal

- [2] The Respondent sued the Appellant for inter alia, declaration that the suit land located at **Kityanga cell, Buliisa Town Council, Buliisa District** belongs to him and that the Appellant was a trespasser thereon. He claimed that he is the lawful owner of the suit land having acquired it by way of inheritance from his father, the late **Kaliisa Kanaga**. That together with his family members have lived on the suit land for many years without disturbance until 22nd April, 2014 when the Appellant trespassed upon the land by way of forceful entry, clearing and construction of a mud and

wattle iron roofed structure while making claims of ownership thereof.

- [3] The Respondent contended that he had houses, a Kraal, trees herds, a piggery and crops among other developments on the suit land and that as a result of the Appellant's misconduct, he suffered loss and damages for which he holds the Appellant liable.
- [4] The Appellant on the other denied the Respondent's claims and contended that he was the lawful customary owner of the suit land having acquired the same by way of inheritance from his father, the late **Kizige Gapunda**. Further, that his late father's land is different and separate from that of the Respondent's late father but that the Respondent knowingly and forcefully crossed their common boundary and trespassed on to the Appellant's land where he cut the Appellant's trees, put up structures and damaged and converted the Appellant's bricks into his own.
- [5] The learned trial Magistrate found that the observations at locus reveal that the Respondent had tangible developments on the suit land, a big house which appeared to have lasted long, a toilet and a kraal, while the Defendant had a small mud-ded house which appeared to have "dropped" on the suit land in front of the Respondent's Kraal. He concluded that the Appellant came from a far and built his mud-ded house in the compound of the Respondent and therefore held that the Respondent was the lawful owner of the suit land and declared the Appellant as a trespasser.
- [6] Judgment was entered for the Respondent and the Appellant being dissatisfied with same filed this Appeal on the following grounds:

1. *The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on record and thereby arrived at a wrong conclusion that the Respondent was the owner of the customary land measuring approximately 4 acres.*
2. *The learned trial Magistrate erred in law and fact when he failed to address himself as to the correct procedure to be followed at locus in quo and where he totally disregarded the evidence and made no observations on visiting locus in quo.*

Counsel legal representation

- [7] The Appellant was represented by **Mr. Simon Kasangaki** of **Ms. Kasangaki & Co. Advocates, Masindi** while the Respondent was represented by **Mr. Tugume Moses** of **Tugume Byensi & Co. Advocates, Kampala**. Both Counsel filed their respective written submissions as permitted by this Court for consideration in the determination of this Appeal.

Duty of the 1st Appellate Court

- [8] It is the duty of this Court as a first Appellate Court to re-hear the case by subjecting the evidence presented to the trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its conclusion, **Fr. Narsansio Begumisa & 3 Ors Vs. Eric Tibebaga S.C.C.A. No. 17 of 2007 [2004] UGSC 18**. This Court is therefore required to properly subject the whole evidence to an exhaustive legal scrutiny and reach its own conclusion as to whether the trial Magistrate was correct when she found the Respondent as the

rightful owner of the suit land and declared the Appellant as a trespasser thereon.

Grounds 1 and 2

- [9] Counsel for the Appellant submitted that the Appellant is the owner of the suit portion of land having been born thereon and buried his father here. That the developments his father left on the suit land were old structures, trees which the Respondent cut, a kraal and flowers for cultural rituals which the Respondent also uprooted. Further that the parties had previously disputed over the suit land and that Town Council authorities and Magistrate Grade II ordered the Respondent to vacate but all was in vain.
- [10] Counsel submitted further, that at locus, the Appellant told Court that the suit land is where his father was buried and houses built. That the Respondent's Kraal was constructed on the former site of the Appellant's houses.
- [11] It was the Counsel for the Appellant's contention that all the above pieces of evidence were never challenged or that he told Court lies. That it is clear from the above that there was no evidence whatsoever led or adduced by the Respondent that he had vested customary interest over the suit land. That the trial Court therefore erred in holding that the Respondent was the lawful owner of the suit land and the Appellant as a trespasser when there was no evidence to support that finding.
- [12] Counsel for the Respondent on the other hand submitted that the Appellant claim ownership of the suit land by virtue of his late father being buried there and that his old trees were cut on April,

2014 but on locus, the said grave of his father was not there and the tree stamps of the alleged cut tress could also not be seen.

- [13] Secondly, that the Appellant claim that when the 2 parties previously disputed over the suit land, the dispute was referred to Town Council Court in 2010 and then to the Grade II Court. Counsel contended that all these were cooked up stories by the Appellant since he never presented any documentary evidence concerning the said proceedings.
- [14] Lastly, Counsel submitted that the Appellant's claims of customary ownership were not proved to discredit that of the Respondent who is currently living on the suit land with his family and livestock, where he has lived for a long time having inherited the same from his late father. That the Appellant's act of coming and building houses on the Respondent's land on the grounds that it is where he had seen the good side or site to build a house is mere impunity.
- [15] It is a requirement of the law that he who alleges a fact must prove it. The burden of proof in civil cases is on the one who alleges as per **S.103 of the Evidence Act** which makes it imperative for the Respondent/Plaintiff to adduce evidence to prove his allegations in the *Plaint*, see also **Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 130** where it was held that the Plaintiff has to prove his case on the burden of probabilities.
- [16] In his bid to prove his case, the Respondent/Plaintiff testified that on the 22nd April, 2014, the Appellant/Defendant came and built a house between his house and kraal on his land and when he questioned the Appellant/Defendant about his act, the Appellant

responded that the spot where he put up his house is where he had seen a good site to build a house.

- [17] The Appellant/Defendant on the other hand testified that the suit portion of land belonged to him and that is where he buried his late father. That the Respondent/Plaintiff cleared the trees and flowers of cultural beliefs left by his father on the suit land and that when the dispute was before the Town Council Court and later to Grade II Court, the matter was resolved in his favour.
- [18] At locus in quo, the trial Court observed that the Respondent/Plaintiff has a permanent house, kitchen, latrine and trees planted on the land together with a kraal. The Appellant's/Defendant's house was constructed in the compound of the Plaintiff, in front of the kraal of the Respondent/Plaintiff. It appeared clearly from the maturity of the building that the Respondent had lived long on the suit land and the Appellant/Defendant "planted" on the suit land the small mudded house.
- [19] Counsel for the Appellant criticized the trial Magistrate allowing persons who never testified in Court in the main trial and then relying on their evidence to prove that the Respondent/Plaintiff had lived on the suit land for 15 years.
- [20] I agree that the trial Magistrate erred in law and fact when he permitted the adducing of fresh evidence at locus in quo from **Godfrey Mugenyi, Charles Kiboya and Tumusiime Godfrey** whom the trial Magistrate referred to as "independent witnesses" but who had not testified in Court and who the trial Magistrate had not neither summoned nor the Appellant/Defendant having

been alerted in advance that they were to testify at locus. No reasons had been or were advanced by Court as to why they had to testify when they were not part of the trial and had not been listed as witnesses.

- [21] As rightly observed by Counsel for the Appellant, the purpose of visiting locus in quo is to cross check on the evidence adduced during trial and not to fill gaps in the evidence of the parties; **Yeseri Waibi Vs. Edisa Byandala [1982] HCB 28.**
- [22] In this case, the trial Court assumed the role of “investigator” and gathered fresh evidence at locus which was irregular. This is however not vitiate the entire proceedings at the locus in quo in this case as was held in **Kabonge Jane & Anor Vs. Ssemanda Paul, H.C.C.A. No. 76 of 2014** because, the observations made by the trial Magistrate at locus were not based on the evidence of these locus witnesses. It will therefore be just and fair to parties that the evidence of these so called “independent witnesses” at locus will have to be severed and or disregarded during the consideration of this Appeal, see also **Odyek Alex & Anor Vs. Geno Yokonan & 4 Ors H.C.C.A. No. 09 of 2017.**
- [22] Whereas the Respondent/Plaintiff clearly showed Court the location of his home and his family including the kraal at locus as illustrated by the trial Magistrate in his sketch plan/map of the scene, the Appellant/Defendant did neither show the Court where his father was buried by identifying the grave nor adduced evidence supporting his claims that old trees left by his father were cut. It is inconceivable as the Appellant appeared to explain, that the Respondent’s house was built on top of the grave of the

Appellant so as not to be identified at locus. The Appellant failed to show Court the stumps of the old trees of his father the Respondent allegedly cut or explain why the stumps could not be seen. Instead, there is overwhelming evidence that the Appellant had poured on suit property building materials to wit bricks, which support the Respondent's assertion that the Appellant is trying to assume possession.

- [23] The trial Magistrate at locus saw and made his observation over the Respondent's house and kraal and that of the Appellant, the "mudded" house and concluded that the Appellant's activities on the land were recent in contrast to those of the Respondent which bore evidence of long stay on the suit land.
- [24] It is apparent that the trial Magistrate's observations were correct and justified because for example, whereas the Respondent had a pit latrine for use of his family, the Appellant who claim ownership of the land had not dug any. The Appellant could not have been on the land with any vested interest without a pit latrine serving his family.
- [25] Secondly, as rightly observed and found by the trial Magistrate, the Appellant's claims that during the previous dispute over the suit land, the Town Council Court and or Grade II Court adjudicated over the matter in favour of the Appellant is unbelievable in the absence of any evidence in form of documents to support the same. In the premises, I find that the Respondent's suit was neither *res judicata* nor misconceived and an abuse of Court process.

- [26] Lastly, I do agree that as a general rule when one occupies or develops land does not *ipso facto* create a customary interest as was held in **Balamu Bwetagine & Anor Vs. Zephania Kadooba C.A.C.A. No. 59 of 2009** but in the instant case, the Appellant's claims of customary ownership were not proved to discredit that of the Respondent who is living on the suit land with his family and livestock as proved by the existences of the kraal for animals thereon. The Appellant did not in any way show that he had a better title than the Respondent over the suit land. The Appellant failed to show Court that the Respondent owned a separate land other than the suit as he pleaded in his WSD.
- [27] I note that Counsel for the Appellant by letter dated 1st June, 2022 brought to the attention of this Court information and or "evidence" that the Respondent is not on the land by virtue of the fact that the Appellant has a corporate tenant, **Total Exp. (U) B.V.** on the land and attached a copy of tenancy agreement. I find his approach superfluous and amounting to adducing evidence from the bar. The referred to corporate tenant or the tenancy agreement were never pleaded at all by the Appellant, for that simple reason, that document cannot be looked at and or later on be considered in the determination of this Appeal. Besides, there is no basis for it or anything to show that it refers to the suit property.
- [28] In the premises, I find that the trial Magistrate, despite the lapses at locus in quo where he allowed non witnesses to testify, properly evaluated the evidence before him that the Respondent/Plaintiff was the one in possession of the suit

property where he resided with his family members and his livestock and therefore arrived at a rightful conclusion that the suit land belongs to the Respondent and the Appellant's conduct of forcefully put up developments thereon amounted to trespass.

[27] All in all, this Court finds no merit in the entire appeal and as a result, the Appeal is dismissed with costs to the Respondent. The trial Magistrate's findings and orders are accordingly upheld.

Dated at Hoima this ^{8th}..... day of **October, 2023.**


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Byaruhanga Jesse Rugyema
JUDGE