THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 59 OF 2023

(Arising from MSD Chief Magistrate's Court, C.S No.08 of 2016)

KASANGAKI JOSEPHINE :: **APPELLANT**
(Administrator of the Estate of the late **Josephat Muhindi**)

VERSUS

1. **KATO MICHEAL**
2. **ISINGOMA FRANCIS**
3. **KATUSABE HENRY** :: **RESPONDENTS**

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and orders of the Chief Magistrate's Court of Masindi at Masindi before **H/W Biwaga Selsa,** Magistrate Grade 1 dated the 2nd/12/ 2020.

Facts of the Appeal

[2] The Appellant as **Administrator of the Estate of the late Muhindi Josephat** sued the Respondents for trespass to land at **Kyeema-Kyakato Cell, Isimba Ward, Kigulya Division, Masindi District** which the Appellant claimed that it formed part of the estate of the late **Josephat Muhindi** who on his demise left the same to his brother, the late **Kiiza Joseph,** father to the Appellant, who later rented it out to a one **Muhammed Babyesiza,** an uncle of the 3rd Respondent to grow food crops. That during the period the land was rented out, the 3rd Respondent was cultivating on part of the land under the auspices of his uncle, **Muhammed Babyesiza.** That the 3rd Respondent later grabbed the portion he was cultivating on, claiming to had acquired the same from a one **Absolomi Matama,** a neighbour to the

suit land. That the 1st and 2nd Respondents on their part, merely entered the suit land, slashed it degraded old graves thereon and threatened to evict the lawful beneficiaries of the late **Josephat Muhindi,** claiming that they purchased the portions of land originally belonging to **Absolomi Matama.**

[3] The Respondents on the other hand denied the Appellant's allegations and contended that they were the lawful owners of the suit land measuring approximately 12 acres. That the 3rd Respondent acquired his interest from his father **David Kiiza** who was given 4 acres by the original owner **Absolomi Matama** in 1985 while the 1st and 2nd Respondents purchased their respective portions of land from **Capt. Darlington Mugisha** who had brought it from a one **Mpemu** who had also bought it from the original **Absolomi Matama.**

[4] The trial Magistrate heard the matter and upon evaluation of the evidence as presented before her, found that from 1965 when the Appellant's father, **Kiiza Joseph** allegedly rented the suit land to **Babyesiza Muhammed,** there is no evidence that the late **Muhindi's** family whose estate the Appellant administers, ever attempted to repossess or use the land. That the Appellant did not have the details and particulars of the land including its size and that the Appellant's case was mostly hearsay, thus on the balance of probabilities, she failed to support her claim that the suit land formed part of the estate of the late **Muhindi Josephat.** That even if one was to find that the suit land belonged to the estate of **Muhindi**, the Appellant's interest in the land was extinguished by abandonment owing to the prolonged and un explained non-use of the land (for over 60 years) by the descendants of **Muhindi Josephat.**

[5] The Appellants suit was in the premises dismissed with costs to the Respondents with a declaration that the Respondents were the lawful owners of the suit land.

[6] The Appellant was dissatisfied with the decision and orders of the trial Magistrate. She lodged the instant appeal on the following grounds:

1. *The learned Magistrate erred in law and in fact when she failed to expunge the entire evidence of the defendants in that;*

a) *The 1st and 2nd defendants' evidence hinged on inadmissible sales Agreement substituted by lodge receipts.*
b) *The 1st and 2nd defendants/Respondents' evidence was not consistent with their pleadings and departed from the same.*
c) *The 3rd defendant departed from his pleadings of obtaining title to the four acre portion of the suit land and claimed it was part of the land purchased by the 1st and 2nd defendants.*

2. *The learned trial Magistrate erred in law and in fact when she totally disregarded the Appellant's unchallenged evidence of ownership of the suit land thereby arriving at a wrong decision.*
3. *The learned trial Magistrate erred in law and in fact when she disregarded the plaintiff/Appellant's corroborated evidence of her predecessor in title thereby arriving at a wrong decision.*
4. *The learned trial Magistrate erred in law and in fact when she held that the plaintiff/Appellant had admitted the 1st and 2nd Defendants/Respondents' purchase whereas not.*
5. *The learned trial Magistrate erred in law and in fact when she reached a conclusion that the plaintiff/Appellant had abandoned their interest in the suit land.*
6. *The learned trial Magistrate erred in law and in fact when she considered fraud; abandoned by counsel of the plaintiff/Appellant and the Defendants/Respondents.*
7. *The learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence (or at all) thereby arriving at a wrong decision in civil suit No.005 of 2016 which occasioned a miscarriage of justice.*
8. *The learned trial Magistrate erred in law and fact when she failed to conduct a visit to the locus in quo in accordance with the law thus leading her to reach a wrong decision that prejudiced the Appellant.*

[7] **Grounds 2-7** revolve around how the trial Magistrate evaluated the evidence before her and as such, I shall deal with them together while **ground 1** and **8** shall be dealt with separately.

Counsel legal representation

[8] The Appellant was represented by **Ms. Barbra Katusabe** of **M/s. Musinguzi & Co. Advocates, Masindi** while the Respondents were represented by **Mr. Simon Kasangaki** of **M/s. Kasangaki & Co. Advocates, Masindi.** Both counsel filed their respective written submissions for consideration in the determination of this appeal.

Duty of first Appellate Court

[9] It is settled that the duty of the first Appellate court like the instant one, is to review the record of evidence 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 it is 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.**

[10] This court 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 its own conclusion of fact and determine whether on the evidence the decision of the trial court should stand.

Consideration of the Appeal.

Ground 1(a), (b) & (c); Admissibility of D.Exh.1 and Departure from pleadings.

[11] Counsel for the Appellant submitted that the trial Magistrate ruled that the validity of the 1st and 2nd defendants/Respondents' sale agreement was not an issue. It is her contention that the 1st and 2nd defendants/Respondents' evidence hinged on an inadmissible sale agreement which was substituted

by lodge receipts, **D.Exhs.2 & 3.** According to counsel, the **D.Exhs. 2 & 3** departed from the pleadings which were to the effect that the 1st & 2nd defendants/Respondents bought the suit land from **Darlington Mugisha.**

[12] Then lastly, that the 1st, 2nd and 3rd defendants/Respondents' evidence was not consistent with their pleadings and departed from the same as regards the status, acreage of the land each allegedly acquired and from who, thus contravened **O.6 r.7 CPR as amended** which prohibits departure from pleadings by the parties. She relied on the authorities of **Jani Properties Ltd Vs Dar es-salaam City Council [1966] EA 281** and **Struggle Ltd Vs Pan Africa Insurance Co. Ltd [1990] ALR 46-47** for the proposition that parties in civil matters are bound by their pleadings.

[13] Counsel for the Respondents on the other hand submitted that the agreement, **D.Exh.1** was exhibited on court record without objection. That as rightly found by the trial Magistrate, the validity of the purchase agreement was not in issue and that such dispute if it ever existed, would be between the 1st and 2nd Respondents and the seller, **Capt. Darlington Mugisha** and not the Appellant.

[14] I have perused the evidence of the 1st Respondent, **Kato Micheal** (DW3) and the 3rd Respondent, **Katusabe Henry** (DW4), their evidence is to the effect that the suit land located at Nyakologi/Kisambya village, Kigulya, Masindi originally belonged to the late **Absolomi Matama** which the 1st and 2nd Respondents purchased from **Capt. Mugisha Darlington** on the 22/1/2005. It measured approximately 12 acres as per the purchase Agreement **(D.Exh.1)**. **DW3** however, further explained that the seller, **Capt. Darlington Mugisha** had purchased the same from the late **Simon Mpemu** who had bought the same from **Absolomi Matama.** This is precisely what the 1st and 2nd Respondents had pleaded in their Written Statement of Defence (WSD).

[15] However, though the purchase Agreement **(D.Exh.1)** show that it is a one **Nyangoma Benadete** (DW5) who signed as the buyer, the entire body of the Agreement, in my view, however show that the 1st and 2nd defendant/Respondent together with their sister **Nyangoma Benadete** (DW5) were the beneficiaries of the purchase and all of them endorsed the

Agreement as either parties to it or witnesses, more so as **DW3** and **DW5** explained, that they all bought the property and the property was bought for the family/clan. The 1st Respondent is a twin brother to **Nyangoma** (DW5) while the 2nd Respondent is their big brother.

[16] Lastly, though the 3rd Respondent, **Katusabe Henry** (DW4) in paragraph 3 of his witness statement referred to the suit land as measuring approximately **6 acres** yet the purchase agreement **(D.Exh.1)** refers to **12 acres,** this was never a departure from the pleadings as counsel for the Appellant both in the lower court and on appeal wanted the court to believe. By **DW4** referring to **6 acres,** he was describing the acreage of the disputed portion. **DW3** had explained that whereas they purchased **12 acres of** land, the Appellant was illegally claiming approximately **6 acres** of the land, thus, it is the **6 acres** that consisted of the disputed land (**paragraph 8** of the **DW3's** Witness Statement).

[17] In the premises, I find neither a contradiction nor any departure from the pleadings as counsel for the Appellant argued. The central point is that the suit land originally belonged to the late **Absolomi Matama.** The fact that **Mugisha Darlington** ever bought land from **Absolomi Matama** was alluded to by the Appellant himself in her evidence.

[18] As regards the admissibility of the purchase Agreement **(D.Exh.1),** in the first instance, it was admitted in evidence without any objection by the Appellant and her counsel then, **Mr. Guma James**. **D.Exh.2** is comprised of receipts for the payment of the consideration which was made on "Ogwente Inn Receipts" a lodge presumably owned by the vendor since as **DW3** explained, payments were made in the lodge. I do not see any anomaly as regards such receipting of the payments of the consideration as long as the contents of the 2 documents indicated the purpose of the payments. As regards the dates thereon, the Agreement itself **(D.Exh.1**) has the explanation endorsed by the vendor, **Capt. Mugisha**;

> *"By the time of signing this agreement the purchaser had paid to the vendor Capt.Mugisha 04 months ago from this date."*

Thus the receipt of part of the consideration prior to the execution of the agreement was accordingly explained.

[19] These receipts **(P.Exh.2)** were also admitted without any objection from the Appellant and her counsel. The Appellant and her counsel are therefore in the premises estopped from raising the issue of the validity and admissibility of the purchase Agreement **(D.Exh.1)** and the receipts of the payments of the consideration **(P.Exh.2).**

[20] The 1st ground of appeal is in the premises found to be devoid of any merit and it accordingly fails.

Grounds 2-7: Evaluation of evidence

[21] Under **Ss.101-103 of the evidence Act,** it is trite that the burden of proof is on he who alleges and or asserts the existence of facts to be believed. In civil suits, the burden is on the plaintiff who has to prove his/her case on balance of probabilities; **Lugazi Progressive School & Anor Vs Serunjogi & Ors [2001-2005]2 HCB 12.**

[22] In this case, in her bid to prove her case that the suit land formed part of the estate of her late uncle, **Joseph Muhindi,** the Appellant testified that upon the death of her uncle, her father **Kiiza Joseph** was left as the heir. That when the father of the 3rd defendant a one **David Kiiza** left the army, he had no land to cultivate and when he requested from the Appellant's father, **Kiiza Joseph** where to cultivate, he referred him to his brother **Babyesiza Muhammed** who the Appellant's father had on 7/3/1965 rented a piece of land for use. That the said **Babyesiza** used the land with **David Kiiza**, the father of the 3rd Respondent for approximately, 20 years and that now, the 3rd Respondent has claimed it as his.

[23] In the first place, the document the Appellant referred to as proof of rent of the suit land by her father **Kiiza Joseph** to **Babyesiza Muhammed** (uncle to the 3rd Respondent) was rightly rejected by court on objection by counsel for the Respondents on the ground that the said **Kiiza Joseph** never endorsed it and that the Appellant was not an administrator to the estate of the late **Kiiza Joseph** and therefore, had no capacity to tender the document in evidence.

[24] 2ndly, **Tusiime Rogers** (PW2) testified that when his grandfather a one **John Mugungu** applied for the title of his land in the 1990s, the application documents indicated the family of the late, **Muhindi Josephat** from whom the Appellant claim to derive interest of the suit land as the immediate neighbour and that in around 2013, they carried out a boundary opening exercise which also revealed the late **Muhindi Josephat** as their immediate neighbour. However, no proof was presented by the Appellant in support of the above assertions as none of the referred to documents i.e, **PW2's** application and land form for the title or the boundary opening report were tendered in evidence.

[25] 3rdly, **Yusi Yolamu** (PW3) a neighbour testified that the late **Muhindi Josephat** and his other 2 relatives i.e, brothers were buried on the suit land but neither him nor the Appellant attempted to locate the graves for the trial Magistrate during the locus visit. Whereas PW3 claim to had become blind, the Appellant claimed that they were dug up by the Respondents with a tractor. Still no evidence was adduced to prove this aspect of the allegation regarding the destruction and digging up of the graves on the suit land.

[26] Lastly, it was the Appellant's evidence that she did not know the period the defendants trespassed on the suit land she intended to recover because at the time, she was in her marital home and she returned in 1980. It is her evidence that

> *"By 1987, I found the Defendants using the land."*

[27] The Appellant however filed this suit for recovery of the suit land disguised as trespass, on the 25/1/2016, after a period of over 28 years. It is my view that the Appellant as a beneficiary of the estate of the late **Josephat Muhindi** ought to have filed the suit within 12 years with effect from 1987 when she discovered that the Defendants had grabbed the estate land. This suit whether styled as trespass or as recovery of land is barred by **S.5 of the limitation Act** which provides that;

> *"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her, if it first accrued to some person through whom he or she claims, to that person."*

S.20 thereof which specifically applies to the personal estate of a deceased person limits the actions to 12 years.

Ss.6(1) & 2 thereof, the right of action is deemed to have accrued on the date of the dispossession of the land or on the date of the death of the deceased owner of the suit land.

[28] In the premises, though counsel for the Respondents never raised the issue of the competence of this suit in the lower court whether by way of a preliminary objection or otherwise, this court is entitled and has a duty to make sure Rules of procedure and the law are not flouted. The court is under duty at all times to uphold the law and its procedure.

[29] In the premises, I find that the Appellant's suit was time barred and therefore, the trial Magistrate erred in law when she did not strike it out for being time barred.

[30] On the other hand, the Respondents' case was clear. The suit originally belonged to **Absolomi Matama** from whom the 1st-3rd Respondent derive their interest vide his successors in title. As rightly found by the trial Magistrate, since 1965 when the late **Muhindi Josephat** allegedly rented the suit land to **Babyesiza Muhammed,** no one from the family of the Appellant and or beneficiary of the estate of the said **Muhindi** ever claimed and or complained that the suit land had been grabbed until 2014 or thereafter when the Appellant acquired letters of administration in respect of the estate of the late **Josephat Muhindi** and filed the present suit in 2015.

[31] The mere passage of time alone does not constitute an abandonment of vested rights, **Strauch Vs Coastal States Crude Gathering Co.424 S.W 2d 677 (1968).** The trial Magistrate alluded to the principle of abandonment as an alternative in case she would be found wrong to find that the suit land did not form part of the estate of the late **Josephat Muhindi.** She cannot in the premises be faulted for that approach.

[32] The available evidence is that the Appellant did not adduce sufficient evidence to prove on the balance of probabilities that the suit land formed part of the estate of the late **Josephat Muhindi.** Her evidence and that of her witnesses was merely comprised of inadmissible hearsay. The Appellant had never been in possession of the suit land and therefore she

could not sustain a claim of trespass against the Respondents who at all material times were in possession of the suit land. **J.M.N Lutaaya Vs Sterling Engineering SCCA No.11/2002,** as was later confirmed by the trial Magistrate at locus in quo.

[33] As regards fraud, none was established against the 1st & 2nd Respondents since court found that the Appellant had failed to prove ownership of the suit land. There was simply no evidence of fraud and therefore, no way its consideration by the trial Magistrate would prejudice the Appellant when she failed to prove ownership of the suit land as counsel for the Appellant appeared to argue.

[34] As a result of the foregoing, I find no merit in **grounds 2-7** of this Appeal and these grounds therefore accordingly fail.

Ground 8: The conduct of the visit to the locus in quo.

[35] The counsel for the Appellant complain that the trial Magistrate did not record the proceedings at locus in quo which constitute an illegality. However, I have perused the record. It is not correct to say that the trial Magistrate did not record the locus proceedings. The record clearly show that court visited locus in quo on 30/9/2020 whereon she recorded her findings and drew the sketch of the suit land in which she reflected among other things, her observations and the neighbourhood of the suit land.

[36] In the premises, I find that the available material on record was sufficient for the trial Magistrate to conclude the suit. This ground of appeal is therefore also devoid of merit and it accordingly fails.

[37] All in all the entire appeal lacks merit. It is accordingly dismissed with costs to the Respondents.

Dated at Masindi this ..31st.. **day of August, 2023.**

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Byaruhanga Jesse Rugyema
JUDGE.