

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 41 OF 2023

(Formerly MSD Civil Appeal No.04 of 2018)
(Arising from Hoima Civil Suit No.059 of 2008)

MAKURU ROBERT ::: APPELLANT

VERSUS

1.BYENKYA HARUNA

2.MUKURU REBECCA ::: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and orders of **H/W Aber Irene**, Magistrate Grade 1 Hoima Chief Magistrate’s court dated 23/1/2018.

Facts of the Appeal

[2] By an amended plaint filed in the lower court on 18/9/2012, the plaintiff/Appellant **Robert Makuru** sued 3 defendants, **Mpanuka Amos** (1st defendant), **Byenkya Haruna** (1st Respondent/2nd defendant) and **Mukuru Rebecca** (2nd Respondent/3rd defendant) jointly and severally for inter alia, a declaration that he is the owner of the suit land located at **Kyentale village, Buhanika Sub county, Hoima District** and that the defendants were trespassers thereon. However, on 7/10/13, the suit against the 1st Defendant, **Mpanuka Amos** was withdrawn with costs to the 1st Defendant upon him contending in his defence that he had no interest in the suit land.

[3] It was the plaintiff/Appellant’s case that in 1979, a one the late **Yozefu Tibanyenda Nyakojo** donated the suit land (kibanja) as a gift intervivos to

the Appellant's father, a one **George Byabataguzi** of which he is a direct beneficiary of the same.

- [4] Further, that during 2008, the 2nd defendant/1st Respondent through their agents forcefully, illegally and unlawfully encroached on the suit land/kibanja by cutting bushes and later constructed thereon a pit latrine. In July 2012, the 3rd defendant/2nd Respondent entered on part of the suit land by clearing it for purposes of growing crops thereon and has gone ahead to apply for a certificate of title for the land upon which the Appellant lodged a complaint with the Secretary District Land Board.
- [5] The Appellant contended that as a direct beneficiary to the estate of the late **Byabataguzi**, he had an interest and rights over the suit land and that due to the Respondents' continued acts of trespass, he has suffered loss, damage, mental anguish, stress and inconvenience and as such held them liable for trespass.
- [6] In their defence, the Respondents denied the Appellant's allegations each counter claiming that he and or she is the rightful owner of the suit land and the Appellant is a trespasser thereon.
- [7] It was the 1st Respondent's case that he is the heir to **Yozefu Nyakojo** who before his demise, passed over possession of a document pertaining ownership of the suit land, (A licence/certificate from the Bunyoro Kitara Government) and hence he owns the suit land by inheritance as successor who has occupied the same unchallenged.
- [8] As regards the 2nd Respondent's case, she contended that the suit land/kibanja has been in occupation of her family and their agents since 1982, her late father **Jack Mukuru** having purchased it from **Joseph Nyakojo** and accordingly bequeathed it to her. That the Appellant in 2012 wanted to take advantage of the death of her father to grab the suit kibanja. In brief, each of the Respondents lay claims over the suit land in their individual personal capacities.
- [9] The trial Magistrate on her part, upon evaluation of evidence before her, she found that in the absence of any evidence as to why the Bunyoro Kitara

certificate of the land that was in possession of the owner **Joseph Nyakojo** was not given to the Appellant's father, then, the suit land was never given to his father, **George Byabataguzi** and therefore, it belonged to the estate of **Nyakojo** who gave it to the 1st Respondent and sold part of it to the 2nd Respondent's father.

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

1. *The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus leading her to reach a wrong decision.*
2. *The learned trial Magistrate erred in law when he awarded Respondents remedies such as permanent injunction which are awarded to the plaintiff or counter claimant when the Respondents had not prayed for such remedies and when the Respondents did not adduce any evidence to prove their respective counter claims.*
3. *The learned trial Magistrate erred in law and fact when she relied on the evidence allegedly of what she saw when it is not recorded in the observations she made while at the locus in the record of proceedings thus leading her to reach a wrong decision.*
4. *The learned trial Magistrate erred in law and fact when she awarded general damages of Shs. 5,000,000/= to each of the Respondents which is excessive and when the Respondents never prayed for general damages or adduced any evidence to prove that they suffered general damages or justifying the award of general damages awarded to them.*

Counsel legal representation

[11] On Appeal, the Appellant was represented by **Mr. Aaron Baryabanza** of **Baryabanza & Co. Advocates, Hoima** while the 1st Respondent was represented by **Mr. Peter Kobwemi** of **Peter Kobwemi Advocates & Solicitors, Hoima** and the 2nd Respondent was represented by **Mr. Simon Kasangaki** of **Kasangaki & Co. Advocates, Masindi**. All counsel filed their respective written submissions.

Duty of the 1st Appellate court

[12] As rightly submitted by counsel for the 1st Respondent, the duty of the first Appellate court is well settled. It is to evaluate all the evidence that was before the trial court and arrive at its own conclusion as to whether the finding of the trial court can be supported by the evidence that was adduced before the trial court; **Selle & Anor Vs Associated Motor Boat Co. Ltd & Anor [1968] EA 123.**

[13] This court as a first Appellate court in this matter, its duty is to re-evaluate the evidence as adduced before the trial court and establish whether the position the trial Magistrate reached on both questions of the law and fact including the remedies were justifiable in the circumstances of the case.

Grounds 1 & 2

[14] The major issue for determination before the trial Magistrate was whether the suit land belonged to the Appellant, 1st Respondent or the 2nd Respondent. As rightly observed by the trial Magistrate while referring to **Miller Vs Minister of Pensions [1947] 2 All ER 372**, the burden of proof in all cases lies on the person who stands to lose if no evidence is led and in civil cases, it lies on the plaintiff who has to prove his or her case on a balance of probabilities, See also **Ss.101-103 of the Evidence Act** and the case of **Nsubuga Vs Kavuma (1978) HCB 307.**

[15] In his bid to prove his case, the Appellant adduced evidence that he acquired the suit land from his father **George Byabataguzi** who in turn got it from a one **Yozefu Tibanyenda** by way of donation as a gift *inter vivos* as per the letter/document which was admitted in evidence (without objection) from the defendants as **P.Exh.1**. The late **Tibanyenda** had given the suit land to the Appellant's father as his old friend who had looked after him when there was no body, including his clan members who bothered to look after him.

[16] The Appellant further testified that upon the death of his father who predeceased **Mzee Tibanyenda** in 1980, he went ahead utilizing the land

by way of cultivation of crops and grazing of animals thereon. When he secured a job in Kampala and he was to leave **Mzee Tibanyenda** behind, he placed him in a smaller house where he was to be looked after by his brother and mother in his absence. He demolished the bigger house and took away the iron sheets. Upon his death, he demolished the small house of mud and wattle and continued to utilize the land. According to him no body raised any objection about his demolition of the small house in 1980s.

[17] On the other hand, the 1st Respondent testified as **DW5**, that the late **Yozefu Nyakojo** was his uncle. In his pleadings and evidence, the 1st Respondent claimed that he was heir though during cross examination he conceded that he was never appointed heir to the late **Yozefu Nyakojo**. It is however apparent that the said **Yozefu Nyakojo** did not have any child.

[18] The 1st Respondent nevertheless testified further that the late **Yozefu Nyakojo** gave him the suit land measuring about 5-6 acres in 1979 and the proof he presented is what he described as a “land ownership certificate” issued by **Bunyoro Kitara Government** dated 1945 (**D.Exh.2**).

[19] I have looked at **D.Exh.2**. Indeed, it is a document of ownership or licence issued by the Bunyoro Kitara Government of the suit kibanja at Kyentale. It is however in the names of **Yozefu Nyakojo**. There is no accompanying document or any other evidence adduced by the 1st Respondent that indeed, he was offered or given the suit kibanja by the said **Yozefu Nyakojo**. However in my view, mere possession of documents pertaining to ownership of any land by a person who is not named therein the document as owner is not proof of ownership or that the owner passed over ownership by virtue of the document. Possession of such a document (**D.Exh.2**) by the 1st Respondent whose name does not appear on the document without more, does not confer upon the holder of the document any legal or equitable interest in the property. Indeed, none of his witnesses **DW6-DW8**, knew how he came to acquire the suit land he was claiming. To hold otherwise would mean that any person who lands on any document of ownership of property in the deceased’s box of custody of documents would lay claim on such property. In my view that is not the case.

[20] In the premises, I find that the trial Magistrate erred in law and fact to find that the late **Nyakojo** gave a portion of the suit land to the 1st Respondent by him merely possessing the so called certificate of ownership when there was no evidence adduced by the 1st Respondent to support such a finding.

[21] As regards the 2nd Respondent, in her bid to prove her case, she testified as **DW1** that her late father **Jack Mukuru** who died in 1990 bought the suit land from the late **Yusufu Nyakojo** on 3/6/1982 at shs.800,000/= and that when her father passed away, he left a WILL and together with the sale agreement, they were part of the documents he left. She concluded that the WILL was read on the day her father was buried and besides, that in 2008, when the Appellant disputed with her the suit land before the L.Cs, the L.C Court decreed the suit land to her.

[22] In the 1st instance, the document the 2nd Respondent is relying on as a "WILL" (**D.Exh.1**) does not qualify as a WILL as it does not conform to the provisions of **S.50(c) of the Succession Act**. It provides thus;

"Except as provided by this Act or other law for the time being in force, every testator must execute his or her WILL according to the following provisions.

a ...

b ...

c. the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will..."

[23] In the instant case, as the 2nd Respondent conceded in her evidence, **D.Exh.1** was not witnessed by anyone. As a result of **D.Exh.1's** none conformity to the law, I find it as of no evidential value.

[24] 2ndly, the authenticity of **D.Exh.1** is also in balance for the reason that whereas the 2nd Respondent/**DW1** testified that the "WILL" was read at the burial of her father, **Sabiti Christopher** (DW3) who was at one time the R.C1 Chairman of the area in the 1990's, testified that he was the one who organised or mobilised, as he put it, the burial of **Nyakojo** but did not hear anything as regards the WILL. No other person testified about the existence

of this so called “WILL” or that it was read at the deceased’s burial for that matter.

- [25] It is therefore apparent from the judgment of the trial Magistrate that she did not address herself on the law governing the making of WILLS. Had she done so, it is clear that she would have arrived at a different conclusion from that one she made.
- [26] As regards the purported purchase of the suit land by the 2nd Respondent’s father from **Yozefu Nyakojo**, the 2nd Respondent/DW1 failed to produce the agreement, and the photocopy she attached to her pleadings was not endorsed by the purchaser, her late father **Jack Mukuru**. Such a document cannot be relied on by the 2nd Respondent when her father was not a party to it. It is inconceivable that her father would part with **shs.800,000/=** in 1982 and fail to sign a document conferring him an interest or ownership in the subject matter. As a result of the above deficiency, no agreement was exhibited as proof that her father purchased the suit land since evidence must be proved by primary evidence save for public documents where court can admit certified secondary evidence (**Ss.60-64 of the Evidence Act**). See also **Des Raj Shema Vs Regina (1953] E.A/CA 310**.
- [27] Lastly, the claim by the 2nd Respondent and her witness **Kato Peter** (DW4) who was the L.C1 chairperson that the 2nd Respondent disputed the suit land with the Appellant before the L.Cs and the 2nd Respondent won the case holds no water for there is no evidence in support of such a contention. No judgment of the L.C was exhibited by the chairman (**DW4**) himself to prove that the L.Cs decreed the 2nd Respondent the suit land.
- [28] On the other hand, the Appellant adduced evidence of how his father **George Byabataguzi** acquired the suit land from **Yosefu Tibanyenda Nyakojo** that is, by way of gift intervivos (**P.Exh.1**).
- [29] For a gift intervivos to be perfected, the donor must intend to give the gift, the donor must deliver the property and the donee must accept the gift; **Nassozi & Anor Vs Kalule, HCCA No.05/2012[2014] UGHCF D 13**. In the instant case, **P.Exh.1** of which there is no suggestion that it is a forgery and of which there is ample evidence from the evidence of the Appellant (**DW1**) and **Edward Lusoke** (PW2) a former worker of **Yozefu Nyakojo Tibanyenda** that the gift intervivos document (**P.Exh.1**) was read at his

burial by the Mutongole chief **Yusufu Kyamulegire** who witnessed its making. Indeed, at the time, no body raised any objection.

[30] The Appellant established the acquisition of the suit land by his father by a gift *intervivos* by evidence of exclusive occupation and user thereof during and after the life time of the donor, **Mzee Tibanyenda**. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user suffices as evidence of acceptance of the gift, **Ovoya Poli Vs Wakunga Charles, HCCA No.13/2014**.

[31] In the instant case, I find that both the Appellant and his father **Byabataguzi** occupied and utilized the suit land by cultivation of crops and when the donor died, the Appellant demolished his houses and opened the land for cultivation and grazing of animals without any challenge or opposition from anybody until 2008 when the Respondents started laying claims over the land. **Isingoma Stephen** (DW6) testified that it is the Appellant utilizing the land by way of gazing animals thus, the Appellant's occupation and use of the land was not challenged by the Respondents.

[32] In this case, I find that the trial Magistrate did not address the law on gifts of land. Had she done so, she would have arrived at a different conclusion, that the Appellant was the rightful owner of the suit having inherited it from his father who had acquired it by way of a gift from **Yoszeffu Nyakojo Tibanyenda**.

[33] As a result of the foregoing, I find grounds 1 & 2 having merit and they accordingly succeed and both the counter claims would in the premises stand dismissed.

Grounds 3 & 4

[34] In the instant case, in view of the fact that the trial Magistrate is found to have erred in law and fact when she failed to properly evaluate the evidence adduced before her in court thus leading to a wrong conclusion thus disposing of the entire appeal, it is not necessary to delve into whether or not locus proceedings were properly conducted. In any case, the trial Magistrate had not based herself on the evidence obtained at locus in determining the suit.

[35] As regards damages, it is the law that special damages must be strictly proved, **Kyambade Vs Mpigi District Administration [1983] HCB 44**. In this case, no evidence was adduced by the 2nd Respondent in support of her claims of special damages. The 1st Respondent did not plead any. Besides, as the counter claims stand dismissed for failure to adduce evidence in support of the Respondents' respective claims, the awarded general damages of **shs 5,000,000/=** for each of the Respondents would be accordingly set aside.

[36] In conclusion, I find that the entire appeal generally has merit and it accordingly succeeds with the following orders:

1. The judgment and orders of the learned trial Magistrate are set aside and substituted with the following orders;
 - a) The suit land comprised at **Kyentale village, Buhanika Sub county, Hoima District** belongs to the Appellant.
 - b) The Respondents' activities on the suit land amount to trespass for they are not authorised by the Appellant and therefore, the Respondents are trespassers, an eviction order against the Respondents and their agents and or workers accordingly issues.
 - c) A permanent injunction against the defendants and their agents or workers from further trespass and or interfering with the Appellant's occupation and use of the suit land accordingly issues.
 - d) General damages for trespass which is actionable per se are awarded in the sum of **Ugx 5,000,000/=** against each of the defendants/Respondents for the inconvenience, mental anguish and stress he has suffered as a result of the Respondents' unlawful activities.
 - e) The Appellant is awarded costs of the appeal and in the lower court as the successful litigant.
 - f) The general damages to carry interest at court rate from the date of judgment until payment in full.

Dated at Hoima this **28th day of July, 2023**.

Byaruhanga Jesse Rugyema
JUDGE.