THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0060 OF 2020

[ARISING FROM CIVIL SUIT NO. 0005 OF 2003]

1. BADRU MBUGANO
2. AHAMED SEBAGUDDE
3. ZAKALIYA LYAZI :: APPELLANTS

VERSUS

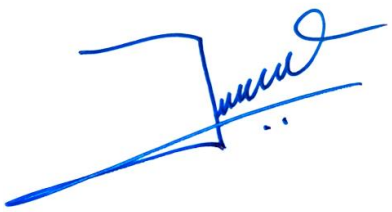
BEN MULIMBA :: RESPONDENT

BEFORE: Hon. Justice Isah Serunkuma.

JUDGEMENT

This is an appeal from the Judgement and Orders of the Chief Magistrate of Masindi, Her Worship Elizabeth Akullo Ogwal delivered on 12th November 2020 in *Civil Suit No. 005 of 2003; Zakaliya Lyazi & 4 others v Ben Mulimba & 7 others.*

The appellants and two others who have since passed on, sued the Respondent & 7 others in MDLT Claim No. 31/23 of 2003 for trespass to land, an order of vacant possession and a declaration that they are the rightful owners of 2 square miles of land situated at Nyakatete, Bwijanga Sub- County, Bujenje County, Masindi District, the suit land. The appellants claimed to have lived on the suit land since the 1960s and acquired a lease over the land from Uganda Land Commission in 1972. On the other hand, the respondent and others, some of whom have since passed on, claimed to have lived on the suit land since 1987 and acquired a lease over the land from Masindi District Land Board in 1995.

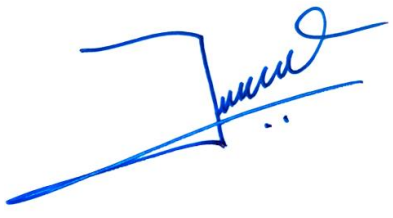


The learned trial Chief Magistrate held that the grant of a customary interest in the land to the Appellants in the 1960s by the Mutongole Chief at the time, and the grant of a customary interest to the Respondent in 1987 by the Resistance Council leaders at the time, were both void ab initio as neither the Mutongole Chief nor the Resistance Council leaders had the mandate to grant public land to the Appellants and to the Respondent, respectively. Secondly, judging by the descriptions of the land in the parties' respective lease offers, the learned trial Chief Magistrate found that the parties applied for and were granted different pieces of land. She held that the Appellants are the rightful owners of 400.06 acres of the suit land, while the Respondent is the rightful owner of 364 acres of the suit land. The learned trial Chief Magistrate declined to grant general damages, mesne profits and costs of the suit.

The Appellants, being dissatisfied with the decision and Orders of the Learned trial Chief Magistrate appealed against the decision on three grounds namely –

1) The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 005 of 2003 that part of the suit land measuring approximately 364 acres belongs to the Respondent.
2) The learned trial Magistrate erred in law and fact when she totally disregarded the Appellants' evidence on acquisition of the suit land thereby arriving at a wrong decision in Masindi Chief Magistrates Court Civil Suit 005 of 2003 that part of the suit land measuring approximately 364 acres belongs to the Respondent.
3) The learned trial Magistrate erred in law and fact when she found that Masindi District Land Board lawfully offered 364 acres of the suit land to the Respondent when the same had previously been offered to the Appellants' father by Uganda Land Commission.

On the basis of the above grounds, the appellants pray that this appeal be allowed and the Judgment of the lower court be set aside with costs of the proceedings in the lower Court and of the appeal.



Representations.

Learned counsel Simon Kasangaki from M/s Kasangaki & Co. Advocates represented the appellants while the respondent was represented by learned counsel Tugume Byensi from M/s Tugume-Byensi & Co. Advocates. Both learned counsels filed written submissions which this Court appreciates and has considered.

Appellants' submissions

The appellants' counsel faulted the trial Chief Magistrate's decision that the respondent owned 364 acres of the suit land. He referred to the testimonies of PW1, PW2, PW3 and PW4 to the effect that the suit land belonged to the appellants' late father, Zakaliya Lyazi who settled on the land in the 1960s. Counsel submitted that the appellants' equitable interest in the suit land preceded the respondent's interest in the land and therefore the lease offered to the respondent subsequently was unlawful on grounds that there was a subsisting interest in the suit land held by the appellants. To support this submission, counsel relied on authorities of ***Balamu Bwetagaine Kiiza & Anor v Zephania Kadooba Kiiza; CACA No. 0059 of 2009, Mwenge Diary Cooperative Society Ltd & Anor v Badru Kachope; HCCS No. 0012 of 2013*** and ***D.J Bakibinga; Equity & Trusts (Law Africa, 2011 at page 46 & 47)*** for the proposition that if, subsequently, a person acquires a legal or equitable interest in land, his or her interest is subject to the interest of the first owner.

Secondly, counsel submitted that the inspection of the suit land by the Area Land Committee, before the lease offer to the respondent, was irregular as the Committee did not consult the Lands Office and the local leaders to verify the ownership of the land. He relied on the case of ***Kampala District Land Board & Anor v Venansio Baweyaka & 3 Others; SCCA No. 002 of 2007*** where it was held that although mere knowledge of an equitable interest cannot be imputed as fraud, where such knowledge is accompanied by wrongful intention to defeat such exiting equitable interest, fraud may be imputed. In the premises, counsel prayed that this appeal be allowed with costs.

Respondent's submissions

Learned counsel for the respondent supported the trial Chief Magistrate's findings and Orders. He submitted that the cases of ***Balamu Bwetagaine Kiiza & Anor v Zephania Kadooba Kiiza (supra),*** and ***Mwenge Diary Cooperative Society Ltd & anor v Badru Kachope (supra)*** which the appellants' counsel sought to rely on are distinguishable from the facts of the present appeal where the parties acquired different lease offers on public land with different descriptions in respect of acreage and administrative units.

Secondly, counsel submitted that the late Zakaliya did not own a customary interest in the suit land. He clarified that the late Zakaliya applied for a statutory lease on public land and not a conversion of customary land to leasehold. Counsel further submitted that the appellants claim of fraud on the part of the respondent is ill intended in so far as it was not supported with any evidence.

In conclusion, counsel invited this court to dismiss the appeal with costs awarded to the respondent.

Appellants' submissions in rejoinder

In rejoinder, learned counsel for the appellants relied on the case of ***Oyet Celestino v Okello Lunjino; HCMA No. 0053 of 2017*** for the proposition that where land is described by its measurements and visible monuments, the description by visible monuments prevails as there may be mistakes in the measurements but there can never be mistakes in the monuments or features. Further, counsel submitted that the respondent testified that his land was situated in Kitinwa-Kyetungamya village, whereas the suit land is situated in Nyakatete village. This proved that the respondent did not own the suit land.

Court's Analysis

The duty of this court as a first appellate court is to reappraise the evidence on record and draw its own inferences of fact and law. In doing so, the court ought to give due regard to the observations made by the trial court as it did not have the opportunity to observe the witnesses

or visit the locus. (See; ***Fr. Narsensio Begumisa & 3 Ors v Eric Tibebaga; SCCA No. 017 of 2002 [2004] KALR 236***).

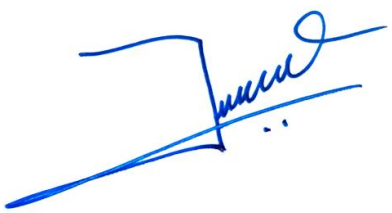
The appellants raised three grounds of appeal which appear to be similar and repetitive in so far as they all fault the learned trial Chief Magistrate for failing to scrutinize the evidence on record thereby arriving at a conclusion that the respondent is the rightful owner of 364 acres of the suit land. Therefore, the court shall consider the three grounds concurrently.

The appellants' claim as pleaded in paragraph 4(a) of the Statement of Claim is that they occupied two square miles of the suit land situated at Nyakatete, Bwijanga Sub-County, Bujenje County in Masindi District. The claim is substantiated by the evidence of PW1 – Sebagude Ahamed at page 30 of the record of proceedings. PW1 testified that his father, Zakaliya Lyazi settled on the suit land in the 1960s. According to PW2 – Wamala Bagenda, the said Zakaliya Lyazi acquired the suit land from the local authorities. One of the local authorities was John Kiliza Chrizestom who was the Mutongole Chief. On this account, the appellants sought to contend that they acquired a customary or equitable interest in the entire suit land.

This contention cannot be sustained because mere occupancy, however long, cannot by itself vest equitable or customary interest in land. In the case of ***Atunya Valiryano v Okeny Delphino; Civil Appeal No. 0051 of 2017 [2018] UGHCLD 69***, this court held that,

> *"Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative."*

(See also; ***Lwanga v. Kabagambe; C.A. Civil Application No. 0125 of 2009 and Musisi v. Edco and Another; H.C. Civil Appeal No. 0052 of 2010***).



Similarly, in ***Bwetegeine Kiiza Anor v Kadooba Kiiza; Civil Appeal No 0059 of 2009, 2015 UGCA 0183***, the Court of Appeal held that without proof of a custom, a customary or equitable interest in land cannot be acquired by way of a gift from Local Council leaders or the Bataka. On this basis, this court rejects the contention of the appellant that Zakaliya acquired a customary or equitable interest in the entire suit land when it was gifted to him for grazing cattle by the Mutongole Chief in the 1960s.

Secondly, the appellants contended that their father, Zakaliya, applied for and obtained a lease offer over the suit land in 1972. The claim was supported by the evidence of PW1 who stated at page 31 of the record of proceedings that Zakaliya applied for 518 acres and was offered 259 acres by the Uganda Land Commission. The Lease Offer was admitted into evidence and marked P.Ex.1. It is titled **ULC Min.217/72(a) 35 B/665 and dated 27th June 1973**. The contents of P.Ex.1 reveal that the appellants applied for a lease over the land in Bwijanga, Bujenje, Bunyoro on 5th April 1972 and approximately 259 hectares of the land was offered to the appellants for an initial period of 5 years from the month following completion of survey and upon completion of the development, an extension of 49 years would be granted. Owing to the political turmoil in Uganda at the time, the appellants were unable to perfect the legal title. In 1995, the appellants obtained a lease offer over the same land described **as approximately 259 hectares at Bwijanga, Bujenje, Masindi under U.L.C MIN. NO. 217/72(a) 35 B/665.**

This Court notes that under the legal regime at the time, section 25 of the Public Lands Act No. 13 of 1969 vested authority in the Uganda Land Commission to make a grant in leasehold of public land. (See; ***Mwenge Diary Cooperative Society Ltd & Anor v Badru Kachope; Civil Suit No. 012 of 2013 (HCT-CA-22 of 2017) [2017] UGHCLD 39***).

The court further finds that upon obtaining a lease offer from Uganda Land Commission in 1973, the appellants acquired an equitable interest in the suit land to the extent of the size of the suit land leased out, namely 259 hectares. The court is fortified in its finding by the decision of the Court of Appeal in the case of ***Bwetegeine Kiiza Anor v Kadooba Kiiza; Civil Appeal No 0059 of 2009,***

2015 UGCA 183 at page 16, where it was held that in law, the first appellant in that case had an equitable interest in the land by virtue of the lease offer pending perfection of the legal title.

In the present appeal, the appellant's equitable interest is limited to the extent of the size of the land indicated in the lease offer, namely approximately 259 hectares. In the result, the learned trial Chief Magistrate erred in law and fact when she awarded the appellants 400.06 acres of the suit land. In so doing, the learned trial Chief Magistrate usurped the function and powers of the Uganda Land Commission under the Public Lands Act, 1969 and the District Land Board under the Land Act, Cap 227.

On the other hand, contrary to his pleadings at the trial court, the respondent supported the learned trial Chief Magistrate's finding that the appellant is entitled to 364 acres of the suit land. According to the record, the respondent who testified as DW6 stated that he acquired the suit land in 1987 from the Resistance Council leaders. The respondent's testimony was corroborated by DW5 – James Mugoya, a Surveyor Lands Management Officer. DW5 stated that the respondent applied for a lease on 6th September 2002 and the lease offer was granted on 19th September 2002. DW5 further testified that the respondent paid 600,000/= as premium and other costs all totaling to UGX 730,000/=. The respondent has continued to pay ground rent to-date unlike the appellants who last paid ground rent in 1995. The respondent's application and Lease Offer were tendered in evidence at the trial Court and marked D.Ex.1. The offer reveals that the respondent applied for and was granted 500 acres of land **under Minute No. MSB/DLB/096/2002 (32) of 11/9/2002 Application No. 6827.** The lease was granted for an initial period of 5 years from the first month after survey and on completion of the building covenant, the period would be extended to a total period of 49 years.

According to the Lease offer, the respondent was granted a lease on the land situated at Kabaroge Nyakatete, Kijunjubwa, Kitinwa in Masindi District. However, the respondent's lease application describes the location of the land as Buruli County, Kitiinwa Village, Kijunjubwa Parish, Kimengo Sub-County. This is quite different from the description in the lease offer already mentioned.

By contrast, the appellants' lease offer describes the land granted to the appellants as Bwijanga, Buruli/ Bujenje, Bunyoro. This description is slightly inconsistent with paragraph 4(a) of the appellants' Statement of Claim which states that the suit land is situated as Nyakatete, Bwijanga Sub- County, Bujenje County, in Masindi District.

From the above descriptions, it is evident that the respondent's lease application indicates that the land is located in Nyakatete village, which is the same description given in the appellant's Statement of Claim and confirmed by PW1 and PW2 to be the appellants' land. It is also evident that both parties gave inconsistent descriptions of their respective lands. This may be attributed to the lapse in time since the 1960s and 1987 when the parties settled on the suit land and the fact that the land was not surveyed. The respondent attempted to explain the inconsistencies by stating that his land touches many villages including Kitiinwa, Nyakatete and Kabaroge, which are all in Kyeitungamya Local Council.

The respondent stated that his neighbours include Dr. John Turyaguruka to the west, Wamala Bagenda (PW2), Kiiza Rujavara to the North, Butare and Kifufuba Road to the South. On the other hand, PW1 testified that the neighbours to the appellants' land include Mzee Wamala Bagenda (PW2) to the East, Kyapisi Jeremy to the North, and Kijunjubwa Road to the West. Owing to the several discrepancies in the descriptions of the parties' lands by the parties, recourse may be made to the natural and artificial monumental features on the land.

In that regard, this court is guided by the dictum of court in the case of ***Oyet Celestino v Okello Lunjino, Miscellaneous Application No.53 of 2017 [2018] UGHCCD 53.*** In that case, the parties relied on estimates of acreage to describe their respective land. The court attempted to use a map but it did not cure the defect as the land was neither registered nor surveyed as is the land which forms the bone of contention in the present appeal. The court held that,

"It is an established rule that where land is described by its measurements, and at the same time by known and visible monuments, the latter prevail… There may be mistakes in measuring land, but there can be none in monuments. When a party is estimating the size of land, he or she naturally estimates its quantity, and of course its value, by the features which enclose it, or by other fixed monuments which mark its boundaries, and he or she may be mistaken as to the size but not the monuments. It is thus an established principle that known monuments must govern over bearings and distances. If there are conflicting calls as to the size of land, those measurements which, from their nature, are less liable to mistake, must control those which are more liable to mistake. No matter how "accurate" a measurement is, it has a lower value than a natural or artificial monument. Any natural object, and the more prominent and permanent the object, the more controlling as locator, when distinctly called for and satisfactorily proved, becomes a landmark is not to be rejected because the certainty which it affords, excludes the probability of mistake."

In the present appeal, the parties identified several natural and artificial monuments which the trial court confirmed to be at the suit land during the locus visit. Some of them include the dam which served as a boundary separation, Rwelihigo swamp, broken poles which used to hold the appellants' barbed wire fencing, the evidence of cattle grazing, banana plantations, pineapples, permanent houses, grass thatched houses, Kijunjuba road, and jack fruit trees. The presence of the said features on the suit land revealed that the appellants and the respondent's land was the same contrary to the learned trial Chief Magistrates finding that the parties applied for and acquired lease offers on different pieces of land. Having found as I have that the appellants are entitled to only 259 hectares of the suit land as per their lease offer dated 27th June 1973, it follows that the respondent's 500-hectare lease offer dated 19th September 2002 is subject to the appellant's equitable interest which ranks first in time. *(See; **Musogo v Kasagalya & Anor (HCT-04-CV-CA 88 of 2011) [2017] UGHCLD 38).*** This implies that the respondent is entitled to 241 hectares of the suit land, being the portion of the suit land that remained unencumbered and available for lease by the respondent from his 500-hectare lease offer. The respondent may seek compensation

from the District Land Board with respect to the 259 hectares which had already been leased to the appellants.

In the final result, the appeal is allowed. The Judgment of the court below is hereby set aside and, in its place, the court orders as follows;

1. The appellants are the rightful equitable owners of approximately 259 hectares of the suit land.
2. The appellants may proceed to survey the suit land and perfect legal title to the extent of the 259 hectares allocated to the appellants in the lease offer.
3. An Order for a permanent injunction doth issue to restrain the respondent and any other person from interfering with the portion of the suit land adjudged to belong to the appellants, namely 259 hectares of the suit land.
4. The respondent is the rightful owner of 241 hectares of the suit land.
5. The respondent may proceed to survey the suit land and perfect legal title with respect to only 241 hectares.
6. An order for a permanent injunction doth issue to restrain the appellants and any other person from interfering with the portion of the suit land measuring approximately 241 hectares.
7. The court declines to award general damages and mesne profits.
8. Each party shall bear its own costs.

It is so ordered.

Dated and delivered on this 20th day of October 2023.

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Isah Serunkuma

JUDGE