

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 81 OF 2017

ARISING FROM WAKISO CIVIL SUIT NO. 46 OF 2013

SEMANDA JOHN APPELLANT

VERSUS

KICONCO JESSICA RESPONDENT

BEFORE HON. LADY JUSTICE FLAVIA NASSUNA MATOVU

JUDGEMENT

1. INTRODUCTION

This appeal arose from the decision of court in Wakiso Civil Suit No. 46 of 2013 that was passed on 29th June 2017. The appellant being dissatisfied with the said decision lodged this appeal against the same. The grounds of appeal were laid in the memorandum of appeal that was lodged at court and endorsed by the Registrar on 18th July 2017 and subsequently amended by consent of both parties on 17th August 2023. Briefly the grounds were that;

- a) the trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record leading to a wrong finding that Kiconco Jessica had locus to sue.
- b) the trial magistrate erred in law and in fact when he failed to visit locus and made conclusions on an undefined kibanja.

- c) The trial magistrate erred in law and fact when he declared the kibanja to belong to the plaintiff/respondent without evidence on record to support this finding.
- d) The trial magistrate erred in law and fact when she awarded the respondent general and punitive damages.
- e) The trial magistrate erred in law and fact when he declared Kamoshe Joyce as widow to the late Gyagenda without evidence on record.
- f) The trial magistrate erred in law and fact when he declared the appellant a trespasser whilst ignoring the appellant's evidence of ownership of the kibanja on record.

The appellant thus called upon this court to set aside the judgment and decree of the lower court with costs to him.

2. BACKGROUND

- a) The respondent who claimed to be a daughter of one late Gyagenda Ephraim filed Wakiso Civil suit No.46 of 2013 against the appellant seeking for a declaration that she was lawful owner of a kibanja situate at Kakoge LC1 , Sentema Kakiri, that defendant was a trespasser on the said kibanja , permanent injunction restraining defendant from committing further acts of trespass on the same, plus costs of the case. She claimed to have inherited the said kibanja from her late father who had bought it in the 1950's. However, after her father's death, the appellant trespassed on a portion of the said kibanja by cutting barbed wire, destroying banana plantations thereon and cultivating it. The respondent thus filed the above-mentioned case against the appellant seeking for the aforementioned remedies.
- b) The appellant on the other hand denied any act of trespass. He maintained that late Gyagenda had never purchased the said kibanja and that he had been in occupation of the same since 2001 without any challenges. He thus called upon court to dismiss the suit with costs.
- c) The case went to full trial and at the trial court three issues were considered i.e.

- i. Whether the defendant had any lawful interest in the suit kibanja.
 - ii. What remedies were available to the parties?
- d) The court delivered judgment in favour of the respondent and made the following orders;
- i. The respondent/plaintiff was declared lawful owner of the suit kibanja.
 - ii. The appellant/ defendant had no lawful interest in the suit kibanja.
 - iii. The appellant/defendant be evicted from the suit kibanja.
 - iv. The appellant/ defendant pays general damages of Ug. Shs. 2 million for the respondent/plaintiff.
 - v. Permanent injunction issued restraining the appellant/defendant, his agents, workmen, and servicemen from dealing with the suit kibanja
 - vi. The appellant/defendant to pay costs of the case.

The appellant was not satisfied with the above decision and thus lodged the instant appeal on the aforementioned grounds.

3. RESPONDENT'S EVIDENCE IN THE TRIAL COURT.

- a) PW1Kiconco Jessica, testified that she was daughter to late Gyagenda Ephraim who died intestate in 2007 leaving behind two wives Kamoshe Joyce who was her mother and Tereza Nalubowa plus several children. That late Gyagenda acquired the suit kibanja measuring approximately 6 acres in the 1950's from Kabuga James. The said kibanja became family land and many relatives were buried there. After Gyagenda's death, the suit kibanja was left in the hands of the two wives who had equal shares with their respective children. In 2004, Nalubowa sold a portion of the suit kibanja to one Nagujja Mary and she eventually passed on. After her death family members realised that Nagujja Mary was in occupation of the kibanja and ascertained that she had bought it from Nalubowa. They agreed to buy back the portion she had bought from Nalubowa and she was paid Ug.shs. 1,000,000. They also realised that defendant was cultivating the said kibanja. He was summoned to go and explain how he

started cultivating the same but he did not go. Hence the said suit was filed against him. In cross examination she insisted that her mother was Kamoshe Joyce and she was daughter to late Gyagenda and that her father had 5 children. She had lived on the kibanja since 1984 -1987. She clarified that her father died in 1997. Kyalisiima was her brother and she did not know that he had sold the land. She found Semanda digging on the said land in 2001 and he was a neighbour to their kibanja. She was the right person to sue because the kibanja belonged to her late father. She had no letters of administration to her father's estate.

4. PW2 was Kamoshe Joyce . Her testimony was largely similar to that of PW1 and she confirmed that plaintiff was her biological daughter and she was surviving widow to late Gyagenda. In cross examination she stated that she left the suit kibanja for 10 years and left her co wife thereon. Kyalisiima never lived on the suit kibanja. He was with them in Ntungamo. Semanda took over the land after Kyalisiima's death. She had stayed on the suit kibanja with her co wife for 20 years.
5. PW3 was Kityo Noah. He testified that he had been chairman LC1 of the area since 2001. His testimony was also similar to that of PW1. In cross examination he stated that at one time Kyalisiima negotiated with Semanda to build a house for his mother and also give him some money in payment for kibanja.

6. APPELLANTS EVIDENCE IN THE TRIAL COURT

- a) DW1 Semanda John testified that he bought the suit kibanja from one Kyalisiima who was the biological son of late Gyagenda and Kamoshe Joyce in 2001. At that time there were no developments and had been using it uninterrupted for a long time. At that time Gyagenda was still alive. Kyalisiima introduced him to the representative of the landlords Ssimbwa Benjamin and he paid kanzu. Kyalisiima instructed him to build a house for one of Gyagenda's wives as part of the purchase money. In cross examination he stated that Kyalisiima sold to him in his capacity as son to

the deceased but not as the owner. The LC's at the time confirmed to him that the suit Kibanja belonged to late Gyagenda.. At that time, he believed Kyalisiima was the only surviving son but he later established that plaintiff was sister to Kyalisiima.

- b) DW2 was Kimbowa Samuel Benjamin. He testified that the suit kibanja used to belong to Gyagenda and that Kyalisiima who was son to Gyagenda sold the same to Semanda in 2001. In cross examination he stated Kyalisiima did not stay on the suit kibanja for long, he came briefly for about one month sold and left. At the time Semanda bought Gyagenda was still alive.
- c) DW3 Ssimbwa Benjamin testified that in 2001, Kyalisiima went to him and told him that he had sold the suit kibanja . That the said kibanja belonged to late Gyagenda and the widow did not complain. Kyalisiima introduced him to Semanda who gave him kanzu.
- d) DW4 was Mulangira Nakibinge Eddy, the former chairman LC1 Kakooge He testified that in 2001 Kyalisiima went to him with his mother Kamoshi Joyce who confirmed to him that Kyalisiima had a right to sell the suit kibanja. He later sold the same to Semanda. That the owner of the suit kibanja was late Gyagenda. In cross examination he stated that when Kyalisiima died, Gyagenda went to Mbarara and came back with Semanda and told him that he was selling the kibanja. That Kamoshe Joyce was mother to both Gyagenda and Kyalisiima.

7. PROCEEDINGS AT THE LOCUS

- a) The court did not visit locus.

8. JUDGMENT OF THE TRIAL COURT

In his judgement, the trial magistrate found that the plaintiff had successfully proved that she was the lawful owner of the suit kibanja and that the defendant had no lawful interest in the same and therefore a trespasser. The

court ordered eviction of the defendant from the suit Kibanja, general damages of 2 million permanent injunction and costs of the case.

9. GROUNDS OF APPEAL

- i. The trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record leading to a wrong finding that Kiconco Jessica had locus to sue.
- ii. The trial magistrate erred in law and in fact when he failed to visit locus and made conclusions on an undefined kibanja.
- iii. The trial magistrate erred in law and fact when he declared the kibanja to belong to the plaintiff/respondent without evidence on record to support this finding.
- iv. The trial magistrate erred in law and fact when she awarded the respondent general and punitive damages.
- v. The trial magistrate erred in law and fact when he declared Kamoshe Joyce as widow to the late Gyagenda without evidence on record.
- vi. The trial magistrate erred in law and fact when he declared the appellant a trespasser whilst ignoring the appellant's evidence of ownership of the kibanja on record.

NB. It appears appellant abandoned ground v of the appeal since he did not make any submissions on it.

10. ISSUES ON APPEAL

- i. Whether the trial magistrate rightfully found that Kiconco Jessica had locus to sue.
- ii. Whether the trial magistrate erred in law and in fact when he failed to visit locus and made conclusions on an undefined kibanja.
- iii. Whether the trial magistrate rightfully declared the suit kibanja to belong to the plaintiff/respondent

- iv. Whether the trial magistrate rightfully awarded general and punitive damages to the respondent.
- v. Whether the trial magistrate rightfully declared the appellant a trespasser on the suit kibanja.

11. DUTY OF A FIRST APPELLATE COURT.

12. The duty of this court as a first appellate court is 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 conclusion¹. And in case of any conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions². As rightly stated in the case of Ocen Ronaldo³, in exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

13. LAW APPLICABLE

- The Constitution of the Republic of Uganda 1995
- The Civil Procedure Act Cap 71
- The Civil Procedure Rules
- The Evidence Act Cap 6
- The Magistrates' Courts Act Cap 16
- Common law and decided cases.

¹ Father Nanensio Begumisa & 3 others vs. Eric Tiberaga SCCA 17 of 2000 (2004) KALR 236

² Lovinsa Nankya vs. Nsibambi 1980 HCB 15 cited with approval in Ocen Renaldo vs. Justin Orunya Gulu Civil Appeal No. 006 of 2013.

³ Ocen Renaldo vs. Justin Orunya Gulu Civil Appeal No. 006 of 2013.

14. LEGAL REPRESENTATION

The appellant was represented by Ms. VERUS Advocates while the respondent was represented by Ms. K. Christopher Advocates and Solicitors.

15. APPELLANT'S SUBMISSIONS:

Counsel for the appellant filed written submissions which I have carefully studied and need not reproduce them here because they are on record. Briefly he submitted that the trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record which led to a wrong finding that Kiconco Jessica had locus to sue and consequently declared her to be rightful owner of the suit kibanja without supporting evidence on record. That whereas in her plaint she claimed to be actual owner of the suit kibanja, in her witness statement she claimed to be beneficiary to estate of late Gyagenda and later on she claimed to have instituted the suit as representative of her mother. None the less the trial magistrate held that she filed the suit as a beneficiary of late Gyagenda clothed with locus to standi to file the case which was erroneous in light of the several shifts by the plaintiff concerning her status in the suit. That in addition there was no evidence to prove that Kiconco Jessica was daughter to late Gyagenda and that the claims in the plaint and reliefs sought were not those of a beneficiary but an actual owner. That it is trite law that parties should be bound by their pleadings and the plaintiff should not have been allowed to deviate from the pleadings that he filed.

In addition, the court did not visit locus yet the respondent did not specifically describe the suit property and the court erroneously declared the defendant a trespasser on the suit property while ignoring his evidence of ownership of the same. He cited several authorities in support of his submissions which I have carefully studied.

16. RESPONDENT'S SUBMISSIONS

Counsel for the respondent also filed written submissions which are on record and I need not reproduce them here. Briefly he submitted that the trial magistrate rightfully found that Kiconco Jessica had locus standi in the case as beneficiary to estate of late Gyagenda and that there was enough evidence to show that she was daughter to late Gyagenda. That the plaintiff clearly described the suit kibanja and there was no need to visit locus. Lastly that Kyalisiima who allegedly sold the suit kibanja to defendant had no right to do so and the trial magistrate rightly found that the defendant had no interest in the same. He also cited several authorities in support of his case which I have carefully studied.

17. DECISION OF COURT

Issue 1

Whether the trial magistrate rightfully found that Kiconco Jessica had locus to sue.

Counsel for the appellant submitted that the trial magistrate failed to properly evaluate the evidence on record leading to a wrong finding that Kiconco Jessica was a daughter to late Gyagenda and had locus to sue. As rightly submitted by counsel for the appellant locus standi literally means place of standing and in determining whether or not a party has locus standi, the court should look at the pleadings and other relevant matters on record. It is also true as submitted by counsel for the appellant that for a person to have locus standi, such a person must have sufficient interest in respect of the subject matter of the suit.

After carefully studying the pleadings specifically the plaint on record, I noted that the plaintiff Kiconco Jessica filed the suit in her capacity as daughter to late Gyagenda who was the owner of the suit Kibanja. (See paragraph 4 of the plaint). The fact that she was daughter to late Gyagenda was further proved

in her own testimony to court together with the testimony of PW2 who was her mother, and the defendant himself who testified that he later established that the plaintiff was sister to Kyalisiima who sold to him and Kyalisiima was son to late Gyagenda. On the contrary, the defendant witnesses who claimed that the plaintiff was not daughter to late Gyagenda were neither family members nor relatives to late Gyagenda. In my view the trial magistrate rightfully found that Kiconco Jessica was a daughter to late Gyagenda . Being a daughter, she qualifies to be a beneficiary to the estate of the late Gyagenda the former owner of the suit kibanja. Following the decision of court in Israel **Kabwa vs. Martin Banoba**⁴, a beneficiary of an estate of an intestate has capacity to sue in his own names to protect the estate for his own benefit without first taking letters of administration. The trial magistrate therefore rightfully found that Kiconco had locus standi to file the said suit.

Issue 2

Whether the trial magistrate erred in law and in fact when he failed to visit locus and made conclusions on an undefined kibanja.

Counsel for the appellant submitted that the trial magistrate erred in law and in fact when he failed to visit locus and made conclusions on an undefined kibanja which was contrary to the provisions of 0.18 r.14 of the Civil Procedure Rules which require courts to visit locus. Counsel for the respondent on the other hand maintained that the particulars of the suit kibanja were clearly known and there was no need to visit locus.

I must note that as a matter of fact, the trial magistrate did not visit locus in this case. Be that as it may it is not mandatory that court should always visit locus in quo. In **Bale & 2 others vs Okumu** ⁵, it was held that the view of a locus is in addition to

⁴ **SCCA 52/1995**

⁵ *Civil Appeal No.21 / 2005*

and cannot be a substitute for evidence already given in court and that visiting locus is not mandatory and court reserves the right to visit locus in quo in deserving cases.

In the instant case from the pleadings of both the plaintiff and the defendant it is clear that both parties were certain about the suit kibanja. In the plaint, the plaintiff described the kibanja as located at Kakoge LC1 Sentema, Kakiri Subcounty, Wakiso District which formerly belonged to her late father Gyagenda. It is this same kibanja for which she adduced evidence in court. The defendant on the other hand claimed to have been in occupation of the same kibanja since 2001 having bought it from late Kyalisiima who was son to late Gyagenda. It is not reflected anywhere on the court record that parties were talking about different kibanja located at different places. No wonder none of the parties moved court to go for locus. It was clear to court that the suit kibanja was the kibanja which originally belonged to late Gyagenda which the defendant/appellant claimed to have occupied since 2001. Failure to visit locus did not occasion a miscarriage of justice in the instant case. It is therefore not true that court made conclusions on undefined kibanja. The suit kibanja was clearly defined and known to both parties.

Issue 3 and 5

Whether the trial magistrate rightfully declared the suit kibanja to belong to the plaintiff/respondent and whether he rightfully declared the appellant a trespasser on the suit kibanja.

Counsel for the appellant submitted that the trial magistrate erred in law and fact when he declared the kibanja to belong to the plaintiff/respondent without evidence on record to support this finding. I must note that the issue that was considered by the trial magistrate was whether the defendant had any interest in the suit kibanja. The plaintiff therefore had a duty to prove on a balance of probabilities that the defendant had no interest in the suit kibanja. From the record plaintiff led evidence to show that the suit kibanja belonged to late Gyagenda who was her father and that defendant had no interest in the same. In his written statement of defence the

defendant simply stated that he had been in occupation of the suit kibanja since 2001 without stating how he came to occupy the same. He then led evidence to show that he bought the same from one Kyalisiima who was a son to late Gyagenda. He however confirmed that Gyagenda had no letters of administration to estate of late Gyagenda. It therefore follows that Kyalisiima had no legal interest to pass on to the defendant because the kibanja did not belong to him. Defendant could not have acquired any lawful interest in the same. Trial magistrate thus rightfully found that defendant had no lawful interest in the suit Kibanja and that the plaintiff was lawful owner of the same in her capacity as daughter to late Gyagenda and thus beneficiary to the said kibanja..

As regards trespass, the evidence on record shows that the suit kibanja originally belonged to late Gyagenda who was in possession of the same and had indeed buried many of his relatives there. Upon the demise of Gyagenda, the beneficiaries remained in constructive possession of the same and none of them had a right to sell the same without the consent of the others. Therefore the defendant who unlawfully purchased the same from one of the children, unlawfully interfered with the constructive possession of the other beneficiaries to wit the plaintiff. In **E.M.N. Lutaaya vs. Stirling Civil Eng⁶**, it was held inter alia that the tort of trespass to land is committed against the person who is in actual or constructive possession of the land. The trial magistrate therefore rightfully found that the defendant was a trespasser on the suit kibanja and rightfully ordered his eviction.

Issue No. 4

Whether the trial magistrate rightfully awarded general and punitive damages to the respondent.

I must note that the trial magistrate did not award punitive damages. He however awarded general damages of 2 million based on the fact that the plaintiff had been

⁶ *Civil Appeal No.11 of 2002*

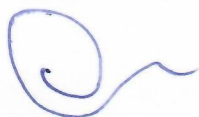
inconvenienced by the defendant's unlawful occupation of the suit land. In my view this was not erroneous and I have not found reason to set it aside.

I have not found reason to set aside decision of trial magistrate. He properly evaluated the evidence on record and arrived at correct decision as discussed above.

18. FINAL ORDERS.

This appeal therefore hereby fails and is accordingly hereby dismissed. The decision of the trial magistrate is accordingly hereby upheld and the appellant shall pay costs of this appeal to the respondent.

DATED at Kampala this 28th day of October 2023



JUDGE.