THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO 3 OF 2008

(FROM RUKUNGIRI LAND CLAIM 4 OF 2005)

BUHOKO WILLIAM ::APPELLANT

VERSUS

1. BUHUNGA LC III COUNCIL
2. MUHUNGUZI ARTHUR :::RESPONDENTS

BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

The Appellant, in the original suit sued the Respondents jointly claiming land measuring approximately 550 ft by 242 fit at Kigono village, Kihanga Parish, Buhunga, Rukungiri District. He claimed he had been allocated the piece of land by the local authorities in 1984 and that he lived quietly on this land until 2004 when the Defendants demanded that he stops using the land. The Defendants denied the allegations and pleaded that the Appellant was entitled only to a plot measuring 23 x 100 feet that had been allocated to him to build a market lock-up. That they fenced off

land that belonged to the first Respondent to prevent the Appellant from encroaching, alienating and surveying off the suit land. At the scheduling the following issued where agreed upon:-

1. Who is the lawful owner of the Suit land?
2. Whether or not the land was surveyed.
3. Whether any damages were due and if so how much?

The hearing of this land claim was conducted by Her Worship Bucyana Lilian, Magistrate Grade One. She dismissed the Plaintiffs suit hence this appeal. The Appeal lists 5 grounds of appeal which I will not reproduce or follow in the manner they were presented because they materially overlap and are repetitive. Where necessary I will paraphrase them and reach conclusion that adequately disposes them. I will examine the first and the second grounds together. Ground 1 and 2 of the Memorandum of Appeal allege that the Trial Magistrate erred in Law, misdirected herself on the evidence, relied on the Respondents and disregarded the Appellants evidence.

I agreed with the Appellants submission that this court is the first appellate court and is obliged to re-evaluate the evidence as a whole

and come to its own conclusion keeping in mind that this court had no opportunity to see the witnesses testifying or under cross-examination. This position was settled in many decided cases see: **ERIA KATENDE VS UGANDA (1971) 1 ULRI.**

SANYU LWANGA MOSOKE VS SAM GALIWANGO (1957) Ka LR 49 and **SELLA VS ASSOCIATED BOAT COMPANY (1968) E.A 223**.

The Plaintiff's evidence is that he is suing for 550 x 242 ft land. He told court that this was un surveyed land. He relied on the fact that he applied for the land in 1984 and he was granted the land by the local authorities. In the whole plaintiffs evidence there is no other evidence that shows that this Kibanja measured 550 x 242. The Plaintiffs' exhibit, a letter dated 19th September, 2004 only confirms that the Appellant had been allocated land in 1984. This fact is not contested by the Respondent. What is not proved by the Appellant and the trial rightly found that there was no proof that the allocated land was 550 by 242 feet. The letter written by the Chairperson Uganda Land Commission Exhibit P.E. 1 is not helpful in the appellant's case. It contains what the Appellant told the Chairman it is not proof of what is under contention. I find this

exhibit irrelevant to matters under consideration. What the Plaintiff had a duty to prove is whether the whole of the land he was suing for belonged to him. The Defence case is that Plaintiff was allocated and he was entitled to a plot measuring 23 by 100 feet. That the Plaintiff/Appellant attempt to survey and include part of the land belonging to the first Defendant/Respondent and he was prevented from doing so by the first Defendant/Respondent's agents including the second Respondent.

PW 2 Tukahweire and PW 3 Matene Patrick confirmed that the Appellant was allocated land but they did not have any clear sense of the measurements of the land allocated. The difference version is that the Appellant was allocated 100 ft by 23 ft but he exceeded his boundaries and attempted to alienate the neighbouring land belonging to the first Defendant/Respondent.

DW 3 RUBIHIRA gave evidence to the effect that he also was allocated a plot in 1984 like his neighbour the Plaintiff/Appellant. The land had initially been reserved for a market. The allocation was for Lock-up purposes sufficient to hold a lock-up and a toilet.

All plots were the same size. The Appellant used his plot built a lock-up where he sold alcohol. He later built a house he lives on at the place where there was a lock-up. Koyekyenga (DW 4) corroborated Rubitira's evidence on the size and purpose of the land that was allocated by the local council authorities. This evidence proves that the land belonged to the local government before 1984. JOLLY RUBATENDA testified as a court witness. The land in this location was originally a market. Small plots were allocated to people who included the Appellant. The Appellants plot was limited to where he had built. The Appellant criticized the trial Magistrate for receiving this last witness evidence at the locus in quo when she had not testified in court. I agree there was an error at the proceedings held at the Locus in quo. Many Magisterial proceedings at the Locus in quo in this circuit appear to fall in the same mistake like the trial Magistrate in this case. First and foremost it is not in all cases involving land that call for visiting locus in quo but the moment it is deemed necessary and it is done it must be kept in mind that the purpose of visiting a locus in quo is for the witnesses who testified in court that need to testify at the Locus in quo to clarify what they had testified to before on oath.

The proceedings at the Locus in quo are court proceedings and therefore no witness should be allowed to testify without affirming or taking oath as the case may be. Each party to the suit should be given the opportunity to cross examine the witness.

In my view, the court has powers to call its own witness at the **Locus in quo** purely for the purposes of clarifying evidence already received. For purposes of clarification a sketch map should be drawn to indicate what was established by these proceedings outside the court room. The most important principle that must be observed is fair trial or fair hearing that preserves the right to cross-examine. In the instant case the appellant criticized the Magistrate that she relied on evidence at the Locus in quo when she held that the Plaintiff's possession is limited to where his home, kitchen, toilet and arrival houses excluding where pigi style are located." I have examined the evidence of other witnesses like the Plaintiff's neighbour who was allocated the same size of the land in 1984, and I find that even if the evidence at the Locus in quo was excluded, this court arrives at the same conclusion. The irregularities at the locus in quo were minor and cannot justify reversal of the trial courts' findings. It must be noted that the duty of this court is not

to making a findings that support the Magistrates Judgment perse but that decide the issues in question and considering the above examination of the parties evidence I find that in 1984 the Appellant was allocated a plot for purposes of putting up a lock-up and enter premises like the toilet. This land had uniform side like the other allocates who included DW 3 RUBIHIRA I have found it is more probable that the plot was 100 ft by 23 ft that the whole of the Suit land. In view of the above grounds 1 and 2 of this appeal have failed. Ground 3 **states that the trial Magistrate erred at Law when she held that the Appellant was either a lawful nor a bonafide occupant of the suit land but a licensee**.

The status of the appellant is settled by the evidence that proves the fact that he was allocated a plot, see evidence of Rubihira and Koyekyenga. This allocation was out of the land belonging to the first Respondent. There was a defined size he was entitled to claimed under the allocation and his occupation beyond the boundary without the authority of the LC III Council authorities amounts to trespass.

I have understood the evidence as a whole that the vast piece of land outside the allocated land was reserved for the first respondents Public projects and members of public including the Appellant grazed animals thereon. It would be wrong to hold that by virtue of the fact that these people grazed on the land it ceased to belong to the first Respondent I find the trial Magistrates conclusion that they were licensees correct. Disposal of the above grounds of the appeal covers the whole appeal which has not succeeded and it is hereby dismissed with costs. The decree and orders of the trial Magistrate dated 21st December, 2007 are upheld.

Dated at Kabale this **13th** day of **March, 2012.**

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J.W KWESIGA

JUDGE

13-3-2012