THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 024 OF 2006
(Arising from Kamuli District Land tribunal Claim No. 12 of 2003)

1. BULIMA KARIM
2. NAPELA WILLIAM } **:::::::::::::::::::::::::::::: APPELLANTS**
3. MUZINGE SIMON

VERSUS

MWIDU SAMUEL:: RESPONDENTS

BEFORE: HON MR. JUSTICE BASHAIJA .K. ANDREW

JUDGMENT

Background facts.

This appeal arises out of the judgment and orders of the Kamuli District Land Tribunal *(hereinafter referred to as the "Tribunal").*

Mwidu Samuel (*hereinafter referred to as the "Respondent")* filed ***Civil Claim No. 0012 of 2002*** in the Kamuli District Land Tribunal against ***Bulima Kasim, Nampala William and Muzige Simon*** *(hereinafter referred to as "1st, 2nd and 3rd Appellants" respectively).* The Respondent claimed that the Appellants, jointly and severally, without any right demarcated his land situate at Butege village, Namugongo sub-county, *(hereinafter referred to as the "suit land")*. The Respondent is said to have inherited the suit land from his late father, one Dhikusoka Mwidu; and has been residing on the land ever since he was born.

It is stated that sometime in September 2003, the Appellants encroached on the suit land and demarcated it and planted boundary marks called *"birowa"* which separated the Respondent's land that traversed a railway line, claiming that they were marking the boarders separating two neighbouring village of Butege 1 and Butege II; one of which the Respondent resides in. The Tribunal decided in favour of the Respondent hence, this appeal. The Appellants advanced three grounds of appeal as follows:

1. ***That the Honourable Land Tribunal members erred in law and infact when they failed to properly evaluate the evidence and as such reached the wrong decision.***
2. ***That the Honourable Land Tribunal members erred in law and in fact when they passed judgment based on evidence riddled with inconsistencies and discrepancies.***
3. ***That the Honourable members erred in law and infact when they held that the Respondent had successfully proved his claim of trespass against the Appellant and consequently made the wrong decision.***

The Appellants seek orders of this court to set aside the decision of the Tribunal. The Appellants are represented by *M/s Okalang Law Chambers,* while *M/s Habakurama & Co. Advocates* represent the Respondent. Both Counsels filed written submissions to argue the cases for their respective clients.

Principles of the law:

The duty of this court as the first appellate court is to subject the evidence of the lower court to fresh and exhaustive scrutiny weighing the conflicting evidence and drawing its own inferences and conclusions from it. In so doing, however, the appellate court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. See ***Selle v. Associated Motor Boat Co. [1968] EA 123, Pandya v. R [1967] EA, 336, Banco Arabe Espanol v. Bank of Uganda. S.C. Civil. Appeal No. 8 of 1908; Bogere Moses v. Uganda, S.C. Cr. Appeal No 1/97 GAPCO (U) Ltd v. A.S. Transporters Ltd [2009] HCB Vol. 1 at page 6.***

Resolution of the Grounds.

Ground 1:

<u>That the Honourable Land Tribunal members erred in law and infact when they failed to properly evaluate the evidence and as such reached the wrong decision.</u>

It was argued for the 1st Appellant that he never encroached on the suit land and that instead it was the Respondent who was bent on grabbing the 1st Appellant's land. As for 2nd Appellant, it was submitted that he only planted the *"birowa"* as replacement for

boundaries separating the two villages of Butege I and Butege II, and not in the Respondent's land. The 4th Appellant totally denied ever giving away the Respondent's land.

For his part the Respondent adduced evidence of PW2, Egulansi Kataike Nviri Munolewa, 70 years old, and PW3 Besweri Kiwumo, 82 years old and formerly a *"Mutala"* Chief, who corroborated his evidence that the suit land belonged to him, and that all the Appellants were involved in the planting of the *"birowa"* on the Respondent's land in attempt to demarcate and grab it.

The Tribunal visited the *locus in-quo*, and indeed found out that the suit land was constituted of a portion beyond the railway line, which the Appellants had attempted to demarcate with the *"birowa"*, and that belonged to the Respondent. After analyzing the all material evidence before it, the Tribunal answered *Issue No. I* at trial in the negative that none of the Appellants had a genuine claim/interest over the suit land.

I have not found any fault with the evaluation of the evidence at trial by the Tribunal. It is clear that the Tribunal (at page 2 paragraph 7 line 1-11 of the judgment) was alive to the need for weighing the evidence as a whole before reaching its verdict. It is, therefore, not true that the Tribunal's decision depended on the level of cross - examination of the Respondent's witnesses at trial, as Counsel for the Appellants submitted.

It only needs to be emphasized that where the testimony of a witness passes unchallenged by the adverse party, it gives a strong presumption as to the truthfulness of the witness and credibility of the testimony so adduced; unless for some other obvious reasons such testimony is rendered unbelievable. For the foregone reasons, *Ground I* of the appeal lacks merit, and it fails.

Ground 2:

That the Honourable Land Tribunal members erred in law and in fact when they passed judgment based on evidence riddled with inconsistencies and discrepancies.

This ground raises the issue of alleged inconsistencies in the testimony of the Respondent's witnesses at trial. Counsel for the Appellants pointed out some of the instances of the alleged inconsistencies and contradictions (at page 2 of the proceedings) where the Respondent stated that one Pakasa is a neighbour to his land in the southern direction, and that PW2 in cross examination stated that she shares boundaries with the Respondent and the that the said Pakasa is a neighbour to the 1st Appellant. There are few other instances which Counsel for the Appellants pointed out which, in his view, amount to inconsistencies in the evidence of the Respondent's witnesses.

I have had opportunity to re-evaluate the entire evidence on the particular point of the alleged inconsistencies and related it to the issues at the trial. I have, however, not found them to have any critical bearing at all on the issues at the trial. If anything, the alleged inconsistencies arise purely as a matter of interpretation of the witness' evidence; which is not contradictory, but was not stated in the exact same words used by each of the witnesses; which is evidently a minor issue that does not go to the root of the case.

The position of the law as it relates to inconsistencies is well settled, that where they are minor, they will not have the effect of impeaching the evidence of the witnesses, unless they point at deliberate untruthfulness intended to mislead or tell a lie. The alleged inconsistencies in the instant case are immaterial and have no bearing on the issues which were before the Tribunal for the trial. *Ground 2* fails.

Ground 3:

That the Honourable members erred in law and infact when they held that the Respondent had successfully proved his claim of trespass against the Appellant and consequently made the wrong decision.

This ground of appeal relates to the issue as to whether or not the Respondent successfully proved his claim of trespass to his suit land by the Appellants. At page 3 of the judgment, (the 3rd paragraph) the Tribunal stated as follows:

> ***"Analyzing the above defences given by the 4 defendants respectively, it is clear that none of them has a genuine interest in the suit land."***

Further, at page 3 (5th paragraph) (Supra), the Tribunal states that:

"At the locus in-quo it was also noted that the separating of the two villages as contained in most of all the respondent's defences was an act of bad faith on their part as it was a gimmick to deprive the plaintiff of his land."

The Tribunal arrived at the above conclusions after carefully evaluating the evidence before it and the visiting the *locus in-quo*. In my view they properly held that the Respondent successfully proved his claim.

Before taking leave of this matter, let one comment on the manner in which the *locus in-quo* proceedings were conducted. It is stated that additional witnesses and evidence were called at the *locus in- quo*. This was highly irregular and a gross misdirection on part of the Tribunal. The purpose of visits and manner of conducting *locus in-quo* proceedings were succinctly stated by Sir Udo Udoma C.J., (R.I.P) in ***Mukasa v. Uganda (1964) EA 698 at page 700*** that:

"A view of a locus in-quo out to be; I think to check on the evidence already given, and where necessary, and possible, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. "

Given the above authoritative position, it would follow that the so-called additional witnesses and their testimonies solicited at the *locus in-quo* falls outside the scope of the evidence that the Tribunal ought to have considered. Having said that, however, I have not found that the additional material substantially effected the decision, which would be the same even if such additional evidence had not been adduced. In the result, the entire appeal fails. It is dismissed with costs.

BASHAIJA K. ANDREW
JUDGE
30.11.12