THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 024/2015

(Arising from Land Claim No. 21 of 2010)

1. BENON KARIBWIJE
2. REV LUKE KARUHARA :::::::::::::::::::::::::: APPELLANT

VERSUS

DR. JOHN KAKITAHI :::::::::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant filed this Appeal against the Judgment of **HW KIRYA MARTINS** Magistrate Grade I delivered in Kabale on 15th day of September 2015

The background to this appeal is that the respondent sued the appellants in the Magistrates Court over land situate at Rwere village in Muyange parish in Bubare sub county of Kabale district.

The respondent, in his claim, asserted that he inherited the suit land in 1991 from his father, Isaka Kakitahi, who was the successor in title to one Rwambimbi, his father and the respondent's grandfather.

The appellants are brothers. It was alleged that the appellant's had trespassed on the land. The respondent's grandfather had allowed one Mukubwa, grandfather to the appellants, to use the land for the growing of Tobacco. That there was no intention to transfer any interest to Mukubwa whose son Mburwa is the appellant's father.

The appellant's case is that their father Mburwa had inherited the land from his father Mukubwa and that their family has had uninterrupted possession of the for several years. The 2nd appellant stated that he had lived all his life on the suit land and it was where he was born. The appellant's state that they took over ownership when their father died in 1992 and that the respondent has never challenged their

possession which is evidenced by the second appellant's construction of a permanent house on the land.

The trial Magistrate entered Judgment for the respondent (Plaintiff). The appellants being dissatisfied with the findings of the trial court filed this appeal with 7 grounds. One ground was later abandoned by the appellant. The grounds are,

1. The learned trial Magistrate erred in law and fact in holding in favour of the respondent despite overwhelming evidence on record to the contrary.
2. The learned trial magistrate erred in law in ignoring the effect of the gross contradictions in the respondent's evidence and his witnesses and reached a wrong conclusion.
3. The learned trial magistrate erred in law and fact when he flouted the trite law governing the locus in quo proceedings
4. The learned trial magistrate erred in law and fact in relying on extraneous matters which influenced his judgment against the appellant's.
5. –
6. The learned trial magistrate erred in law and fact in holding that the late Mukuba, the grandfather to the appellant's was a licensee on the suit land and had nothing to pass on to the said appellants.
7. The learned trial magistrate awarded excessive general damages in the sum of UGX 2,000,000/- (Two Million Shillings) which the respondent did not prove in his evidence.

   Wherefore the appellants prayed for,

   - Upholding the appeal
   - Setting aside the judgment and orders of the trial Magistrate with costs

I will handle the grounds in the order they are laid out in the Memorandum of Appeal.

As this is a first appellate court it is enjoined by law to subject the evidence to a fresh scrutiny and, on a balance of probability, come to its own conclusions based on the law and evidence (see **Uganda Breweries Ltd vs. Uganda Railways Corporation SCCA 6/2001[unreported]**).

Ground 1

The learned trial Magistrate erred in law and fact in holding in favour of the respondent despite overwhelming evidence on record to the contrary.

The appellants argue that the trial magistrate did not properly evaluate the evidence on record or come to logical conclusions. The trial magistrate found that the respondent's case, from pleadings and his witnesses, was that the 2nd appellant had built a permanent house on the suit land and yet the Court found no such house when it visited the locus. The appellants argue that since the trial magistrate did not find a house on the suit land he should have dismissed the claim.

Secondly that it was the contention of the respondent that in 1991 he had attempted to survey the land but met stiff resistance from the appellants. Yet, the respondent and all his witnesses had testified that the land was indeed surveyed but failed to show the court any of the mark stones at the locus visit. This contradiction, it is submitted, ought to have been resolved in favour of the appellants.

It is submitted farther that the respondent did not include the suit land when he did a survey of his land. The land is a small piece therefore it should have been included as part of the respondents land when the survey was done.

Then the respondent's witnesses had testified that one Mukuba, the appellant's grandfather, had been buried on the land. The trial magistrate made a finding that the grave was not on the suit land. The contention of the appellants is that this finding is not based on evidence because the respondent had himself admitted that the grave was on the suit land.

Lastly on this ground of appeal it is said the appellant had not filed his complaint in 1999 which it arose on the alleged interference with the survey but did so in 2010.

The respondent in reply stated that the finding of the trial magistrate on the house was that he found a semi-permanent house which it said is excusable considering the description is dependent on the observer. They state however that the defendant (appellants) constructed a house on the Suitland.

Regarding the process of the survey of the Suitland, it is submitted for the respondent that he started the process of the survey for his whole chunk of land but the appellants trespassed on the part that now forms the Suitland. He therefore had to remove the Suitland and conclude the survey of the rest. It is contended that it is only the process of registration of the part comprising of the suit land that was not concluded.

Regarding the grave, that it was true the Trial magistrate found it outside the Suitland but that the position of the grave did not determine the ownership of the land.

As to mark stones Counsel contends that since the process of survey of the Suitland was not completed, there could be no mark stones on the Suitland. It was argued farther that the issue before the court was ownership and not boundaries of the land.

It is argued that if there were any contradictions specifically in the description of the land, they were minor and did not go to the root of the case which was the ownership of the suit land.

The evidence here will be evaluated collectively.

The evidence adduced for the defendant's here states that the 2nd defendant was born on the land on which he has built a permanent house. The evidence of a house is corroborated by his step brother Muramuzi Samuel, DW II. He also states that there is a banana plantation and that the land is not surveyed although right next to it is land belonging to the respondent which is all surveyed. Even his aunt, DW 4 Kemikyeyi and neighbour DW 3, Turyagenda stated that he had a house and banana plantation on the land besides the grave of the grandfather.

The 2nd appellant also denied the assertion that he had asked to exchange a piece of land for the suit land.

It had been the contention of the plaintiff that the appellants in encroaching on the land had built a house on it. The Plaintiff/respondent contends farther that the land had been given to him by his father who had inherited from his own father. It is his evidence that the land had been given to one Mukuba the grandfather of the appellants to grow tobacco.

Clearly the claim that there is a permanent house on the land is not limited to the claimant but used by the appellant to prop his claim. It is therefore not true as submitted that the claim there was a house on the land was made and limited to the respondent. The appellants made it too.

The question for this court however is this: based on the evidence on record who established proof of ownership of the suit land?

The appellants enjoy possession which the respondent contests. The appellants rely on this possession which they say stems from inheritance from their grandfather Paulo Mukubwa which devolved down to their own father Ezra Mburwa and finally to them.

Section 110 of the Evidence Act is certainly applicable in the circumstances. It provides,

> **Burden of proof as to ownership**
>
> When the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner.

That is the burden that the respondent faces here.

The respondent states he inherited the land from his father in 1991 but the appellants encroached on it. I have keenly examined the evidence on both sides.

The appellants rely on the fact that from birth they have been on the land. There is also the grave of their grandfather and what they state was a plantation. There is no contemporary of either their father or grandfather produced to testify as to ownership.

The respondent produced one Steven Kibira, PW VI, who was 83 years old. He claimed knowledge of the antecedents relating to ownership of the suit land. According to this witness the land had belonged to Isaac Kakitahi the father of the respondent who inherited from Rwamimbi his father. This witness was the respondents' cousin and Rwamimbi was also his grandfather. He stated the appellants are also his relatives but no details were elicited. It was his evidence that he was present when the land was given to the respondent by his father Isaac Kakitahi. This witness does not appear to have been seriously challenged in cross examination. Some of this detail emerged during cross examination.

Secondly there is the evidence that in the early 1980s Mukubwa had been Kakitahi's witness when a dispute over ownership with one Tusime Jackson, PW V, was settled. The dispute was resolved by one Yamuremye Charles, PW IV, who was a Parish Chief at the time. Both state that Mukubwa was present on the Isaac Kakitahi side to prove Kaiktahi's ownership of the land.

According to the respondent, Mukubwa the appellants' grandfather, is alleged to have been granted possession of the suit land to grow tobacco by the respondent's father. Both PW II and DW III state that there was tobacco on the land. PW II states that her grandther, Mukubwa told he that the land belonged to the respondent.

DW III Turyagenda and DW IV Kemikyekye Violet both state that the land belonged to Paulo Mukubwa and that Mburwa inherited from him.

I have carefully examined these two versions. DW III and DW IV were not present when Mukubwa allegedly acquired the land. In my view they cannot testify conclusively to ownership. PW II, PW IV and PW V and PW VI have all testified to being present at different times when Mukubwa has acknowledged ownership by the respondent.

In sum it is the finding of this Court that the respondent has proved his ownership of the suit land.

The first ground of appeal therefore fails.

Ground 2

> **The learned trial magistrate erred in law in ignoring the effect of the gross contradictions in the respondent's evidence and his witnesses and reached a wrong conclusion.**

It is submitted for the appellants that there are grave contradictions regarding the presence of a house on the suit land. I do not regard this as a grave contradiction because it did not go to the root of matter which here is ownership. Besides it was also the defence evidence, by all defence witnesses, that indeed there was a house on the suitland.

Secondly the submission is that the witnesses each had a different description as to the neighbours next to the land. With respect this Court disagrees. Firstly PW 5 gave a description of his own land then the suitland. Clearly all show that the appellants have land at the bottom, the suitland is in the middle and PW 5 sits at the top. This description is consistent even with the other witnesses. I do not accept the contention that the witnesses were deliberately trying to mislead court. No such intention is evident from the evidence on record.

I do not accept the contention that contradictions here point to the respondent's witnesses lying to or misleading the Court.

This ground fails.

Ground 3

> **The learned trial magistrate erred in law and fact when he flouted the trite law governing the locus in quo proceedings**

The contention is that the learned Trial Magistrate did not follow the laid down procedure when conducting proceedings at the *locus in quo.* Counsel cites **JW Ononge Vs Okallang (1986) HCB 63** which lays down the procedure to follow when a court visits the locus in quo.

I have perused the proceedings at the locus in the instant case. It is difficult to ascertain if the witnesses were sworn or to properly follow the record of the proceedings at the locus. It is clear that the Court flouted the law.

I uphold this ground of appeal.

Ground 4

> **The learned trial magistrate erred in law and fact in relying on extraneous matters which influenced his judgment against the appellant's.**

Ground 7

> **The learned trial magistrate awarded excessive general damages in the sum of UGX 2,000,000/- (Two Million Shillings) which the respondent did not prove in his evidence.**

The complaints of the appellant, on these two grounds, as can be seen in the submissions relate to the Trial Magistrates award of damages in the sum of 1,500,000/= to the respondent. It is argued that the trial magistrate arrived at this figure on his own, and not based on arguments or evidence before him.

It is true that the Trial Magistrate stated that

> *I have also noted from the records that the value of the subject matter is not known but I from locus I estimate it to be in the region of 5,000,000/=. Having the above in mind I think damages of UGX 2,000,000/= to be appropriate to restore the status of the plaintiff in the matter.*

In principle general damage is such as the law will presume to be the natural consequence of the defendant's act. It arises by inference of law and may be averred generally (see **Kyambade Vs Mpigi Dist Admin 1983 [HCB] 44)**.

I agree with the appellants that the award of damage should be based on evidence. The plaintiff valued the land at 1500000 in 2012. With this figure in mind and considering the pain and anguish that has been visited on the respondent I find that a sum of 1,000,000/= in damages would be appropriate in circumstances.

Ground 6

> **The learned trial magistrate erred in law and fact in holding that the late Mukuba, the grandfather to the appellant's was a licensee on the suit land and had nothing to pass on to the said appellants.**

As seen in ground '1' above the land was clearly shown to belong to the respondent. His grandfather had allowed the appellants grandfather to enter upon the land for the purpose of growing tobacco. There was never an intention shown that he passed on title or acquired any sort of interest in suit land. Therefore the trial magistrate cannot be faulted on his finding here that the test to determine was whether an occupant is a licencee were met in this case.

The cardinal principles are that a licencee is simply authorised to do a particular act or series of acts upon the other's land without possessing any estate therein. Secondly, it is founded on personal confidence and is generally not assignable or transferrable. Thirdly, no proprietary interest passes to the licensee, who is merely not a trespasser; and fourthly, it is revocable at will by the property owner. See: ***Walton Harvey Co. Ltd. v. Walker & Homfrays Ltd. [1931] 1Ch.274; Armstrong v. Sheppard& Short Ltd. [1915] 2 Q.B.38.***

I find Mukuba was a licensee who had been allowed by Isaac Kakitahi to grow tobacco on the suitland.

The 6th ground of appeal fails

For the foregoing this appeal shall be dismissed with costs here and below to the respondent.

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Michael Elubu

Judge

14.06.2017