

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

CIVIL APPEAL NO. 07 OF 2011

KAAHWA STEPHEN & ANOTHER
..... **APPELLANTS**

VERSUS

KALEMA HANNINGTON
..... **RESPONDENT**

(Arising from Nakasongola Chief Magistrates Court Civil Suit No. 002 of 2009)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The first appellant in this case was a step-son to the respondent. He had been allocated a piece of unregistered, kibanja land by the respondent for cultivation purposes but proceeded to cultivate beyond it, thus allegedly encroaching upon ancestral land including burial grounds. It was the first appellant's contention that he had been given the additional land by the second appellant, a sister to the respondent. The respondent instituted legal proceedings against both appellants for trespass. The trial court entered judgment in favour of the respondent, hence the present appeal. Inexplicably, the judgment did not reflect the 2nd appellant as a party to the suit.

Be that as it may, the memorandum of appeal did make reference to the 2nd appellant and spelt out the following grounds of appeal:

- 1. The learned trial magistrate failed to evaluate the evidence as a whole thus reaching a wrong decision in respect of the appellants.**
- 2. The learned trial magistrate erred in law and fact in holding that the appellants were trespassers on the suit land.**

- 3. The learned trial magistrate did not conduct the locus in quo properly thereby leading her to reach a wrong decision.**
- 4. The trial magistrate erred in law and fact in holding that the disputed land belonged to the respondent whereas the evidence on record pointed to the contrary.**

At the hearing of the appeal Mr. Kenneth Kajeke appeared for the appellants. On the other hand, the respondent did not appear at all neither was he represented. Sufficient proof of service was availed to this court by way of an affidavit of service deponed by a one Nuwamanya Alex Muhwezi, as well as the acknowledgement of service by the respondent in the presence of an LC official. This court therefore ordered parties to file written submission and for the said order to be brought to the respondent's attention. Again, the respondent did apparently acknowledge the said notification but did not file any submissions in support of his case.

Order 43 rule 14(2) of the CPR mandates courts to hear an appeal *ex parte* where a respondent does not appear for the hearing thereof. An aggrieved respondent against whom judgment on appeal is delivered may then find relief by recourse to Order 43 rule 18 of the CPR. This rule provides for such respondent to apply for the appeal to be reheard upon proof to the satisfaction of court that the hearing notice in respect thereof was not served or that he was prevented by sufficient cause from attending the hearing of the appeal. In the present case this court was presented with what would appear to have been sufficient proof of service. Without the benefit of the respondent's known signature on record, this court is unable to verify the authenticity of the signature attributed to him, and endorsed on the hearing notice and a letter by M/s Kajeke, Maguru & Co. Advocates that purportedly forwarded the appellants' written submissions to the respondent. In the premises, I shall proceed to hear this appeal *ex parte* as by law provided. It is trite law, nonetheless, that the appellants shall be required to prove their claim against the respondent to the required standard of proof, his absence notwithstanding. The applicable standard is proof by balance of probabilities.

In his written submissions, Mr. Kajeke argued grounds 1, 2 and 4 together, and addressed grounds 3 separately and in that order. The first set of grounds argued pertain to the ownership of the suit land; the appellants' alleged interest therein, and the evidence in proof thereof. Mr. Kajeke recounted the appellants' evidence before the trial court; argued that the 2nd appellant could not possibly have trespassed on land that had been given

to her by her now deceased father, and sought to discredit the evidence adduced in support of the respondent's case by questioning its failure to specify the size of the piece of land that the respondent purportedly demarcated to the first respondent. It was learned counsel's contention that had the trial magistrate addressed her mind to the totality of the evidence she would have agreed with him that the appellants are not trespassers on the suit land.

It is well settled law that a first appellate court is under a duty to re-evaluate the evidence on record and arrive at its own independent conclusion. See **J. Muluta vs S. Katama Civil Appeal No.11 of 1999 (SC)**. It is also well settled law that an appellate court will always be loath to interfere with a finding of fact arrived at by a trial court and will only do so when, after taking into account that it has not had the advantage of studying the demeanour of the witnesses, it comes to the conclusion that the trial court is plainly wrong. See **Kasifa Namusisi & Others vs Francis M.K. Ntabaazi Civil Appeal No. 4 of 2005 (SC)**, **Jiwan Vs Gohil (1948) 15 EACA 36** and **R.G.Patel Vs Lalji Makaiji (1957) EA 314**. I take due cognition of these rules of evidence applicable to a first appellate court as I proceed to re-evaluate the evidence on record and determine the present grounds of appeal.

In the present case the land in issue appears to be unregistered customary (ancestral) land, which was loosely referred to as a 'kibanja'. At trial, it was the respondent's case that he and his 2 surviving siblings are collectively in occupation of the suit land; that land was never distributed amongst them after the death of their father, a one Gunamira Thomas; the first appellant had been allocated a piece of land adjacent to the suit land for his use not ownership but he subsequently encroached on the suit land. The defence evidence, on the other hand, alluded to the suit land having been distributed to Gunamira's children upon his death, and the first appellant having been in occupation of the disputed land upon receipt thereof from the 2nd appellant and PW2.

The law on trespass to land was stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)** as follows:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land.”

Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.” (*emphasis mine*)

Citing with approval the case of **Wuta-Ofei v Danquah (1961) 3 All E.R.596 at p.600**, his lordship held that for purposes of the rule cited in **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company** (supra) above, possession did not mean physical occupation; rather, the slightest amount of possession would suffice. In **Wuta-Ofei v Danquah** (supra) the Privy Council put it thus:

“Their Lordships do not consider that, in order to establish possession, it is necessary for the claimant to take some active step in relation to the land such as enclosing the land or cultivating it.”

In the present case the evidence of the respondent, PW2, PW4 and PW5 points to a larger piece of land within which the suit land is situated as having been family land and occupied as such. In this regard, the respondent explicitly attested to having occupied the suit land all his life, while PW2 and PW5 testified that they were born on the said land but had since left it. PW4, on the other hand, attested to the suit land having been inclusive of family burial grounds that she was caretaker of. The appellants’ evidence before the trial court did also acknowledge that the suit land originally belonged to the family of a Gunamira Thomas, the plaintiff’s deceased father. Therefore, this fact is not in dispute. What is in issue presently is whether or not the respondent was in lawful possession of the suit land so as to warrant his action against the appellants in trespass to land.

As stated earlier above, it was the respondent’s evidence that he was in physical occupation of the suit land. This evidence was corroborated by PW2 and PW3. PW2 testified that although he was no longer in occupation of the suit land, his son - Kibenge did reside on the said land. Further, the same witness testified that as heir to Gunamira (his father) he had entrusted the same land to his brother, the respondent, for caretaking. PW3 - a neighbour and person well versed with the suit land, in turn, attested to the respondent being in occupation of the suit land. Conversely, the thrust of the defence case before the trial court was that following the

death of Gunamira the suit land had been allocated to the 2nd appellant and PW2, who had since given it to the 1st appellant. This was a common thread of evidence in all the defence witnesses' testimonies. The defence made no reference whatsoever to the respondent's occupation of the suit premises, whether by rebuttal or otherwise. This court finds no reason to question the respondent's evidence on the issue of occupation given its corroboration by PW2 and PW3. It appears most probable to me that the respondent, having been entrusted with the suit land by PW2 - Gunamira's heir, was indeed in occupation thereof as testified by himself and PW3. Having found that the respondent was in possession of the suit land, any person's act of unauthorised entry thereon that interfered with his lawful possession of the land would constitute the tort of trespass to land. I so hold.

The question then is whether or not the appellants did, in fact, trespass onto the respondent's land. It was the defence case at trial that the 1st appellant was a son to the respondent; he had been given the *kibanja* on which the suit land is situated by PW2 and the 2nd appellant - a daughter to Gunamira, and he was therefore, authorised to occupy and till the said land. The defence case on this issue was premised on the contention that following Gunamira's death his land had been redistributed amongst his surviving children and the present suit land was allocated to the 2nd appellant.

I propose to commence consideration of this issue by establishing whether the term 'kibanja' was used here in its loose sense or in legal terms. Section 29(1)(a) of the Land Act as amended defines the term 'lawful occupant' to mean a person owning land by virtue of the Busuulu and Envujjo Law, 1928. Customary *bibanja* owners on mailo land have been identified, rightly so in my view, as persons envisaged as lawful occupants under section 29(1)(a). See **Mugambwa, John T., 'Principles of Land Law in Uganda', Fountain Publishers, 2006 reprint, p.10.**

Section 8(1) of the Busuulu and Envujjo Law provides as follows on *kibanja* holding:

"Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except -

- (a) the wife or child of the holder of a *kibanja*; or**
- (b) a person who succeeds to a *kibanja* in accordance with native custom upon the death of the holder thereof."**

In the present case there is no evidence on record as would support a finding that the 'kibanja' in issue presently was on mailo land. Further, the appellants written statement of defence did not in any way allude to the 1st appellant laying claim to the suit land by virtue of having been a child of the respondent; neither was the issue raised on appeal. It would therefore appear that the term 'kibanja' herein is being used in the context of lay man's parlance for land. Accordingly, it shall be addressed in the same context herein. Nonetheless, reference shall be made to the laws governing kibanja holding as far as applicable to the present appeal.

In my judgment, the crux of the matter in the present appeal was whether or not the Gunamira family land was redistributed following the death of the family patriarch and, if so, whether PW2 and the 2nd appellant as beneficiaries of that redistribution did indeed give the suit land to the 1st appellant as alleged.

It was the appellants' case at trial that upon his death the land was distributed amongst his children, two of whom subsequently permitted him to use the said land. The 1st appellant testified that he was in occupation of the portion of land that had been allocated to PW2 and the 2nd appellant. The respondent disputed this, contending that no such distribution had ever taken place; rather, the suit land was family land that was collectively held as such. Both parties adduced evidence in support of their contrasting positions. However, while the appellants' evidence sought to prove that the 1st appellant was given the suit land by the 2nd appellant and PW2; under cross examination PW2 categorically refuted this. He testified that he was Gunamira's heir but, given that he lived in Masindi, had entrusted the land to the respondent; the said Gunamira's land had never been redistributed between members of his family but was held collectively as clan land. PW2 denied ever giving the suit land to the 1st appellant, stating that the piece of land that was given to the 1st appellant was the land behind the disputed *kibanja*. PW2's evidence was not contradicted or otherwise undone by cross examination. On the contrary, it discredited the appellants' evidence with regard to the circumstances under which the 1st appellant came into occupation of the disputed kibanja. This, in my view, was a major contradiction in so far as it pertains to the basis for the 1st appellant's occupation of the disputed land. If the 1st appellant had indeed been authorised to occupy the disputed land then the question of trespass would not arise; if not, it does arise. To that extent, therefore, I find that the discrepancy in the appellants' evidence did go to the root of this case and points to the improbability of the 1st appellant's case. I therefore hold, on

balance of probabilities, that the 1st appellant was not allocated the suit land by PW2.

With regard to the 2nd appellant, as stated earlier, it was testified by virtually all the defence witnesses, she inclusive, that she was Gunamira's daughter and, following his death had been allocated the suit land. The fact of her being a daughter to Gunamira was not disputed by the respondent. This court has not seen any evidence on the record that alludes to her having been in occupation of the suit land. In any event, having discredited the cogency of the 1st appellant's evidence, this court is unable to agree with the appellants' collective position that there was indeed a distribution of Gunamira's land to his children. Accordingly, the 2nd appellant would have been entitled to be in occupation of family land held by a family she belonged to. I therefore find that the 2nd appellant was not a trespasser on the disputed land.

In the result, I find that the 1st appellant did trespass on the disputed land and cannot fault the trial judge for arriving at the same conclusion. I do, however, find that the 2nd appellant was not a trespasser on the said land. Therefore, grounds 1 and 2 of the appeal fail in so far as they relate to the 1st appellant and succeed with regard to the 2nd appellant.

With regard to ground 4 of the appeal, this court finds no mention in the judgment to a finding that the disputed land belonged to the respondent. In her conclusion on the issue of trespass, the learned trial magistrate found that the 1st appellant had trespassed onto land that the respondent was 'caretaking for the family'. This court has arrived at the same conclusion on that matter and therefore cannot fault the trial magistrate on her decision in that regard. Ground 4 of this appeal fails.

Finally, with regard to ground 3, it was argued for the appellants that the learned trial magistrate conducted the visit to locus in quo improperly and thus arrived at a wrong decision. Learned counsel referred this court to the case of **Yeseri Waibi vs. Elisa Lusi Byandala 1982 HCB 28 at 29** in support of his position. He did also avail court with the judgment in the case of **Badiru Kabalega vs. Sepiriano Mugangu Civil Suit No. 7 of 1987** presumably in support of his argument, but made no reference thereto.

In **Yeseri Waibi vs. Elisa Lusi Byandala** (supra) it was held that '**the usual practice of visits to locus in quo was to check on the evidence**

given by witnesses.' Manyindo J. (as he then was) then outlined the procedure at visits to loci in quo thus:

“The trial judge or magistrate should make a note of what takes place at the locus in quo and if a witness points out any place or demonstrates any movement to the court, then the witness should be recalled by the court and give evidence of what occurred. *Fernandes vs. Noronha (1967) EA 506* applied. In the instant case, the trial magistrate should have ignored the ‘massive show of hands’ by people at the locus in quo since they were not witnesses in the case. He misdirected himself on this issue and erred in law in taking it into account. However, the error did not occasion a miscarriage of justice since the magistrate mentioned the point after he had come to the conclusion that the respondent had easily proved her claim against the appellant on the evidence that had been given by the respondent’s witnesses in court.” (emphasis mine)

Visits to loci in quo are provided for by the *Practice Direction on the issue of orders relating to registered land which affect or impact on tenants by occupancy, Practice Direction No. 1 of 2007*. As spelt out in its long title, that practice direction pertains to orders in respect of registered land. No evidence was adduced before the trial court as would suggest that the land in issue presently was registered land. The appellants now question the manner in which the visit to locus was conducted by the trial court. However, in the absence of any evidence that the disputed land was registered land it does follow that the appellants have not established the applicability of Practice Direction NO. 1 of 2007 to this matter or, indeed, whether a visit to locus was required at all.

Be that as it may, guideline 3 of the Practice Direction provides as follows on visits to *locus in quo*:

“During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:

- (a) Ensure that all parties, their witnesses, and advocates (if any) are present.**
- (b) Allow the parties and their witnesses to adduce evidence at the *locus in quo*.**
- (c) Allow cross-examination by either party or his/ her counsel.**

- (d) Record all the proceedings at the locus in quo.**
- (e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary."**

Guidelines 3(a), (b) and (c) provide for trial witnesses to substantiate the evidence they previously adduced in court. In the present appeal, at trial the trial magistrate swore in only one 'witness' while the other persons that were recorded simply advanced their positions without taking oath. Further, it would appear from the record that the persons that provided information at the *locus in quo* were not witnesses in the main trial. This procedure was irregular. The question is whether these irregularities occasioned a miscarriage of justice and were thus fatal to the trial proceedings. I would think not. In arriving at her final conclusions on the sole issue before her - trespass to land, the trial magistrate seemed to rely on both the evidence and the visit to *locus in quo*. However, with regard to the locus in quo it seems to me that the trial magistrate relied, not on the information volunteered to her irregularly, but on what she observed or saw. Such observations are provided for by Guideline 3(e) of Practice Direction No. 1 of 2007. For ease of reference the pertinent part of her judgment is reproduced below:

"At locus court vividly saw the 1st defendant's crops grown up to the verandah of Mulondo's grandson's hut and encircled with the defendant's banana suckers. The burial ground had cassava and young maize growing planted by the defendant. It was also vivid that the defendant had on the upper side where the family allowed him grow crops had vast uncultivated area and a towering house amidst the uncultivated area. Notably this place stood alone from the rest of the family land."

The trial magistrate then concluded:

"There is no doubt that the defendant has encroached with impunity and malice, a disgraceful act abusing the care extended to him by the humane family of late Gunamira and his son, Kalema ... In total disrespect and selfish tendencies he is dislodging the whole family using Nassuna (2nd appellant) who deceitfully and without evidence of sharing land, concocted testimony of the defence case. The heir Sula has no records of ever dividing their father's land but has clearly stated that they gave the upper part of the land which was Mulondo's

land to the defendant. What ill-hearted greedy man (with) all the land he is not utilizing and continues to squeeze out the plaintiff and the rest of the family members ... The defendant has trespassed and has unlawfully largely cultivated the plaintiff's land he is caretaking for the family."

From the foregoing, it does seem to me that that the trial magistrate did not rely on the impugned information volunteered to her by persons at the locus in quo, but on her own observations. Those observations were rightly made in verification of the evidence that she had already been given. Even then, she did not rely largely on those observations to arrive at the conclusions she did, but rather the observations supplemented the evidence that led her to that conclusion. It is telling, in that regard, that she dwelt at length on the evidence both in her judgment and in her conclusions. Therefore, the irregularities in the procedure at the *locus in quo* were not the main premise for the conclusions arrived at by the trial magistrate; they were not fatal to the trial, and did not occasion a miscarriage of justice in this matter. I so hold. Ground 3 of the appeal, therefore, fails.

In the result, I would dismiss this appeal with costs in this and the lower Court to the respondent.

Monica K. Mugenyi
JUDGE

22nd November, 2013