

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL APPEAL NO. 029 OF 2013**

**(Arising from Kiboga Chief Magistrate’s Court Civil Suit
No. 0051 OF 2012)**

1. DOKA YASSIN

2. AGONDWA WAHAB ::::::::::::::::::::::::::::::::::::::

APPELLANTS

VERSUS

SEGUJJA YERINIM ::::::::::::::::::::::::::::::::::::::

RESPONDENTS

**BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA
NAHAMYA**

JUDGMENT ON APPEAL

This is an Appeal from the Judgment of His Worship Francis Kaggwa, Chief Magistrate at Kiboga Chief Magistrates Court delivered on the 1st day of March, 2013 against the Appellants. The Appellants being dissatisfied with the decision, lodged in this Honourable Court a Memorandum of Appeal on the 15th day of March, 2013.

Background of the Appeal

The Respondent filed **Civil Suit No. 51 of 2012** against the Appellants for trespass on the kibanja located at Kakinzi Village,

Dwaniro Sub-County, Kiboga District seeking for among other orders; a Permanent Injunction, general damages, eviction order, vacant possession and Costs of the suit. Te 1st Appellant averred that he acquired and settled on the suit land in 1972 and has been there to date while the 2nd Appellant, the son to the 1st Appellant denies ever trespassing on the Respondent's land as the land he owns is his having acquired it from his father(the 1st Appellant).

Judgment was entered in favour of the Respondent on the 1st of March, 2013. The Appellants were dissatisfied with the decision of the Trial Magistrate lodged an Appeal in this Honourable Court, hence this Appeal.

When the parties appeared before me on the 10th day of September 2014, neither the Appellants nor their Counsel appeared. Counsel for the Respondent addressed me and requested that the parties file written submissions which I allowed. I gave the respective dates to the parties to which they should have filed their submissions. The Appellants were to file their submissions by the 17th day of September 2014, the Respondent was to file his reply by the 24th day of September 2014 and a rejoinder by the Appellants was to be filed by the 1st day of October 2014. To date, it is only the Appellants who have filed their submissions.

The Appellants were represented by Counsel Mwesige of Messrs Mwesige Mugisha & Co. Advocates; whilst, the Respondent was

represented by Counsel Twijukye Aust of Messrs Twijukye Aust & Co. Advocates.

Grounds of Appeal to be determined

1. That the Learned Trial Magistrate erred in law and fact when he held that the Appellants/Defendants are trespassers on the Respondent's/ Plaintiff's *kibanja*;
2. That the Learned Trial Magistrate erred in law and fact in evaluating the evidence on the record and thus reached a wrong decision which occasioned a miscarriage of justice;
3. That the Learned Trial Magistrate erred in law and fact when he relied on a non existing Area Land Committee Report thus reaching a wrong conclusion;
4. That the Learned Trial Magistrate erred in law and fact when he awarded **Three Million Uganda Shillings Only (UGX 3,000,000)** as general damages to the Respondent/Plaintiff;
5. That the Learned Trial Magistrate erred in law and fact in conducting *locus in quo* thus reaching a wrong conclusion;
6. That the Learned Trial Magistrate erred in law and fact when he ordered the 2nd Appellant to plant poles on the land belonging to the 1st Appellant in his absence while conducting *locus in quo*.

SUBMISSIONS OF THE APPELLANT

Ground one and two

Counsel Mwesige, for the Appellants, submitted that it is trite law that the duty of the 1st Appellate Court is to subject the record of proceedings to adequate scrutiny as if it were hearing the case afresh. See ***Peters vs. Sunday Post Ltd [1958] EA 424.***

Counsel Mwesige submitted that it was the 1st Appellant's testimony in the Trial Court that he settled on the suit land at Kakinzi Village, Dwaniro Sub-County, Kiboga District in 1972 while coming from Koboko in Arua District. This fact was not challenged by the Respondents or his witnesses while the 2nd Appellant, in his Written Statement of Defence averred that he owns land at Kakinzi Village, Dwaniro Sub-County, Kiboga District having acquired the same as a gift from his father (the 1st Appellant).

According to the testimonies of PW2 (Mugema Lameka), the Area Land Committee Chairperson and PW3 (Olema Majid) testified that they inspected the 2nd Appellant's land in 2009 before the Respondent's purported purchase of the land in 2011. Mr. Mwesige argued that on the face of the record, by the time the Respondent purported to have bought the suit land, the Appellants were occupying the same. It was Mr. Mwesige's contention that the facts of the case go to the core of the suit which the Trial Magistrate disregarded in his evaluation of evidence thus arriving at a wrong conclusion that the Appellants are trespassers on the suit land.

Counsel Mwesige submitted that failures by the Trial Court to properly re-evaluate the evidence on record caused a

substantial miscarriage of justice in respect of which this Honourable Court is under duty to correct. He further substantiated that the miscarriage of justice to occur where there has been misdirection by the Court on the matter of fact relating to the evidence given or where there has been unfairness in the conduct of the trial. See ***Fida Biribwa vs. Solomon Tingawai***[1993]KALR 2 (cited in ***Crane Insurance Company vs. Shelter (U) Ltd C.A No. 14/1998***).

Counsel Mwesige referred this Honourable Court to the record of proceedings at page 9 which contains the testimony of 2nd Appellant that he had forfeited his portion to the Respondent. Mr. Mwesige argued that this is not an admission of the claim by the Respondent as the Trial Magistrate conceived it to be. According to Mr. Mwesige, this can only mean someone giving up what belongs to him.

He further submitted that an admission cannot be used against the 1st Appellant, who owns a separate piece of land independent of the 2nd Appellant's land. Moreso, the 1st Appellant was absent during the said *locus in quo*.

In furtherance to the *locus in quo* visit, the 2nd Appellant admitted to having uprooted the Respondent's poles with the view of extending his *kibanja*. Counsel Mwesige submitted that the Trial Court erroneously admitted the 2nd Appellant's admission which was contrary to the evidence of PW4 and a report from the L.C (P.Exh. IV) dated 29 May 2012, which claimed that the Respondent was complaining against the 1st

Appellant for uprooting his poles but not the 2nd Appellant which was an erroneous finding.

Mr. Mwesige prayed that this Honourable Court upholds the 1st and 2nd grounds of Appeal.

Ground 3

It was Counsel Mwesige's submission that PW3 tendered in Court an Area Committee Report, which was admitted as evidence and marked as P.Exh. III. He contended that this report is invalid with no legal effect as provided under Section 6 (6) of the Land Act Cap 227 as amended. Section 12 (1) of the Land Act provides that the Applicants for the grant of free hold shall comply with the procedures as set out in Section 6. The provides in sub-section (6) of the Land Act as amended the requisites for the contents of the Area Committee Report. They include: the occupation or use of land; findings of the Committee; recommendations and claims among others. Counsel Mwesige submitted that the alleged Committee report has none of the above contents.

Mr. Mwesige submitted that the Trial Magistrate erred in relying on the Committee report. Furthermore, it was contested by Counsel Mwesige that the Committee report which was based on the visit to the *locus in quo* had a lot of discrepancies and left a lot to be desired. As such, the Trial Magistrate erred in admitting the Committee report and subsequently reaching to wrong conclusion.

Counsel for the Applicant did not address Court on ground 4.

Ground 5 and 6

Counsel Mwesige submitted that the Learned Trial Magistrate conducted the visit to *locus in quo* improperly and thus arriving at a wrong decision. He relied on the case of ***Yeseri vs. Elisa Lusi Byandala [1982] HCB 28***, where Court held that the usual practice of visiting the *locus in quo* is to check on the evidence given by the witnesses and not to fill gaps. It was Mr. Mwesige's contention that the Trial Magistrate should have ignored the massive show of hands by the people at the *locus in quo* since they were not witnesses in the case. Mr. Mwesige's contention is that the Trial Magistrate misdirected himself on this issue and erred in law in taking into consideration the non-witnesses. This is because the *locus in quo proceedings* were conducted in the absence of the 1st Appellant which the Trial Court did not take into account.

Counsel Mwesige referred Court to the Judgment of the Trial Magistrate at Page 4 where he held that at the *locus in quo*, the majority of the people present indicated and pointed out that the 2nd Appellant's conduct of uprooting the fencing poles of the Respondent's *kibanja* amounted to land grabbing. According to Mr. Mwesige, the procedure adopted by the Trial Magistrate involved opinions of persons who were not witnesses to the suit. He invited Court to find that the Trial Magistrate erred in conducting the *locus in quo* and his findings and orders should be annulled.

In his closing submissions, Mr. Mwesige implored Court to allow the Appeal, set aside the decree and orders of the Trial Court and award costs to the Appellants.

Resolution

I have carefully read the submissions of the Appellants. The Respondent did not file any submissions in rebuttal. I will not go into the details of the submissions of the Appellants as they have been well elaborated above. I have also considered the Proceedings and read in depth the Judgment of the Lower Court. I agree with Mr. Mwesige, the Counsel for the Appellants that, generally, the Trial Magistrate did not properly and thoroughly evaluate the evidence before him. First, his holding that the Appellants, particularly 1st Appellant, were trespassers without giving adequate weight to the 1st Appellant's testimony was a miscarriage of justice. The other error involves the Trial Magistrate's conduct of the *locus in quo* whereby he took into account the show of hands of non-witnesses. Additionally, the Area Committee Report did not conform to S. 6(6) of the Land Act 1998 as amended, a factor, if properly addressed would have resulted into a different decision, which would be in favour of the Appellants. Overall, the Trial Magistrate reached at a wrong conclusion. In the circumstances, I make the following Orders.

IT IS HEREBY ORDERED THAT:-

1. This Appeal be allowed;

2. The findings and orders of the Trial Court are hereby set aside;
3. Costs in the lower Court and in the Appellate Court are awarded to the Appellants.

I SO ORDER.

SIGNED:.....

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

J U D G E

3RD NOVEMBER 2014