

The duty of a first appellate court as held in *Pandya v. R (1957) EA. 336* is to review all evidence, subject it to a fresh scrutiny and come up with own conclusions.

From the lower court record, the parties appeared in court for a civil dispute whereby plaintiff (appellant) sued the defendant (respondent) for trespass. The plaintiff alleged that he was the lawful owner of the suit land situate at Plot 7 and 8 Hajji Masaba Road, Mbale Municipality having acquired it from his mother and the defendant had trespassed on the land by 3 x 7 meters.

Defendant pleaded that the suit property belongs to him by customary acquisition.

The evidence by plaintiff in the lower court was led through PW.1, PW.2 and PW.3. Their evidence basically was that the plaintiff got the land through his mother who bought the said land from **Sulait Bwairisa**. He applied for lease from Mbale Municipal Council in 1992, and was given a lease offer. He was also given consent to survey, and had the land surveyed. He obtained a site plan for the land plotted as plots 7 and 8.

In 1996 defendant bought land near plaintiff which is unsurveyed. In 2000 defendant began building a permanent house which extended to his plot 7 by 3 x7 metres. Plaintiff tendered in exhibits 1, 2 and 3 to prove and show extent of the trespass (these were site plan, Town Clerk's letter and application for town Plot (D.1).

The survey was done in absence of plaintiff; and it was **Wambeyabeya** and plaintiff's mother who showed the surveyor the boundaries.

PW.2 Zeluna Namayemba (mother of PW.1) said PW.1 is a son. Defendant is a neighbor. She bought the land in dispute from someone who used to work in Municipal Council in 1973.

She claimed an agreement was made but she can't remember where she put it. She couldn't remember the date of the survey. She claimed she was present during the survey together with **Wambeyabeya**.

During cross-examination she confirmed that during the survey neighbours were not called, however during re-examination she said that neighbours were called in during the survey.

PW.3 Wambeyabeya, stated that defendant encroached on plaintiff's land by 3x4 metres. She further stated that the survey was done in 1993. That **Gabriel Atuya** and **Zeruna** were present.

Defendant called 2 witnesses **DW.1 Ben Mukwana** said the land was bought by their mother for them. He said the land has boundary marks. That the mother bought the land in 1996 on 27.12.1996 from **Bwayirisa Sulaiti** for shs.680,000/= and an agreement a photocopy was tendered in . They inspected the land and the land was not surveyed and there were boundary marks of Birowa and Nsambya trees. Later on in 1998, the plaintiff and surveyors attempted to survey the land but defendants stopped them. A photograph of the status of that land was tendered in showing boundary marks. It was tendered as PID.I and PI.D.II.

DW.2 Nyope Musa is brother to defendant. He confirmed evidence of DW.1 in all material particular.

DW.3 Mukono Richard nephew to defendant, confirmed that the land belongs to defendant.

D.IV Wodelo Rogers told court he was a neighbor between plaintiff and defendant. He witnessed the attempt by plaintiff to survey defendant's land and was present when this scheme was fouled by the neighbours and the surveyors left. He confirmed that the surveyors jumped the boundary from plaintiff to defendant's land.

At the locus two witnesses testified.

CW.1 Bukoma Sowedi, who confirmed that though plaintiff alleged encroachment, the land on which defendant built was his land; and was with boundary marks of Nsambya trees, which are old.

CW.2 Masera Juma, who told court the same facts as CW.1 and confirmed that the land is separated by the boundary marks of Nsambya trees.

In his judgment the trial Magistrate considered four issues;

1. Who is the rightful owner of the suit land?
2. Whether or not the defendant has any interest in the land.
3. Whether or not defendant encroached on plaintiff's piece of land.
4. Whether there are any remedies available to the parties.

His assessment of evidence led him to find for the defendant; as owner of the land in dispute and that defendant never encroached on plaintiff's land, that defendant has an interest in the land, and that plaintiff does not own the land. He therefore dismissed the suit with costs.

Having reviewed the lower court record and having gone through the submissions by both appellants and respondents I make the following observations and findings.

Burden of Proof

In all civil cases, the burden of proof is on he who alleges the existence of facts. (See 100-102 of Evidence Act).

In the case of *Erumiya Ebyetu v. Gusberito [1985] HCB 64*, it was held that;

“ where the plaintiff leaves his case in equilibrium the court is not entitled to incline the balance in his favour. The plaintiff must prove his case against the defendant to the required standard.”

In this appeal, the lower court evidence shows that plaintiff merely asserted his allegations but led no evidence to prove them. the trial Magistrate's assessment of the evidence considering the weight of evidence available was in my view correct. The appellant did not lead enough evidence to prove the case on the balance of probability.

His allegation of ownership was not backed up by any concrete evidence. He had no agreement.

PW.2 was contradictory. She could not produce the sale agreement, could not remember who sold her the land, could not remember who was present during the survey. She was a very unreliable witness. This was the witness to prove that appellant owned the suit land but when she failed to do so, then plaintiff was left with his own statement which was inconclusive regarding his claims. On the other hand, the evidence from defendants/Respondents though DW.1, DW.2, DW.3, DW.4, CW.1, CW.2 shows that all testified that defendant owned the piece of land customarily for a long time through his mother. Even if plaintiff did obtain a lease offer from the Municipal Council, that offer does not vitiate defendant/respondent's title.

See *Sekabanja v. A. Sajjabi & 3 Others 1983 (HCB) 54*, holding that:

“non registration per se cannot defeat a claim of ownership of land or customary tenancy...”

In this case surveying and plotting of the land as alleged by the appellant/plaintiff, cannot diminish the customary ownership by defendant to his piece of land.

Having discussed the law and facts as above, I now turn to the grounds of appeal to deal with them with the above position in mind.

Ground 1; That the learned trial Magistrate did not evaluate the evidence properly.

This ground fails because in my view the learned trial Magistrate correctly evaluated the evidence for reasons as stated above.

Ground 2; That the decision is tainted with fundamental misdirections and non directions in law and evidence.

None of the misdirections pointed out by appellants has been proved.

This ground also fails.

Ground 3: That the decision is unsupportable.

It's my finding that there is no merit in this ground and the decision is supported by law.

Ground 4: That the decision has occasioned a miscarriage of justice.

No error was made; contrary to the holding in Matayo Okumu v. F. Amudhe & 2 Ors 1979 (HCB) 229. The decision of the learned trial Magistrate is correct and this court upholds it. This ground therefore also fails.

In the result, this appeal has failed on all grounds raised.

It is dismissed with costs to the respondents.

Henry I. Kawesa

JUDGE

13.11.2014