THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0024 OF 2013

(Arising from FPT – 01 – CV – LM 012 of 2013)

MONDAY ROBERT .....APPELLANT

VERSUS

REV. HAEZEKIAH BISUNGA BUKOMBI.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the decision of His Worship Mushabe Alex Karocho, Magistrate Grade 1 at Bundibugyo delivered on 23/05/13.

Brief facts

The Appellant instituted a Civil Suit against the Respondent for trespass and his claim was for recovery of approximately one and a half plot of the suit land, an eviction order, general damages and costs. That the suit land is customary family land, and was first lent to the forest department of Uganda in the 1940's. In 2005 Mr. Byamaka Charles was appointed as the caretaker and repossessed the suit land from the Forestry Department and evicted all the encroachers. That it is upon his death in 2006 that the Respondent took advantage and started interfering with the boundaries. That, all effort to settle the dispute had been futile.

The Respondent on the other hand averred that the suit land is part of the bigger land that once belonged to Lusenge Daniel Sindiketi who later sold to three different people in 1967. That at the time of this sale, the three people stayed on the disputed land without any interference or protest from Edward Mukonjo. That the suit land was sold to the Respondent by John Kule Kandanda on 5th October 1994 having utilized the same for 27 years. That the Respondent had used the suit land until 2011 without any interference and prayed that the suit be dismissed.

Issues raised in the lower Court were;

1. Whether the Defendant crossed the boundary and trespassed on the land belonging to the estate of Edward Mukonzo?
2. What remedies are available to the parties?

The trial Magistrate having heard all the evidence and visited locus found that the suit land belonged to the Respondent and dismissed the suit with costs.

The Appellant being dissatisfied with the above decision lodged this appeal whose grounds are:

1. That the trial Magistrate erred in law and fact by neglecting, failing or refusing to evaluate the evidence before it presented by the Plaintiff/Appellant and thus made a decision not borne out of evidence on record which occasioned miscarriage of justice.
2. That the trial Magistrate erred in law and fact when he stated in his judgment that the Defendant trespassed on the suit land in 1994 which was not part of oral evidence because oral evidence stated that it was 2004 and thus arrived at a wrong decision.
3. That the trial Magistrate also erred in law and fact by neglecting and failing to take notice of the fact that the Appellant had fully grown cocoa trees and other perennial crops on the land.
4. That the whole decision, judgment and orders were against the weight of evidence presented by the Plaintiff/Appellant.

Counsel Bwiruka Richard appeared for the Appellant and Counsel Cosma Kateeba for the Respondent.

Resolution of all the grounds jointly:

It is the duty of the first Appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the appellate court may re-appreciate the evidence and reach its own conclusion. (See: **Pandya versus Republic [1957] EA 336, Kifamunte Henry versus Uganda Criminal Appeal No.10 of 1997, Page 5. (Supreme Court).**

In the instant case the Appellant told Court that the suit land belonged to his father having inherited it from his father and therefore was family land. That the Respondent started trespassing on the suit land in 2004 whereof he planted cocoa on the suit land. That the boundary between the family land and that of the Respondent was a valley.

Counsel for the Appellant submitted that it was the evidence of the Appellant's witnesses that the suit land belonged to the Appellant. That it was wrong for the trial Magistrate to conclude that the suit land belonged to the Respondent by basing on the fact that he had occupied the suit land uninterrupted.

PW1 told Court that the cocoa trees grew where the forestry authority nursery bed was due to the cocoa seedlings. And these seedlings are the ones that were found at the locus – in – quo. The nursery bed was also a boundary between the two parties.

Counsel for the Appellant went on to submit that the so called bisogasoga trees and miramura trees as alleged by the Respondent and his witnesses as the boundary marks were not shown to Court during the locus visit.

Counsel for the Respondent on the other hand submitted that Grounds 1 and 4 should be struck out for offending **Order 43 Rule 1(2)** of the Civil Procedure Rules. (See: **Attorney General versus Florence Baliraine, Court of Appeal, Civil Appeal No. 79 of 2003**.)

That the ownership of the suit land could be traced through DW2 who sold the land to John Kule Kadanda who then sold to the Respondent. Thus, the suit land was purchased by the Respondent in 1994 and the boundary marks were clearly stated by DW2 and the same were found at the locus – in – quo.

Further that the trial Magistrate was right in finding that the Respondent had stayed on the suit land for long as seen by the trees found acting as boundary marks. That it was not possible for the Respondent to have trespassed on the suit land 9 years later from the alleged time of the clearance of the bush as alleged by the Appellant being 1995.

Furthermore, that the Appellant failed to show Court the perennial crops he had on the suit land and the alleged palm trees acting as the boundaries were found scattered all over the suit land and on the adjacent land.

In my opinion much as DW2 was the first seller of the suit land, his evidence is not of much weight in the instant case since he clearly told Court that the last time he was on the suit land was in 1968 when he sold to John Kule. In his evidence DW2 also confirmed that the suit land had bisogasoga and miramura trees as boundary marks and also bordered with the forestry authority nursery bed.

At the locus – in – quo no miramura trees or bisogasoga were shown to Court. Instead the Appellant showed Court the valley he referred to as the boundary mark of the suit land. This boundary was not challenged by the Respondent.

I note that the Appellant stated that the Respondent started trespassing on the suit land in 2004 as per the Appellant's evidence and that there had been previous effort to resolve the dispute by the former caretaker before his demise but in vain.

I do concur with the submissions of Counsel for the Appellant, that the Appellant did prove his case on a balance of probabilities. The Respondent on the other hand was unable to show Court the boundaries as he alleged. It is seen from the sketch map a boundary and trees growing over the drawn boundary covering the Respondent's land. This being a boundary dispute Court needed to have been keen on the boundary marks as described by both parties. The parties were clear as to what the boundaries of the suit land were. In regard to the old Cocoa trees, the Appellant told Court that there was a nursery bed which had cocoa seedlings that eventually caught up and grew, where as the Respondent alleged that these were cocoa trees planted by him.

This Appeal is therefore allowed with costs.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

2/12/16

Delivered in open Court in the presence of:

1. The Appellant
2. The Respondent
3. Court Clerk- James

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OYUKO ANTHONY OJOK

JUDGE

2/12/16