

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

HCT-12-LD-CA-0016-2017

(Arising from Chief Magistrates Court of Hoima at Kibaale C.S. No. 07 of 2009)

RICHARD ASABAAPPELLANT

VERSUS

KAHUMA JOHN..... RESPONDENT

JUDGMENT

This is an appeal arising from the Chief Magistrate of Hoima sitting at Kibaale in which the learned Grad I Magistrate upheld the suit of the respondent for trespass and ordered the eviction of the appellant from suit land, and awarded the appellant damages and costs of the suit.

The appellant being dissatisfied with that decision appealed to this court on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision in civil suit No. 0007 of 2009.
2. The learned trial Magistrate erred in law and fact and in the manner in which the locus proceedings and findings were made.

Mr. Kabigumira of the Uganda law Society's Legal Aid Scheme for the appellant argued both grounds together. Mr. Baryabanza for the respondent did likewise. I intend to handle the matter similarly, especially considering that there was no submission touching the conduct of the locus proceedings from either Counsel.

The complaint was that the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 7/2009.

This being a first appeal, this court is enjoined to give the evidence a fresh and exhaustive evaluation but in so doing the first appellate court must keep in mind that, unlike the trial court, it did not have the opportunity to see and hear the witnesses as they gave their respective testimonies.

The respondent who was the plaintiff in the lower court told court that around 1972, he bought a big piece of land from Atanasi Badugala measuring about 89 ha., and a certificate of title thereto was exhibited. The transaction was concluded by Kasamba the son of Badugala in 1987 as the administrator of the estate of his father.

PW3 Kafero told court that he witnessed the transaction of sale. The sale agreement was written by the son of Badugala, and so far as Kafero was concerned, it was Kasamba who sold. He knew the boundaries of the land.

The grandmother of the appellant who was the defendant in the trial court Josephine Kabonesa PW2 told court that she was married to the grandfather of the appellant, but later they separated. She was living with her husband in what was described as the lower part of the road to Muhororo. Upon separation, she asked the respondent to allow her live in a small portion of his land, and he agreed. She not only lived there growing crops for her livelihood, but also when her son, the father of the appellant fell critically ill, she nursed him from that same place. He

died and she sought permission from the respondent to bury her son I that land and he gave his consent.

The grandson, now the appellant returned from Fort Portal where he had ran off to live with the daughter of the respondent. He joined his grandmother on this piece of land measuring about 1.5 to 2 acres. This is the land in dispute.

The appellant told court that he inherited suit land from his grandfather who acquired it in 1912. His father was born on the same land in 1948 and similarly that was where he was born from in 1972. from his testimony, 'all that time we were in peace with John Kahuma who was our neighbour'. When his father started planting permanent corps on suit land, Kahuma the respondent sued his father, and later himself. He told court hat his side won all along the way.

His mother Nsungwa DW2 told court that she was married to appellants father, and that they lived together on suit land. She however separated while the appellant was still very young. By the time of her marriage to appellants father, her mother in law PW2 Josephine Kabonesa had already separated from the husband, and was living on the upper side while they lived on the lower side. There was a road in between, but according to her, this was not the boundary of her father in law's land, which evolved to her son the appellant.

With that evidence on record, it was clear that the appellant told basically hearsay. He was born in 1972. He can only have heard of the 1912 acquiring of suit land by his grandfather, or the birth of his father on suit land in 1948. His mother Nsungwa DW2 arrived at the scene after the grandparents had separated. So her knowledge of the state of affairs was limited to that extent. The person was present Josephine

Kabonesa PW2 told court that she was living on this upper side of the road having separated from her husband who remained living in his land on the lower side.

She was so living on that upper side at the mercy of the plaintiff who allowed her to take refuge in his land. When the appellant who moved away to Fort Portal returned and found her living on this upper side, he also settled there with her permission. When he talks of this being the place where even his father is buried, this is true and is explained by the grandmother. The plants which his father planted in suit land are not denied, and their origin was equally explained. It was the expansion of this planting plus chasing away from suit land of Josephine Kabonesa, who was the person who was given leave to stay on suit land that the respondent decided to sue the respondent and his father for eviction from his land.

The evidence of Kabonesa was not controverted materially. She was the one from whom the appellant and his father derived the right to suit land. Her testimony was that that right was right was entirely on the acquiescence of the respondent who was the owner of the land.

That would explain why the land title to suit land was not also materially challenged, though there was an attempt to do so on appeal. The challenge was not with merit. The transaction was entered into in 1972. The appellant was either not yet born, or just a kid. The certificate of title was taken out after the death of the original seller. That was the reason the title had to be in the names of the Administrator of the estate of Atanasi and later it was transferred to the respondent. At the locus, court was shown the road which divides the land into what is referred to as upper and lower. The learned trial magistrate saw the tree and fruits which were planted by the appellant and his father. These were youngish, according to his

observation making true the assertion that they were mostly planted after the respondent commenced the suits, culminating in the present one.

From the analysis of the above evidence, I was not satisfied that the learned trial magistrate failed to evaluate the evidence properly. The appeal is accordingly dismissed with costs in this court and in the court below.

RUGADYA ATWOKI

JUDGE

09/11/2017