

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT CIVIL APPEAL NO.00-07 OF 2010

(From Kabale Civil Appeal No.007 of 2004

TURYATUNGA SILVER :::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

RWAKAKEIGA YORONIMU:::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE HON. MR. JUSTICE J.W. KWESIGA JUDGMENT

This is an Appeal from the decision of the Chief Magistrate of Kabale where she sat as an Appellate Court in Civil Appeal 007 of 2004 that arose from Kashambya Grade Two Court case No. 23 of 1983. This, therefore, is a second appeal in this dispute. This appeal, as will be set out is on a mixture of Law and facts. I did not have the benefit of seeing and hearing the witnesses while they testified and my decision will depend on examination of the evidence on record. The guiding principles were settled in the case of SET.TE & ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123. That an appeal to this court from a trial court is by way of a retrial.

That this court must consider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this regard.

Further in COGHLAN VS CUMBERLAND (3) 1898) CH 704. It was settled that;

“ Evenwhere, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty as to rehear the case, and the court must reconsider the materials as it may have decided to admit. The court must then make-up its mind, not disregarding the Judgment appealed, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the Judgment was wrong..... When the question arises which witness is to be believed rather than another, and that the question turns on manner and demeanour, the court of appeal always is, and must be guided by the impression made on the Judge who saw the witness. But there may obviously be circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; these circumstances may warrant the court in differing from the judgment, even on question of fact turning on the credibility of the witnesses whom the court has not seen.”

In view of the above this court is not obliged to make a decision in support or not in support of the decision appealed although the decision must be considered and not withstanding the fact that the Appellate court did not see or hear the witnesses, the court can still assess the credibility of the witness for instances by examining their testimony against the other witnesses to determine consistence and credibility of the witnesses. This courts obligation is to re-examine the evidence available in the whole case whether oral evidence, documental evidence or circumstantial evidence that helps to determine the rights of the parties. The subject matter in question is succession over land that is a customary holding described as 4 strips of land located at Kashambya which was declared by the Grade II Magistrate and the Chief Magistrate on appeal to belong to the Respondent, Rwakakeiga.

The Appellant sets out three grounds of Appeal namely;

1. The Chief Magistrate erred in Law by upholding the Judgment of the Magistrate Grade Two, whose Judgment was based on extraneous evidence of people who had not testified before court and therefore bad in Law.
2. The Chief Magistrate erred in Law by upholding the Judgment of the Magistrate Grade Two which had relied on exhibit P.1 that contained testimony of one Bahira which formed the basis of the trial courts extraneous finding.
3. The Chief Magistrate wrongly upheld the Magistrate Grade Two Judgment which had been entered when the Defendant had died before provisions of order 24 had been complied with and in the result occasioned miscarriage of Justice.

The Appellant's Advocate, conceded in the written submissions that the third ground of Appeal had no merits because the Appellant had obtained Letters of Administration as early as 6th February 2003 while the Judgment in question was delivered on 28th July, 2003. All parties were given the opportunity to be heard before the Trial Magistrate therefore this ground of Appeal as conceded had no merits.

Grounds one and two are basically complaining of the same thing that the decision of the Magistrate Grade Two was based on extraneous matters and should not have been upheld by the Chief Magistrate on Appeal. This court will examine the evidence available before the Magistrate Grade Two and come up with its own conclusion on whether the suit land, the 4 strips of land belonged to the Appellant or the Respondent by virtue of customary succession. It will be noted from on set that customary practice in the communities that were predominantly illiterate customary transfer of property can be proved by oral evidence from the people who may witnessed the actual transfer of ownership, giving of the land by one person to another or effective takeover of the

land and utilization of the land for considerably long period or quiet possession that creates a presumption of ownership until the contrary is alleged and proved. In the instant case, the Respondent sued Nyansio Ndyahoza, deceased, in 1983, for recovery of 4 strips of land at Kanyabwiga Kashambya Sub-County. He claimed this land to be part of 9 strips of land that were given to him by his grandmother KEIKINISA in 1947. He had since 1947 cultivated or used this land during the lifetime of Keikinisa (Donor) who died in 1970. The respondent testified that RWOOGA, the Appellants grandfather had trespassed on 4 strips out of the 9 strips in Rwamucucu as far back as 1965, which was a subject of a judgment in the then District African Court Civil Appeal 28 of 1965. See Exhibit P1. The Appellant's case is that he was using the land at Kanyabwiga now in dispute. That his claim over the land is because it belonged to Rujooga's father, Keikinisa's husband and that she had not produced a boy. He confirmed that

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in 1965 his father Rujooga had lost the suit over the land in Rwamucucu sub-County. He confirmed that both the land in Rwamucucu and Kashambya belonged to KEIKINISA. PW 11 Margaret Kamahanga told court that she is the mother of the Plaintiff/Respondent and a daughter to Keikinisa. That before Keikinisa died she gave the suit land to the Plaintiff/Respondent. This witness witnessed the occasion when the land was being given to the Respondent. It will be noted that apart from PW 11 Margaret Kamahanga, almost all that were present in 1947 were dead by the time of the hearing. The Plaintiff/Respondent and this witness remain the only two witnesses that had direct evidence of Keikinisa's donation of the suit land to the Respondent.

The Magistrate Grade Two correctly evaluated the evidence and correctly made reference to the Judgment in Civil Appeal 28 of 1965 to determine that the suit was not Res Judicata because the suit pieces of land were completely

different. In my view the contents of the judgment in Civil appeal 28 of 1965 only corroborates the fact that KEIKINISA owned strips of land at Kanyabwiga, Kashambya Sub-county and Rwamucucu sub-county, my understanding of the evidence as a whole is that these subcounties were neighbouring and Keikinisa's strips of land were in both sub-counties. The claim by NYANSIO NDYAHOZA, the Defendant/Appellant is founded on a donation by KEIKINISA alleged to have been made and written in 1964. The trial Magistrate correctly observed that the Defendant and his witness RUHIMBIRI claimed that an agreement was executed but none was produced in court. The Magistrate correctly observed the contradiction created by DW II RWEHIRIKA when he created impression that because KEIKINISA did not produce a boy and because land belonged to RUJOOGA'S father that this simply followed that Rujooga or his sons were entitled to the land that Keikinisa got from the father or grandfather as the case may be. Keikinisa had all legal rights to give while she was alive whatever property belonged to her or to bequeath the same to anybody before her death. The uncontradicted evidence is that the trial Magistrate in his judgment at page 7 referred to evidence of one PAULO TIRWOMWE that testified that he grew -up and found the Plaintiff/Respondent utilizing the suit land. The Appellant criticized this part of reference to TIRWOMWE because this was not on trial record and that this was extraneous evidence. I agree that evaluation of evidence in Judgment writing the trial court ought to limit itself to the evidence received during the hearing or trial it is not proper to consider any extraneous matter. For this reason I have disregarded the portion of testimony attributed to TIRWOMWE as a witness. This notwithstanding, I have found the Respondent's case well corroborated by the evidence of Keikinisa's daughter Margaret Kamahanga. I am alive to the fact that this witness is the mother of the Respondent, this alone can not discredit her evidence in view of the fact that all the parties claiming under the original claim of right of ownership by NYANSIO NDYAHOZA are members of the same family. The Appellant attack of the trial Magistrate's quotation from the Judgment of over

Rwamucucu pieces of land was not proper since these were separate cases and separate pieces of land. I have already found that it was proper to refer to this Judgment and to hold that the matter was not res judicata. However it is another piece of evidence that corroborates the fact that Keikinisa was the original owner of the separate pieces of land in Rwamucucu and Kashambya and had the capacity to pass on title of the land any person she chose.

The Plaintiff/Respondent had the burden of proof, to prove that he is rightful owner of the suit land. The fundamental evidence I have found sufficient for this purpose is the plaintiff's testimony and that of Margaret Kamahanga and I have reached the same conclusion as the Chief Magistrate in the first Appeal the suit land belongs to Rwakakeiga, the Respondent. The errors found in the trial proceedings did not cause any miscarriage of Justice and finally I hereby dismiss this Appeal with costs here and in the lower courts.

Dated at Kabale this 7th day of August, 2012.

J.W. KWESIGA

JUDGE 7/8/2012

Judgment delivered in open court.

In presence of Mr. Beitwenda for Respondent. Mr.

Kwizera for Appellant absent.

Parties not present.

Mr. Joshua Musinguzi court - Clerk.