THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 59 OF 2018

1. **OBBO ARAJAB**
2. **MAWAZI KALEMA :: APPELLANTS**

VERSUS

1. **WAAKO JAMES**
2. **MUKAMA BASHIR**
3. **SHILLING ABUDU**
4. **BALAZA**
5. **KATAMA WILBER**
6. **OMUJONG**
7. **MAGALA SULAI**
8. **OMUGISU JOSEPH :: RESPONDENTS**

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

This Judgment is in respect of an appeal which was lodged by the Appellants against the decision of Her Worship Acca Ketty Joan, the Grade 1 Magistrate-Iganga court delivered on the 11th December, 2018.

Before the trial court, the Appellants brought a suit against the Respondents for a permanent injunction restraining them, their agents, servants and/ or successors from threatening, intimidating or in any other way interrupting the Plaintiffs use and enjoyment of the suit land, general damages, costs of the suit and interest on the decretal amount from the date of Judgement until payment in full.

Background:

Before this court gets into the merits of the appeal it is pertinent to understand its background which is briefly as follows.

The Appellants allege that they got the suit land situated at Bukyaye- Butama village, Nakalama Sub county, Iganga district from their late father Haruna Obbo

as a gift in 1980 while they were still young. Thereafter, they went to stay in Luuka with their mother, Rose Nabirye and would frequently visit their father and also inspect the land in dispute with no trespassers. That in 1990, following the death of the Appellants' father, they visited the land in dispute but found the Respondents trespassing on part of this land and accordingly, the matter was registered with the LC 1 but they were never assisted. As a result, the Appellants suffered loss and damages thereby instituting a suit vide Civil Suit No. 48 of 2007 before the Chief Magistrates Court of Iganga.

The defendants filed their written statements of defence whereby they denied all the appellants allegations in the plaint. The defendants stated that the suit has never belonged to the plaintiffs' father and was never given as a gift intervivos. The defendants further stated that the plaintiffs have no knowledge of the suit land.

The learned trial Magistrate heard the matter and in his ruling dated 5th December, 2019 entered Judgement for the Respondents/ Defendants and held that the defendants are the lawful and bonafide owners of their respective bibanja/ plots, a permanent injunction restraining the plaintiffs from laying claim over the defendants' bibanja and costs of the suit. As earlier on pointed out, the Appellants felt aggrieved by that decision and filed the appeal which is the subject of this Judgment.

In their memorandum of appeal, the Appellant cited seven grounds for this court to determine namely;

1. That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record as a whole hence arriving at a wrong decision.
2. That the learned trial magistrate erred in law and fact when she ignored the major and material inconsistencies and contradictions in the respondents' evidence hence arriving at a wrong decision.
3. That the learned magistrate erred in law and fact when she held that the suit land was not given to the appellants as a gift intervivos by their late father Haruna Obbo.
4. The learned trial magistrate erred in law and fact when she failed to conduct the visit at locus in accordance with the law hence arriving at a wrong decision that prejudiced the appellants.
5. That the learned trial magistrate erred in law and fact when she misdirected herself on the law of possession/ ownership and trespass hence arriving at a wrong decision.

6. That the learned trial magistrate erred in law and fact when she jointly declared the 7th and 8th respondents as lawful and bonafide owners of the suit land without any evidence/ testimony from them on the record.
7. That the learned trial magistrate erred in law and fact when she misdirected herself on the law and procedure regarding the written statement of defence with counter claims hence arriving at a wrong decision that caused a miscarriage of justice.

At the time of hearing the appeal, Mr. Mudhumbusi Daniel represented the Appellants while Ms. Kabonesa Evelyn Hellen represented the Respondents.

Court will now proceed to dispose of the appeal in the light of the above grounds, the submissions of counsel, the evidence on record and the law.

Determination

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in ***Father Nanensio Begumisa & 3 Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236, Pandya -vs- R (1957) EA 336, Seller & Anor – vs- Associated Motor Board Co. Ltd & Ors (1968) EA 123**.

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and, remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly, the view of the trial court as to where credibility lies is entitled to great weight.

However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances

or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.

Grounds 1 &2

1. **That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record as a whole hence arriving at a wrong decision.**
2. **That the learned trial magistrate erred in law and fact when she ignored the major and material inconsistencies and contradictions in the respondents' evidence hence arriving at a wrong decision.**

The law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. **See: Makau Nairuba Mabel vs Crane Bank Ltd., HCCS No. 380 of 2009 per Obura J.; Okecho Alfred vs Uganda, S.C. Crim. Appeal No24 of 2001; Alfred Tarjar v. Uganda Crim. Appeal No 167 of 1969(EACA).**

What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

The Appellants submitted that the magistrate held that the plaintiffs clearly showed court that they were in possession of the suit land at the time of this suit but however came to the conclusion that the plaintiffs were not in possession of the suit land and therefore failed to prove all the elements to sue for trespass.

From the evidence on the court record, the Appellants; Obbo Rajab (PW1) and Kalema Mawazi (PW2) testified that they had not been staying on the suit land but that at the time of the suit had built a house.

This evidence was controverted by the defendants'/ respondents' witnesses who testified that the Appellants had only settled on the suit around 2005 when their father called them back. Indeed, a perusal of the record of proceedings shows no evidence of a written document of deed that was made.

In my view, the alleged contradictions noted by the Appellants' counsel are very minor, especially when viewed against the main issue at trial, which related to ownership of the suit land. I do not also agree that there were major contradictions and inconsistencies in the defendants' case.

I therefore find that the Magistrate properly evaluated the evidence that was presented to him and came to the right conclusions based on the said evidence.

Therefore, grounds 1 and 2 of this appeal fail.

Ground 3 & 5

3. **That the learned trial magistrate erred in law and fact when she ignored the major and material inconsistencies and contradictions in the Respondents' evidence hence arriving at a wrong decision.**
5. **That the learned magistrate erred in law and fact when she held that the suit land was not given to the Appellants as a gift intervivos by their late father Haruna Obbo.**

These grounds are premised on the Appellants claim for the ownership of the suit land having acquired the same as a gift inter vivos from their late father. The appellant submitted that PW1 stated that he was born on the suit land and in 1980 was given to him by his late father Haruna Obbo while he was still alive.

It is important to note that these grounds of appeal raise the issue as to the ownership of the land. The nature and character of the rights vested in the land in dispute relate to its ownership and control. The concept of ownership of land is an aggregation of a number of rights, including: the right to possession, the right to control, the right to its use and quiet enjoyment, the power to allow others a right to use (licenses and leases), the right to privacy and to exclude others, the right to disposition or to transfer the land to someone else by selling, gifting or inheritance, and the right to use the land as collateral through a mortgage.

It is important to note that the suit land in respect of this appeal is unregistered land. In the case of **John Katarikawe vs William Katwiremu [1977] HCB 210 at 214**, it was observed by Byamugisha J (as she then was) that interests in land, in particular, include registered and unregistered interests. In the instant case, the Appellants' claim in the suit land is based on unregistered interest. The appellants must therefore show that they acquired an interest from someone who previously had an interest thereon. (See: **Ojjwang vs Wilson Bagonze CACA No. 25 of 2002**)

It is also important to note that **Section 101 of the Evidence Act** is very clear on where the burden of proof lies; this being the person that desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts. He who asserts as to the existence of certain facts must prove. (See: **Jovelyn Bangahare -vs- Attorney General S.CCA No. 28 of 1993**) The appellants therefore have the onus of proving on the balance of probabilities that he is the owner of the said land in question.

Having noted that the suit land is unregistered land and that the Appellants' claim that the said land is customary land, it is necessary to understand the customary land tenure. The customary tenure is recognized by **Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and the *Land Act*, Cap 227** as one of the four land tenure systems of Uganda. Section 3 (1) of the Land Act does not define customary tenure but gives incidences of what amounts to customary tenure. The ownership must be in accordance with the customs and norms of a particular class of persons or community for that matter and subject to section 27 of the Land Act, it is governed by rules accepted as binding by the class of persons to which it applies.

Customary tenure ownership can be sufficiently proved with evidence of user. Although proof of customary ownership of land ordinarily requires establishing the nature and scope of the applicable customary rules and their authoritative character and acquisition in accordance with those rules, in a case such as this where the parties did not dispute the fact that the suit land was one in respect of which parcels could be recognized as belonging to a person or a family and hence that it was held under customary tenure, ownership could be sufficiently proved with evidence of user (see: ***Marko Matovu and two others v Mohammed Sseviiri and two others, S.C. Civil Appeal No. 7 of 1978*).**

It is also trite law that all rights and interests in unregistered land such as this may be lost by abandonment. **Section 37 (1) (a) of *the Land Act, Cap 227***, provides that where a tenant by occupancy voluntarily abandons his or her occupancy; the right of occupancy lapses. Under that section, abandonment occurs where he or she leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for three years or more. Although in respect of tenancies by occupancy abandonment is deemed to have occurred after the lapse of three years of leaving the whole of the land unattended to by occupant or a member of occupant's family or his or her authorised agent, there is no similar temporal delimitation in respect of land held under customary tenure.

This doctrine enables extinguishment of dormant interests in land on the basis of non-use coupled with intent to abandon. An essential element of abandonment is the intention to abandon, and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances, but they must disclose some definite act showing intention to abandon. The non-use of a right is not sufficient in itself to show abandonment, but if the failure to use is long, continued and unexplained, it gives rise to an inference of intention to abandon.

The Appellants testified that the said suit land was given to them in 1980 when they were still young and thereafter, they left the village with their mother only to return in 2005 when their father called them back. It was also stated that the Appellants' father Haruna Obbo remained on the said land. Since the latter was the Appellants' family member, it cannot be said that the land was abandoned or voluntarily left unattended to.

From the evidence on the court record, the Appellants testified that the disputed land was gifted to them inter vivos by their father who stayed in possession thereof.

A gift intervivos is defined in Black's Law Dictionary 8th Edition at page 710 as;

> *"...a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property."*

Court in the case of ***Sajjabi John vs Zziwa Charles Civil Appeal No 50 of 2012*** while relying on the **Halsbury's Laws of England Vol.18 pp 364 para 692** defined a gift intervivos as:

> *"The transfer of any property from one person gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true possessor to another person with full intention that the thing shall not return to the donor and with full intention on the part of the receiver to retain the thing as his own without restoring it to the giver."*

The law, as it relates to the issue of gifts intervivos is well established. Court in the case of ***Joy Mukobe vs. Willy Wambuwu HCCA No. 55 of 2005*** held that;

"...for a gift intervivos to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift.

Ordinarily deeds of gift of land must be by deed and according to the decision in **Noah Nassozi & Anor vs. George William Kalule HCCS 5/2012** followed in **Namugambe Balopela& Ors vs. Fredrick Njuki & Anor HCCS 341/2013**, our laws do not recognize a verbal gift of land.

Looking at the circumstances of this case, the appellants testified that the suit land was gifted to them while young at the age of about 11 years. Thereafter, they left the said village and stayed with their mother only to return in 2005. The defendants/ respondents also testified before the trial court that the late Haruna Obbo had sold to them several pieces of land during his life time and that the Appellants at the point of return found them onto the suit land. DW1- Waako James testified that he bought the said land from Haruna Obbo in 1990 and started using it for cultivation and also built a house. He testified that the Appellants were not in occupation of the suit land at the time and only raised complaints over the same in 2006-2007 upon their return.

DW2 Bashir Mukama testified that he bought land from the late Haruna Obbo in 2000 and never received any complaints on the said land until the Appellants. DW3 testified that he purchased land from Blasio Rwenyi who bought from Obbo Haruna in 1997. At the time the Respondents bought the said pieces of land from the late Obbo Haruna. The Respondents adduced evidence of the purchase of the said land. They further testified that the Appellants were not in occupation of the said land. This was controverted by the Appellants' evidence who stated that they only returned in 2005.

Furthermore, aside from the Appellants' testimonies that they were gifted land in 1980 by their father, the late Haruna Obbo, the Appellants did not adduce any evidence to support their claim. They were also never in possession of the suit land unlike the Respondents.

As stated above, the onus and burden of proof in civil matters lies on the plaintiff and in the instant case, the Appellants, to prove that indeed that suit land was given as a gift intervivos by Obbo Haruna. However, from the evidence on the court record, I am not convinced that the Appellants were indeed given the suit land as a gift intervivos by the said Haruna Obbo who later during his life went ahead to sale several parcels not only to one person but several of them.

I further note that there was no strong evidence showing how the suit land came into the hands of the Appellants nor did they adduce any evidence. In the absence of any evidence from the Appellants as seen on the court record, I am unable to find that the said land belongs to the Appellants. It therefore goes without saying that the Respondents having purchased the said land and been in possession thereon before the time the suit land was bought, there is no trespass.

Therefore, ground 3 and 5 of the appeal fail.

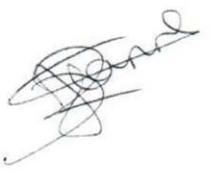
Ground 4: whether the learned trial magistrate erred in law and fact when she failed to conduct the visit at locus in accordance with the law hence arriving at a wrong decision that prejudiced the appellants.

The law with regard to visiting of locus in quo is now settled and there are a host of authorities on what happens at the locus in quo. The purpose of visiting locus in quo is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features on the land. It is during locus in quo that witnesses who were unable to go to court either due to physical disability or advanced age may testify. However, if the trial court finds/or is satisfied that the evidence given in court is enough, and then he or she may not visit the locus in quo. Evidence at the locus in quo cannot be a substitute for evidence already given in court. It can only supplement. See: **Kwebiiha & Anor vs Rwanga & 2 Ors Civil Appeal No. 021 of 2011**

It should therefore be noted that visiting locus in quo is not mandatory. It depends on the circumstances of each case. However, once locus in quo is visited, all the relevant procedures must be followed. Witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross examination by the parties and/or their advocates.

All evidence and proceedings at the locus in quo must be recorded and form part of court record. It is also important to note that evidence at locus cannot be considered in isolation from the existing evidence recorded in Court.

In the present case, the record reveals that whichever witness that testified at locus in quo was not subjected to cross examination by advocates and was fully recorded. I also did not find any much departure or variance with the testimonies given on either side by the parties in court.



Counsel for the Appellants submitted that the witnesses at the locus were never sworn in and had not testified before the locus visit. He further stated that their evidence was not subjected to cross examination although it was collectively referred to by the trial magistrate.

In my view, the trial magistrate in his judgment did not rely solely on the proceedings at the locus in quo. I am therefore unable to find any faults with the proceedings at the locus in quo. The 3rd ground of appeal therefore collapses.

Ground 6: whether the learned trial magistrate erred in law and fact when she jointly declared the 7th and 8th Respondents as lawful and bonafide owners of the suit land without any evidence/ testimony from them on the record.

As earlier noted above, **Section 101 of the Evidence Act** is very clear on where the burden of proof lies; this being the person that desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts. He who asserts as to the existence of certain facts must prove. (See: **Jovelyn Bangahare-vs- Attorney General S.CCA No. 28 of 1993**) The Appellants therefore have the onus of proving on the balance of probabilities that they are the owners of the said land in question.

The Appellants thereby failed to prove their right or ownership over the suit land and this court cannot give judgment on their behalf just because the 7th and 8th Respondents did not appear and defend their case before court. Courts look at the evidence on the court record to pass judgement according to the prayers sought.

This ground therefore fails.

Ground 7: Whether the learned trial magistrate erred in law and fact when she misdirected herself on the law and procedure regarding the written statement of defence with counter claims hence arriving at a wrong decision that caused a miscarriage of justice.

I have read the learned trail magistrate's judgement and I disagree with counsel's submissions on the latter making the said orders to the Respondents. **Section 98 of the Civil Procedure Act** gives court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The exercise of inherent powers by court is a matter within the discretion of the court. In the exercise of this discretion, the court must act judiciously and according to settled principles, bearing in mind that the decision

to make must be based upon common sense and justice. The court has to look at all circumstances of the case. See **Standard Chartered Bank of Uganda V Ben Kavuya & Barclays Bank Ltd [2006] HCB Vol. 1 134.**

The trial court found that the Appellants were not the rightful owners of the suit land and thereby made the given orders and declarations as to the effect that the Respondents were the bonafide owners as it deemed fit which was well within its discretion. I therefore do not find fault with the orders of the trial magistrate made.

This ground therefore fails.

Conclusion:

Having held and found all grounds of appeal in the negative, I hereby dismiss this appeal and confirm the judgment and orders of the lower Court.

Costs of this appeal are hereby granted to the Respondents.

I so order.

Jeanne Rwakakooko
JUDGE
28/02/2022

This Judgement was delivered on the 15th day of March 2022.

15/3/2022

Both parties ... ... the ... at ... ,

Ct: Judgment delivered in open court

15/3

Copy : Received on 18/3/2022