

(Arising from Hoima Civil suit No.19 of 2012)

VERSUS

2. KAAHWA BALIKURUNGI RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] This is an appeal from the judgment and orders of the Chief magistrate's court of Hoima at Hoima dated 5th day of September, 2013.
- [2] The facts of the appeal are that the plaintiffs who are mother and son respectively sued the defendants jointly for trespass on to the suit land **measuring approximately 4 acres situate at Kiboni village, Mparo Division, Hoima Municipality** which the 1st plaintiff claimed to had acquired from the original owner a one **Mutooka** in the 1950s. That the 1st defendant unlawfully sold the same to the 2nd defendant who trespassed thereon by way of forceful entry, slashing, damaging trees, cultivating and planting crops thereon.
- [3] The defendant's case was that the suit land was part of the land owned by the late **Yakobo Kiiza**, the father of the 1st defendant who had acquired the same from the kingdom at Bunyoro Kitara in 1946. The 1st defendant sold part of the suit land to the 2nd defendant who took possession of the same.

- [4] The trial Magistrate upon evaluation of the evidence before him, found the plaintiffs' evidence reliable and believed the same, that the boundary explained and showed by the plaintiffs' witnesses at the locus in quo was the right boundary. He held that the land in dispute belonged to the plaintiffs and the sale of the land by the 1st defendant and his brother **Apostle Kiiza Emmanuel** was unlawful. That the 2nd defendant's purchase was illegal and his occupation of the same amounted to trespass.
- [5] Judgment was therefore given in favour of the plaintiffs and the suit land was decreed to the plaintiffs with orders inter alia, the 2nd defendant vacates it or be evicted.
- [6] The defendants/Appellants being dissatisfied with the judgment and orders of the trial Chief Magistrate, filed the present appeal on the following grounds as contained in their memorandum of appeal:
- 1) That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion that the disputed land in **CIVIL SUIT NO. HMA-00-CV-CS-NO.0019 OF 2012** belongs to the Respondents.*
 - 2) The trial Magistrate erred in law and fact when he declared the suit land as property of the Respondents thus ignoring the proprietary customary interests of the Appellants in the land.*

Counsel legal representation

- [7] The Appellants were represented by **Counsel Simon Kasangaki of Ms Kasangaki & Co. Advocates, Masindi** while the Respondents were represented by **Counsel Mwebaza of Mwebaza & Co. Advocates, Hoima** and later by **Susan Zemei of Zemei, Aber Law Chambers, Masindi**. The respective counsel filed written submissions as permitted by court.

Duty of the Appellate Court

- [8] The duty of the first Appellate court is to review the evidence on record for itself in order to determine whether the decision of the trial court should stand. In so doing, court must bear in mind that an appellate court should not interfere with the discretion of the trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in exercise of its discretion and that as a result, there has been a miscarriage of justice; **Stewards of Gospel Talents Ltd Vs Nelson Onyango H.C.C.A No. 14 of 2008** and **National Insurance Corporation Vs Mugenyi [1987] HCB 28**.
- [9] This being a first appellate court therefore, it has a duty to rehear the case and re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence the decision of the trial court must stand.
- [10] Both counsel opted to submit and argue grounds 1 and 2 together and I follow suit because both grounds revolve around on whether the trial magistrate properly evaluated the evidence on record and arrived at proper and correct conclusion.

EVALUATION OF THE EVIDENCE

[11] The undisputed facts:

a) The parties to the suit are immediate neighbours to the disputed portion of land. The 1st defendant being in the south and the plaintiffs being in the north as evidenced below.

According to the 2nd plaintiff **Kaahwa Aloyzious Balikurungi** (PW2) **Yakobo Kiiza**, from whom the defendants derived their interest was a

neighbor to the suit portion of land and that is the land the 1st defendant occupied. At **page 8 of the proceedings**, he testified thus:

*"I know the land in dispute which belongs to my mother **Nyangoma Katalina**...on the south is the 1st defendant... I knew **Yakobo Kiiza** (the 1st defendant's father) who owned land in that area. He was our neighbor. The boundary was a feeder road. That is the land the 1st defendant occupied. I sued the 1st defendant because he sold part of my mother's land to the 2nd defendant."*

At **page 18 of the proceedings**, during cross examination, the 1st defendant testified thus:

*"The land of late **Yakobo Kiiza** (1st defendant's father) neighbours the land of Nyangoma (1st plaintiff)."*

(b) The 1st defendant and his brother **Apostle Kiiza Emmanuel** sold land to the 2nd defendant that included and or formed the disputed land. It is the defendant's case that the entire land belonged to **Yakobo Kiiza**, the 1st defendant's father and that the 1st defendant sold part of it to the 2nd defendant.

The Disputed facts.

According to **Paul Kiiza** (PW1), the common boundary between the disputed portion of land and the defendants is a path to the main road to Masindi. The same path still exists. The 1st defendant has crossed the same path and trespassed on the suit land.

According to 2nd plaintiff, **Kaahwa Aloyius Balikurungi** (PW2), the land in dispute which is about 1 acre out of the 4 acres of his mother, its boundary with that of the 1st defendant is a feeder road.

The chairperson of the area **Kahaibale Abel** (PW3) described the boundary as a path to the well and concluded in his testimony that the defendant trespassed on the plaintiffs' land.

Atuhaire Daniel (PW5) further amplified and clarified the boundaries to be a "Musasa" tree then **a road** and **an anthill**.

[12] On the other hand, the 1st defendant **Mugisa Julius** (DW1) described the boundary as an **anthill** where there is a "**omusasa**" tree.

According to him, the 1st plaintiff, mother to the 2nd plaintiff has crossed the boundary by clearing the land, and that the disputed portion of land is about 40 yards.

[13] From the foregoing, it is clear that the common denomination of the description of the common boundary of the disputed portion of land between the plaintiffs and the defendants' land was the "**omusasa**" tree and the **Anthill**. The task of the trial court was to investigate and make a finding as to whether the land sold to the 2nd defendant included or formed part of the suit portion of land. The trial magistrate could only do so and ascertain either party's claims by evidence and or his observation at locus. In his judgment **at page 3**, the trial magistrate found that the evidence of the plaintiff was reliable and believed the same that the boundary explained and showed by the plaintiffs' witnesses as at locus in quo is the right boundary and concluded that the land in dispute belonged to the plaintiffs.

[14] It is apparent on record that none of the defendants' witnesses; **DW3 – DW6** including the 2nd defendant himself knew or was able to describe the boundary features/marks of the suit portion of the land the 2nd defendant purchased. The 2nd defendant **Kisembo Jacob** (DW2) himself **at page 20 of the proceedings** testified thus;

*"I know the land in dispute in this court. It is located at Kiboni...
I bought part of that land in the year 2009...This is the*

agreement we executed. I did not know that the land belonged to the plaintiff. I grew up there and I knew that land but I did not know the boundary. The plaintiff stays in the area."

During cross examination at **page 21 of the proceedings**, he testified thus;

"I never consulted neighbours in this case...I was assured by the sellers that the land belonged to them. We involved a lawyer to be sure that I had paid my money. The lawyer never visited the land. The lawyer never ascertained the history of the land. The boundaries the lawyer put in the agreement, he was told. He did not measure the land. He was told the size and all that he put in the agreement...It was not necessary to involve the local authorities. I knew the owners of the land but I did not know the boundaries. The neighbours never signed. I don't know the history of the land I bought."

[15] It is clear from the 2nd defendant's evidence above that he never bothered and or that there was lack of any due diligence before he purchased land that included the suit portion of land.

As was held in **Naome Juma & Anor Vs Nantume Ruth & Anor H.C.C.S.No.363/2010[2020] UGHCLD 1**,

"It is trite law that the value of land as valuable property calls for thorough investigations before purchase. Call it due diligence. The buyer who fails to carry out due diligence and buys from fraudsters gets no legal title."

It is evident on record that the 2nd defendant in this case, did not do his due diligence to establish the status and extent of the land he was buying including the people who were in occupation. The need for due diligence is more so important where the land in question is customary or untitled land because the boundary marks are in most cases in form

of natural features and boundary mark plants. The role of the neighbours and the local authorities is therefore paramount for the buyer to ascertain what he or she is buying and the boundaries thereof. It is therefore apparent the 2nd defendant's intentional failure and or refusal to do the due diligence and opted to have the sale agreement executed elsewhere and not at situ, he knew or ought to have known the status of the suit portion of land. The status of the suit portion of land as found by the trial magistrate was that it belonged to the plaintiffs. The 2nd defendant therefore in the circumstances could not be allowed to benefit from his wrong doing of not bothering to carry out due diligence before embarking on the purchase of the land from the 1st defendant.

[17] As a result, I am unable to fault the trial magistrate who heard the witnesses in court, visited locus and made a finding that the land in dispute belonged to the plaintiffs. He properly evaluated the evidence before him and reached a proper and correct conclusion.

[18] Counsel for the Appellants submitted that the plaintiffs/Respondents did not lead evidence of user and/or ownership of the suit land over the years. I do not agree. Whereas the 1st defendant **Mugisa Julius** (DW1) testified at **page 17 of the proceedings** thus;

"I know the land in dispute. It is in the area where she had been given. She is trying to expand."

and **Solomon Byenkya** (DW3) testified that the 1st plaintiff has been on this land for over 20 years, this supported and corroborated the plaintiffs' case as **Kiiza Yafesi** (PW4) aged 81 years had testified in support of the plaintiff that the suit land belonged to the 1st plaintiff, mother to the 2nd plaintiff who had been there since 1959.

[19] It is clear from the above evidence on record that the land referred to by the parties and the witnesses is that land that forms part and include

the suit land. The evidence points to the plaintiffs/Respondents long use and ownership of the suit portion of the land.

[20] Counsel for Appellants again submitted that the plaintiffs/Respondents' witnesses failed and/or intentionally did not testify on the boundary of the plaintiffs' land in the south.

[21] As correctly submitted by counsel for the Respondents, the southern part of the land was not in dispute and therefore it was not necessary to dwell on it. It was the northern boundary that was in dispute because the complaint of the plaintiffs/Respondents against the 2nd defendant's was that while utilizing his purchased land from the 1st defendant and his brother **Apostle Emmanuel Kiiza**, he crossed boundaries and encroached on the plaintiffs' land.

[22] I do however agree that the trial magistrate overlooked the entire evidence which was to the effect that the suit property formed part of the bigger land that the 2nd defendant/Appellant had purchased from the 1st defendant/Appellant and his brother **Apostle Kiiza Emmanuel** which they had acquired from their late father **Yakobo Kiiza**.

As a result of this misdirection, the trial magistrate ordered for eviction of the 2nd defendant/Appellant from his entire purchased land. As per the evidence of the 2nd plaintiff, the trespassed and or encroached upon portion of the suit land is **one acre** out of the **4 acres** of the plaintiffs' land. The plaintiffs' evidence stood unchallenged as regards the extent of the trespass since none of the defendants and their witnesses could tell or knew the boundaries of the land the 2nd defendant purchased as different from that description as given by the plaintiffs. The 2nd defendant himself never bothered to inquire about the boundaries or and confirm from the ground what he was purchasing from the 1st defendant and his brother **Apostle Kiiza Emmanuel**.

[23] In conclusion, the 2 grounds of appeal fail as they are devoid of merit. The judgment and orders of the trial magistrate are upheld save for the order of eviction which is modified to read.

“The 2nd defendant is ordered to vacate the suit portion of land measuring 1 acre or be evicted.”

The Appeal is in the premises dismissed with costs to the Respondents.

Dated at Masindi this 13th day of April, 2022.

.....

Byaruhanga Jesse Rugyema
JUDGE.