

THE REPUBLIC OF UGANDA
IN HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. 0071 OF 2017

(Arising From Civil (Land) Suit No.052 of 2012)

MONDAY AHAMAD **APPELLANT**
(Administrator of the Estate of **Mary Nsekanabo**)

VERSUS

1. THE REGISTERED TRUSTEES
OF HOIMA CATHOLIC DIOCESE
2. MUSINGUZI GEOFFREY
3. PASCAL NDOLERIRE
4. KYALIGONZA CHARLES
5. KALIISA JOHN

..... **RESPONDENTS**

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and orders of the Grade 1 Magistrate of Hoima Magistrate’s court at Hoima delivered on the 23rd day of October, 2017.

Facts of the appeal

[2] The Appellant filed **C.S No.54/2012** in the Chief Magistrate’s court of Hoima at Hoima against the Respondents jointly and severally for a declaration that he is the lawful administrator of the estate of his late mother, **Mary Nsekanabo** and the lawful owner of the suit property situated at Kabaale Cell, Kyentale Ward, Hoima Municipality, Hoima District, a declaration that the Respondents are trespassers thereon, a permanent injunction restraining the defendants, their agents, workers, relatives and or any person acting for them from further trespass on the said estate and the costs of the suit.

[3] It was the Appellant’s case that the suit land forms part of the estate of his mother, the late **Mary Nsekanabo** as a customary holding of which the Appellant is the administrator and beneficiary thereof. That the late Mary had acquired the suit land from her late father **Francis Kakobogo** who was buried on the suit land. That the late **Mary Nsekanabo** and her

family used the suit land uninterrupted for cultivation and growing crops among other things but that in 2010, the defendants built a commercial house in the suit land and destroyed the plaintiff/Appellant's crops such as avocados and mango trees and planted pine trees thereon.

[4] In their defence, the Respondents denied the Appellant's allegations. The 2nd -5th Respondents contended that they have never trespassed on the suit land as neither do they have any personal gardens nor developments thereon. That the land in issue belonged to the church of Hoima Catholic Diocese, the 1st Respondent.

[5] The defendants contended and averred further that the suit land/kibanja was part of land that originally belonged to the **Crown government** under the custody of the District Commission who allocated it to the missionaries in the 1920 for purposes of setting up missions and the 1st Respondent derive their interest therefrom.

[6] Lastly, that **Francis Kakobogo** was the 1st Respondent's former Catechist in around 1959 who stayed and carried out pastoral duties on the suit land and upon his death in 1978, on humanitarian grounds, the church buried him on the suit church land and allowed his daughter **Mary Nsekanabo** to remain on the land as a licensee. That therefore, **Francis Kakobogo's** stay on the suit land as the 1st Respondent's Catechist did not confer on him legal interest or ownership for his daughter and the Appellant to claim.

[7] Upon the trial Magistrate's evaluation of the evidence before her, she found that the plaintiffs grandfather **Francis Kakobogo**, stayed and utilized the suit land as a Catechist of the 1st Respondent and upon his demise, a portion of the land where he was staying and buried was given to the widow, the late **Mary Nsekanabo** and it is demarcated from the suit land by a foot path from the **Trading centre** to **Kitaki**. She concluded that the suit land therefore did not belong to the Plaintiff and dismissed the suit accordingly.

[8] The plaintiff/Appellant was dissatisfied with the judgment and the orders of the trial Magistrate and filed the present appeal on the following 3 grounds as contained in the memorandum of appeal;

- 1. The learned trial Magistrate erred in law and fact when she failed to consider the contradictions and inconsistencies in the*

Respondent's evidence thereby reaching a wrong conclusion which occasioned miscarriage of justice.

2. *The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a wrong decision which occasioned miscarriage of justice.*
3. *The learned trial Magistrate erred in law and fact when she held that the suit land belongs to the 1st Respondent which occasioned a miscarriage of justice.*

Counsel legal representation

- [9] The Appellants were represented by Counsel **Robert Hatega** of **Baryabanza & Co. Advocates, Hoima** while the Respondents were represented by Counsel **Tugume Moses** of **M/s Tugume -Byensi & Co. Advocates, Kampala**. Both Counsel filed their respective submissions for court's consideration in the determination of this appeal.

Duty of the 1st Appellate court

- [10] The duty of the first appellate court is to review the record of evidence 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 the exercise of the discretion and that as a result, there has been a miscarriage of justice; **Stewards of Gospel of Talents Ltd Vs Nelson-Onyango H.C.C.A No.14/2008** and **N.I.C Vs Mugenyi [1978] HCB 28**.
- [11] The present appeal being a first appellate court, it therefore has a duty to rehear the case by re-evaluating all the evidence adduced before the trial court as a whole by giving it a fresh and exhaustive scrutiny and then draw its conclusion of fact and determine whether on the evidence, the decision should stand.

Consideration of the grounds of Appeal

[12] The 1st ground of appeal shall be considered separately and the 2nd and 3rd grounds of appeal shall be considered jointly for they both revolve around how the trial Magistrate evaluated the evidence before her.

Ground 1: The learned trial Magistrate erred in law and fact when she failed to consider the contradictions and inconsistencies in the Respondent's evidence thereby reaching a wrong conclusion which occasioned miscarriage of justice.

[13] Counsel for the Appellant submitted that it was not pleaded anywhere in the W.S.D by the Respondents that the 5th (it should read the 1st Respondent Diocese) gave land to either **Kakobogo**, his son **Augustine Kasangaki** or his widow. That the trial Magistrate should have rejected that piece of evidence because a party can only prove a case he or she has pleaded; **Remmy Kasule Vs Makerere University [1975] HCB 376**. Counsel explained that **DW1, DW2 and DW3** all testified that the church gave or allowed people who were staying on the church land who included the family of the late **Kakobogo** (grandfather to the plaintiff), his widow, **Kakobogo's** son **Augustine Kasangaki** and others, land to carry on their activities permanently. That yet on the other hand, the defendants/Respondents never pleaded so and the trial Magistrate concluded that,

*“Having taken into account all the evidence that has been produced before court, it is my finding therefore that the suit property and the property the plaintiff's uncle (Kasangaki) is staying on was all church land and that the church then gave the land to the family of **Kakobogo** being the oldest Catechist of the church and the land given is separated by a foot path going to Kitaki.”*

[14] Counsel concluded that from the foregoing, the trial Magistrate having found so, she should not have declared the suit land as belonging to the 5th (should read as 1st defendant (Diocese) since it was already given to the family of **Kakobogo** and other people permanently.

[15] It is trite that the burden of proof in civil cases is on the plaintiffs to prove their case on a balance of probabilities; **Nsubuga Vs Kavuma**

[1978] HCB 307. This is also the law under **SS. 101-103 of the Evidence Act** which provide as follows;

“101. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[16] In the instant case, in his bid to discharge the onus laid on him by the above requirement of the law, the plaintiff/Appellant pleaded and adduced the following evidence;

- a) That he is a lawful administrator for her deceased mother, **Mary Nsekanabo’s** estate as a biological son. The deceased was buried on the suit land which she acquired from her late father **Mzee Francis Kakobogo** without any interference. The late **Francis Kakobogo** was also buried on the suit land. His uncle **Augustine Kasangaki** is also on the suit land.
- b) That the plaintiff was born on the said estate, grew up there as also a bonafide occupant and has been using it as an entire family of the deceased for growing crops.

[17] In cross examination, the plaintiff/Appellant testified that there is a **road from Kinogozi to Buhimba that separates the church land from the suit land.**

[18] During the trial, neither the plaintiff/Appellant nor any of his witnesses testified as to how the late **Francis Kakobogo** (grandfather to the plaintiff/Appellant) from whom he claims to derive his interest came to acquire the suit land.

[19] On the other hand however, the defendants pleaded and adduced evidence that the land/kibanja in issue is part of that land that originally belonged to the Crown government and was under the custody of the District Commissioner then, who gave it to missionaries in the 1920s for purposes of setting up their missions (See cross examination of DW4 Kyaligonza Charles).

Francis Kakobogo father to the late **Mary Nsekanabo**, the mother of the plaintiff was a Catechist at the 1st defendant/Respondent's church from 1958. **Seperia Kaijuko** (DW1) aged 87 at the time testified as follows;

*"I was once a Catechist of Kabale Catholic church between 1953-1958...I started knowing it in 1937 when I was Baptized in this church. I found a Catechist called **Kereto**, he was replaced by **Alisio** followed by **Maliko**. I followed **Maliko** and was replaced by **Kakobogo Francis**. **Kakobogo** was the grandfather of Monday, the plaintiff...**Kakobogo** died. He was buried at Kabale on the church land. He left a widow on this land. Even the widow later died. **Augustine Kasangaki** is the heir of **Kakobogo**."*

He testified further thus;

*"I know the plaintiff since childhood. He was born at his grandfather's home. His grandfather was **Kakobogo**. I know Monday's mother. She just came to **Kakobogo**'s home. **Kakobogo** was her father. After the death of **Maria**, the mother to the plaintiff, his father took him. By this time, the plaintiff was aged about 5 years. His father took him to his home in Kyaruyambi...**Maria** was buried where his father was buried on church's land...The church has not chased the family of the late **Kakobogo**. It gave the widow land where to stay."*

[20] The above evidence is virtually as that of **DW2** and **DW3**. The giving out of the land to the family of the late **Kakobogo** as alluded to by the Respondent's witnesses **DW1-DW3** was clearly pleaded in the amended W.S.D dated 13/5/2013 on record as follows;

Para.6 (d) of the amended W.S.D;

*"At the hearing, it shall be brought to the attention of court that the plaintiff is a son to the late **Francis Kakobogo** who was a Catechist at this St. Joseph Kabaale Sub Parish around*

*the year 1959 and he died in 1978. The late Catechist **Kakobogo** came on this land strictly to carry out the pastoral duties of Hoima Catholic Diocese and as thus, never acquired any legal interest in church land. His daughter to wit late **Mary Nsekanabo** was allowed by the church to live on this land after the demise of her father and she lived on acknowledging that this kibanja belonged to the church.”*

- [21] Clearly, the above evidence on record that the plaintiff’s family was given land by the church is not an afterthought but formed part of the Respondent’s pleadings and therefore, the trial Magistrate properly and rightly admitted the evidence and accordingly relied on it.
- [22] The trial Magistrate having believed and accordingly relied on the evidence that the suit property was given to the family of **Kakobogo** being the oldest Catechist of the church and that the land is separated by a foot path going to “Kitaki,” the question is, was she entitled to again rule that the suit land belonged to the Respondent church?
- [23] It is apparent from the evidence on record that it is a fact that the late **Kakobogo**, grandfather to the plaintiff from whom he derives his interest in the suit land was a Catechist of the Respondent church in the late 1950s as testified to by **Seperia Kaijuko** (DW1). Though this is denied by the plaintiff/Appellant, it is understandable because as he himself conceded, by the time the late **Kakobogo** died, the plaintiff/Appellant was not yet born. However, during the cross examination of **Nangoma Margret** (PW3), she admitted that **Kakobogo** was a Catechist at Kabaale Catholic Church.
- [24] Having found that **Kakobogo** was a Catechist at the Respondent church, the evidence as adduced by the defendants/Respondents to the effect that upon the death of **Kakobogo**, he was buried on the suit land and the widow was allowed to stay where the church had a house of the Catechist on the suit land, is believable. She was later followed by the daughter of **Kakobogo**, **Maria Nsekanabo** and her brother **Augustine Kasangaki**. However, the Respondent contend that **Kakobogo** was buried on the church land on humanitarian grounds and or on an honour of his long service for the diocese. I do in this case note that the late **Kakobogo**, as most catholic church dioceses do, was honoured to be buried at church on the church land because of his long service to the church but not that the deceased acquired legal interest thereon

for his descendants to claim and inherit. It was just an honour given to the long serving servant of God at this particular Kabaale Catholic Church that is not bestowed to or inheritable by any other person including the plaintiff/Appellant. It would appear to me that the plaintiff/Appellant in this case by suing the 1st Respondent church, he abused the honour and gesture of appreciation accorded by the church to his grandfather, **Kakobogo**.

- [25] Like any other person who had stayed on the church land on account of his pastoral duties as a Catechist, **Kakobogo** and his family grew both perennial and seasonal crops thereon. Such perennial crops like jackfruits, mangoes, coffee etc could not be used by his descendants in the likes of the Appellant as evidence that the suit land did not belong to the church. The same apply to the graves of the Catechist and his daughter. As per the evidence of **Bitima Vicent** (DW3), the land the late **Kakobogo** was permitted to use and later offered to his wife was not measured and this explains why the plaintiff could also not precisely tell its size.
- [26] This court however, again notes that as per the evidence of **Rev. Father Stephen-Asiimwe** (DW7) there was a wave of church neighbours putting pressure on church land by way of occupation and utilization. The church got into an amicable settlement with them to occupy and take ownership and beneficiaries of such arrangement included **Augustine Kasangaki** (uncle to the plaintiff/Appellant), **Byenkya Silvester**, the family of **Muhumuza**, and the family of **Mzee Rostico**. There is no evidence however that the plaintiff/Appellant also benefitted along this arrangement. He only benefited from that arrangement where that portion where his grandfather **Kakobogo** and his mother **Maria Nsekanabo** were buried was offered to **Kakobogo's** family and now is inclusive what has been offered to his uncle **Augustine Kasangaki**.
- [27] Otherwise, as found by the trial Magistrate, the entire suit land belong to the 1st Respondent Diocese. The plaintiff/Appellant failed to discharge the burden on him to prove his interest in the suit land. Upon his failure to show by way of evidence where his grandfather derived his interest from or how he came to acquire the suit land, yet on the other hand, the defendants/Respondents laid down their genesis and the root of interest of the suit land, on that basis, the entire appeal fails.

- [28] I do however note that the 1st Respondent church diocese did not plead or file any Counter claim for the suit land. It follows therefore that the trial Magistrate's decreeing of the suit land to the Hoima Catholic diocese was an error because court cannot decree to a party what that party has not sought. However, in view of the findings of this court that the plaintiff/Appellant had no interest whatsoever in the suit property, the trial Magistrate's error of decreeing the suit property to the 1st Respondent Hoima Church Diocese did not occasion any miscarriage of justice.
- [29] In the premises, the entire appeal is dismissed with costs to the 1st Respondent Hoima Catholic Diocese.

Dated at Masindi this 29th day of **April, 2022.**

Byaruhanga Jesse Ruggyema
JUDGE