

UGANDA / JUDGMENT

Asimwe and 2 Others v Mujuni (Civil Appeal 97 of 2023) [2024] UGHC 1158 (18 October 2024) [2024] UGHC 1158

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Appeal 97 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT HOIMA

CIVIL APPEAL NO. 097 OF 2023

1. ASIIMWE MERIDA

2. KISEMBO GERALD

3. ONEGA PATRICK:.....: ##### VERSUS

MUJUNI ALEX:.....:

[Appeal from the judgment and orders of H/W Komakech Kenneth, the Magistrate Grade I,
Buliisa Chief Magistrate's Court in Civil Suit No. 03 of 2020 delivered on 16/12/2022]

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

Background

- §[1] The Appellants/Plaintiffs sued the Respondent/Defendant for inter alia; declaration of ownership of the **suit land measuring** approx. 60x20 metres situated at Kirama village in Buliisa **District**, that the Respondent is a trespasser thereon, permanent injunction, general damages and costs of the suit.

- [2] It was the Appellants' case that they acquired the suit land by inheritance from their late mother, Nyakato Kakire who also acquired the same by way of inheritance. That on 1/10/2019, the Respondent without the Appellants' consent forcefully entered the land by way of constructing a kraal claiming that the suit land belongs to him. That the Respondent's conduct and or actions occasioned and continues to occasion the Appellants untold anguish, discomfort, inconvenience and denial to further develop the land for which they hold the Respondent liable for general damages.
- [3] The Respondent on the other hand denied the Appellants' claims and contended that the suit land is ancestral family land (Bugema

clan) of which he has been in possession for over 29 years where he has made a lot of developments to wit, kraals, houses, tree plantation and grazing of animals. That the claimed 60x20 metres, the suit portion of land in dispute, is part of his approximately 30 acres of his ancestral land and therefore, forms part of his land. Lastly, that the Appellants are a group of land grabbers who are being pushed by greed as a result of the discovery of oil and construction of oil pipeline in the area to frustrate the Respondent's silent enjoyment of his land having initially used their relative, Wandera Christopher and Kamanyire Steven to grab the entire Respondent's land vide **Civil Suit No. 17** of 2015 and Civil Appeal No. 29 of 2017 in the High Court of Uganda at Masindi and they lost.

- [4] The trial Magistrate on his part, upon evaluation of the evidence before him found that the Appellants claimed that they occupied and utilised the suit land which belonged to their grandfather who died in 1972 and left their mother a one Nyakato who died in 2016 and as her children inherited the land. That however, the Appellants did not adduce any evidence alluding to any custom under which they operated or how their grandfather, Okello Wange came to acquire the suit land apart from stating that it was by first occupation without detailing the status of the suit land before and when their grandfather settled on it. That proof of their grandfather's occupation would determine their customary claims. The trial magistrate concluded that upon visiting locus, he found that whereas the Appellants were claiming a portion of land measuring 60x20 metres, the suit land was what the Appellants pleaded as it was **approximately 30 acres**. As a result, the trial magistrate found that the Appellants had failed to prove their case and he dismissed it with costs to the Respondent/Defendant.
- The Appellants were dissatisfied with the judgment and orders of [5] the trial magistrate and filed the present appeal on the following grounds of appeal:
- The learned trial Magistrate erred in law and fact when he 1. failed to properly evaluate the evidence on record and thereby

arrived at a wrong conclusion that the disputed land belongs to the Respondent.

- \$2.\$ The learned trial Magistrate erred in law and fact when he declared the Appellants' entire land (about 16.3 acres) without any counterclaim to that effect causing the Appellants' failure of injustice.
- The learned trial Magistrate erred in law and fact when he \$3.\$ concluded that the disputed land (about \$60x20\$ metres) together with the entire land of the Appellants (about 16.3 acres) is the same land in Masindi Civil Suit No. 17 of 2015/Civil Appeal No. 29 of 2017.
- The learned trial Magistrate erred in law and fact when he \$4.\$ failed to address himself to the correct procedure to be followed at locus.

Counsel Legal representation

The Appellants were self-represented while the Respondent \$[6]\$ was represented by Mr. Norbert Alibankoha of M/s Alibankoha & Co. Advocates, Hoima.

On record, there are submissions from both parties for consideration by this court in the determination of the appeal.

Duty of the 1st Appellate Court

It is the duty of this court as a first appellate court to re-hear the \$[7]\$ 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, Fr. Narsensio Begumisa & 3 ors vs Eric Tibebaga, S. C. C. A No. 17 of 2000; [2004] KALR 236. In case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses and test their veracity. It must weigh the conflicting evidence and draw its own inference and conclusions as was held in Lovinsa Nankya vs Nsibambi [1980] HCB 81.

Preliminary point of law

- The Appellants raised a preliminary objection to the effect that the \$[8]\$ Powers of Attorney to Happy Ignatius both in the lower court and in this court is incompetent at law, the donor **Mujuni Alex** having died by \$3/11/2016\$.
- The Appellants submitted that as per the evidence of Mugema \$[9]\$ Gabriel (DW2) dated 3/11/2016, the donor Alex Mujuni, died in Murama and therefore, that DW2 testified on behalf of the deceased without his instructions. That testimony given on behalf and in the name of deceased on the authority of a power of attorney of the deceased is a nullity because the Powers of death of the donor. Wandera Attorney lapses upon the Christopher & Anor Vs Mujuni Alex & Anor H. C. C. A. No. 29/2017. That in this case, **Happy Ignatius** (DW1) got "the Power of Attorney" on 10/3/2023 when the Respondent/Defendant Mujuni Alex, the donor died sometime back thus, the evidence of DW1 the "Donee" is a nullity.

- [10] Again, that basing on the above, even the defence pleadings and the judgment and decree of the lower court is a nullity because the written statement of defence (WSD) was filed in court on \$13/2/2020\$ and yet by \$3/11/2016\$, the said Mujuni Alex was already deceased.
- [11] Counsel for the Respondent on the other hand submitted that the Powers of Attorney granted to **Happy Ignatius** are valid because the donor, Mujuni Alex is still alive.
- [12] In this case, Counsel for the Respondent has raised a preliminary objection that the Powers of Attorney granted to **Happy Ignatius** who testified \$\overline{\text{as}}\$ \$DW1\$ in this \$of\$ case \$on\$ behalf the **Respondent/Defendant** \$bv\$ **Mujuni Alex**. the Respondent/Defendant is incompetent and unlawful premising it on the fact that the donor of Powers of Attorney, Mujuni Alex is dead. There is however no evidence on record that the said donor,

Mujuni Alex is dead. Counsel for the Appellants relied on the testimony of Mugema Gabriel (DW2) who testified on 3/11/2016 in Civil Suit No. \$17/2015\$ thus:

"The \$1^{st}\$ defendant [Mujuni Alex] is a grandson of Murama but he died in Murama".

- [13] On the face of the statement above, it appears to refer to "Mujuni Alex as the one who died in Murama (read Kirama). It is however apparent that DW2 was referring to "Murama", the grandfather of **Mujuni Alex** as the deceased but not Mujuni Alex himself. The problem appears to have arisen out of the way the proceedings were lower recorded \$ \mathbf{b} \mathbf{v} \$ the court. \$ \mathbf{If} \$ it were \$SO\$ that the **Respondent/Defendant** **Mujuni Alex** was dead. the Appellants/Plaintiffs would not have instituted the suit now under i.e. Alex appeal. against Mujuni. him Secondly. the Appellants/Plaintiffs would have challenged the status of **Happy Ignatius** (DW1) who obtained the Powers of Attorney during the trial of the suit of lower court.
- [14] Proof about the existence and status of the Respondent/Defendant. Mujuni Alex is in the proceedings of 24/2/2022 of the lower court where he was reported sick and admitted in Kampala and the Appellants did not contest this report made to court. Indeed, the trial Magistrate in his **judgment at p.5** noted as follows:

"It is however pertinent to note that at the inception of this case, the defendant [Alex Mujuni] as a result of his health status granted Powers of Attorney to one Happy Ignatius (Donne) (sic) to act as his lawful attorney for purposes of prosecuting this land suit".

- [15] Whereas I do agree that it is the position of the law that a power of attorney terminates upon the death of the principal, Nanziri Yayeri & Ors vs Namirembe Kagimu & Ors H. C. C. S. No. \$313/2014\$, in this case, in the absence of any evidence from the Appellants/Plaintiffs that the Respondent/Defendant is dead, I find this preliminary objection devoid of any merit and I accordingly reject it. The decision in **Wandera vs Mujuni** (supra)

on the status of Mugema Gabriel who testified as DW1 was per **incuriam** because it was a result of DW1's ambiguous testimony and that the way it was recorded by the lower court regarding **Muiuni Alex** as a deceased person.

[16] **Grounds 1, 2, & 3** relate to how the trial Magistrate evaluated the evidence before him before arriving at the conclusion that the Respondent was the rightful owner of the suit land. The three grounds of appeal are to accordingly be resolved together.

Grounds 1, 2 & 3: Evaluation of Evidence

- [17] It is not in dispute that both parties own and occupy portions of land in Kirama Village adjacent to each other. The Appellants' entire land is about 16 acres where they have their residential houses and fruit trees and the Respondent's land which he claims to be approx. **3-4 acres**. Whereas the Appellants claimed that the Respondent crossed the boundaries of their land or extended to the Appellants' land by the contested **60x20 metres**, the Respondent contended that the contested area where they have a kraal is part of their land. The problem however, was how the parties led their respective evidence. Each party adduced evidence defending their respective entire portions of land instead of focusing on the boundaries of their portions of land vis-as-vis the contested 60x20 metres and therefore help court determine as to who encroached on the other's land. This case was therefore about boundary determination between neighbours and not ownership of their respective portions of land which were not in issue.
- [18] As a result of the manner the trial of the suit was conducted, the trial Magistrate also ended up in the trap. Instead of focusing on the suit portion of land i.e. **60x20 metres** that had allegedly been trespassed on, he allowed the parties to put him in a voyage to explore the entire pieces of land the respective parties owned and or occupied thus appeared in his conclusion to decree the entire land of the Appellants measuring approximately 16.3 acres to the Respondent. This again explains why he allowed the parties to

bring in the judgments in **Civil Suit No. 17 of 2015** and Appeal in **Civil Appeal No. 29/2017** whose subject matter was clearly land in **Kayeka** village and not **Kirama** village where specifically the present suit land measuring 60x20 metres is located. The decision in Civil Suit No. 17 of 2015 did not in any way determine the issues in the present suit under appeal.

[19] As a result, I find **grounds 1, 2 & 3** having merit and they accordingly succeed.

Ground 4: The learned trial Magistrate erred in law when he failed to address himself to the correct procedure to be followed at locus in quo.

[20] As already observed, this was a case of boundary ascertainment for purposes of finding whether the Respondent indeed encroached and or trespassed on the Appellants' neighbouring land by the contested **60x20 metres**. At locus in quo, the trial Magistrate did not focus on the boundaries and as a result, no sketch plan/map of the area was drawn and no observations were made to that effect, especially locating the kraal that was allegedly

established in the disputed portion of land as required under Direction (e) of the Practice Direction No. 1 of 2007.

Conclusion

- [21] This is a case where there were serious glaring procedural defects by the trial Magistrate which occasioned the Appellants a miscarriage of justice. When there is such glaring procedural defects of a serious nature by the trial court in the conduct of the trial, the High Court is empowered to direct a retrial if it forms the opinion that the defect resulted in a miscarriage of justice.
- [22] In the premises, I accordingly allow the appeal, set aside the judgment and orders of the trial Magistrate and order a retrial before the Chief Magistrate's Court with directions to focus on the contested portion of land measuring 60x20 metres and ascertain who is the owner and trespasser thereon. No order as to costs since the procedural defects were a result of court and not parties.

Dated at Hoima this 18th day of October, 2024.

Byaruhanga Jesse Rugyema JUDGE

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