

UGANDA / JUDGMENT

Banage Tibetta Tito and 3 Others (Civil Appeal 38 of 2023) [2024] UGHC 1167 (18 October 2024)

[2024] UGHC 1167

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Appeal 38 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT HOIMA CIVIL APPEAL NO. 038 OF 2023

BANAGE JOSEPH:..... VERSUS**1. TIBEITA TITO 2. TUGUME CHRISPUS 3. PETER MUHUMUZA 4. STEVEN BILLY
KIIZA:.....**

[Appeal from the judgment and orders of H/W Mfitundinda George, Ag. Chief Magistrate of Hoima Chief Magistrate's Court sitting at Hoima in Civil Suit No. 32 of 2020 dated 29th June, 2023]

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA**JUDGMENT****Background**

- The Appellant instituted Civil Suit No. 32 of 2020 against the Respondents that he is the rightful owner of the suit land measuring approximately 43.5 hectares situate at Rukaiga-Kikoboza Village, Buhimba Sub-County, Kikuube District, that the Respondents are trespassers thereon and a permanent injunction restraining the Respondents from further trespass, general damages, mesne profits, punitive damages, interest and costs of the suit.

- It was the Appellant/plaintiff's case that in around 1975, the [2] Appellant acquired the suit land which he found vacant by first settlement by way of grazing and mushroom picking. That upon confirmation that the suit land was vacant, the Mutongole (Parish) Chief of the area a one Erinewo Mugasa availed him with ownership/allocation of the land which documents of unfortunately got lost during the 1978/79 Amin war but that following the restoration of peace, he commenced the process of

acquiring a certificate of title to the suit land and on 30/1/2015, the Area Land Committee of Buhimba Sub-County inspected the land and issued a report to the Hoima District Land Board indicating that there was no conflict thereon and that the Appellant/Plaintiff had been using the land for mixed farming for over 30 years.

- The Appellant contended that at all material times he had been [3] using the suit land for grazing, tree, coffee and sugarcane planting 15/1/2020, the Chief Administrative Officer and on the recommended for approval of the Appellant's application.
- It was in July 2020 that the Respondents/Defendants unlawfully [4] trespassed on the suit land. The 2nd Respondent on the orders of the 1st Respondent used weed master (herbicide) to spray part of the suit land the Appellant had been using for grazing of his animals for which he holds the Respondents liable in general and punitive damages.
- In their joint defence, the Respondents on the other hand denied [5] the Appellant's claims and contended that the 1st Respondent and the Appellant who is his biological brother and the 2nd, 3rd & 4th Respondents acquired the suit land as a family by way of first occupation and therefore, they are not trespassers on the suit land which they have utilized un-interrupted as a family for over a period of 50 years.
- The 1st Respondent **Tibeita Tito** counterclaimed against the [6] Appellant for fraudulently starting the process of bringing the family suit land under the Registration of the Titles Act without disclosing the interests of the counterclaimant, and unlawfully renting out some of the suit land to other people.
- Upon evaluation of the evidence before him, the learned trial Ag. [7] Chief Magistrate found that the Appellant did not acquire the suit land alone as evidenced by the family meeting which involved his siblings for purposes of mobilising money for converting the suit

land from customary tenure to freehold and concluded that the Respondents are not trespassers.

- As regards the counterclaim, the learned trial Ag. Chief Magistrate [8] found that the suit land was jointly acquired by the Appellant and the 1st Respondent with their late father **Yoweri Banage** and their other brother James Kaliisa and ordered that the suit land be divided amongst the 4 original owners while the share of the deceased is to be divided amongst his beneficiaries.

- The Appellant's suit was therefore accordingly dismissed with \$[9]\$ costs and judgment of the counterclaim was entered in favour of the 1st Respondent/Counterclaimant with costs against the Appellant.
- [10] The Appellant was dissatisfied with the judgment and orders of the learned trial Ag. Chief Magistrate upon which he lodged the present appeal on the following grounds:
- That the learned trial Magistrate erred in law and fact when in $\mathbf{1}$ evaluation of evidence failed to consider and/or ignored the evidence of the appellant and thereby came to a wrong decision that the suit land was family land acquired by appellant jointly with Tito Tibeita, James Kaliisa and their father Yoweri Banage.
- That the learned trial Magistrate erred in law and fact when in 2 evaluation of evidence failed to consider and/or ignored the evidence of ownership of the suit land presented by the appellant and wrongly decreed the suit land to be joint property of the appellant jointly with Tito Tibeita, James Kaliisa and their father Yoweri Banage.
- That the learned trial Magistrate erred in law and fact when he $\frac{Z}{}$ found that the suit land was customarily owned jointly by the appellant with Tito Tibeita, James Kaliisa and their father Yoweri Banage.
- That the learned trial Magistrate erred in law and fact when he 4 found that Peter Muhumuza (2^{nd} Respondent) and Steven Billy (3^{rd} Respondent) owned an interest in the land without proof.

That the learned trial Magistrate erred in law and fact when he 5. ignored major inconsistencies in the Respondents' case but nevertheless found for the Respondents thereby prejudicing the Appellant.

Counsel legal representation.

- [11] The Appellant was represented by Mr. Simon Kasangaki of M/s Kasangaki & Co. Advocates, Hoima while the Respondents were represented by Mr. Alibankoha Norbert of M/s Alibankoha & Co. Advocates, Hoima. Both Counsel filed their respective submissions for consideration in the determination of this appeal.

Duty of the 1^{st} Appellate Court.

- [12] This appeal arises from the decision of the Ag. Chief Magistrate and therefore this court is sitting as a first appellate court. It is trite that the duty of this court as a first appellate court is to rehear 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, Fr. Narsensio Begumisa & 3 ors vs Eric Tibebaga S. C. C. A. o. 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 or heard the witnesses to test their veracity, it must weigh the conflicting evidence and draw its own inference and conclusions, see Lovinsa Nankya vs Nsibambi

[1980] HCB 81.

Consideration of the Appeal.

[13] The Appellant raised 5 grounds of appeal which all related as to how the trial Magistrate evaluated the evidence before him. As a result, all the 5 grounds of appeal shall be considered together.

Grounds 1, 2, 3, 4, & 5: Evaluation of Evidence.

- [14] Counsel for the Appellant submitted that the learned trial Magistrate concentrated much on the Respondents' evidence and ignored the evidence of the Appellant. That the suit land has never been family land as alleged by the Respondent's and that if it was, their late father would have included the same in his WILL which he made before his death.
- [15] That the Appellant in this case adduced evidence that he acquired the suit land in 1975 as vacant which he later applied for and it was allocated to him by the sub-county chief. That he continued to occupy and utilise the land until in 1999 when he started the processing of its title and invited his siblings including the 1st Respondent to join hands and acquire a certificate of title which the 1st Respondent ignored. That it is the other siblings, **Jane Banage** and **Kaliisa James** who contributed towards the acquisition of the certificate of title of the land that are co-owners. That otherwise, the Appellant has been utilising the suit land for grazing cattle, planting cash crops like coffee, sugarcane and planting of trees like eucalyptus and pine.
- [16] Counsel for the Appellant concluded that the parties have a family land situate at **Kyamuswija Village** owned jointly by the Appellant together with his siblings and that the same was shared amongst themselves as testified by the Appellant and confirmed by the 1st Respondent and that this is the land the Appellant applied for together with the 1st Respondent and **James Kaliisa** which they shared and it is not in dispute. That the above land situate at **Kyamuswija village** is quite different from the suit land situate at **Rukaiga-Kikoboza village** which the Appellant, **Jane Banage** and **James Kaliisa** applied for. That the trial Magistrate therefore, mixed up the 2 sets of applications and processes and wrongly decreed the suit land to the Respondents to the prejudice of the Appellant.
- [17] Counsel for the Respondents on the other hand submitted that the Appellant and **Kaliisa James** started on the process of bringing the suit land under the operation of the Registration of Titles Act

(D. Exhs.1, 2, 3 & 4) but later abandoned the application on the grounds that the 1st Respondent did not contribute money and started afresh for a new title. That therefore, it is not true that D. Exhs.1, 2, 3 & 4 are in respect of a different land but they are in respect of the suit land.

- [18] Counsel for the Respondents concluded that the trial Magistrate was right to hold that the suit land jointly belonged to the Appellant, Banage Joseph, Tito Tibeita (1st Respondent), their brother James Kaliisa, and their father Yoweri Banage.
- [19] Upon perusal of the record and submissions of both Counsel, I find that the **Appellant** and the 1st Respondent are biological brothers, both being the children of the late **Yoweri Banage**. The 2nd and 3rd Respondents are children of the 1st Respondent. There is however confusion as to whether the suit land is situate in Rukaiga-Kikoboza L. C. I or Kyamuswija-Kikoboza L. C I for it appears the parties have separate 2 pieces of land each located in either of the 2 villages.
- [20] The Appellant's claim is clear; it is for land situate at Rukaiga-Kikoboza L. C I. Counsel for the Appellant submitted that the trial Magistrate confused the 2 sets of land. It is therefore important for this court, basing on the evidence on record to make a dissection of the 2 pieces of land and make a finding as to whether the 2 pieces of land are distinct of each other and if so, which of the two pieces of land is or comprise the suit land.
- [21] During cross-examination at p.11 of the typed proceedings the Appellant/PW1 as regards the suit land at Rukaiga village, stated thus:

"I applied for 100 acres. I applied with 2 other people i.e. James Kaliisa and Jane Banage. I first applied alone later I included my two other colleagues. Even before it was given to me formally I was using it customarily by grazing there".

The above evidence is supported documentary by P. Exhs.1 & 2 which are comprised of the application for conversion of land from customary tenure to freehold tenure dated 6/1/2015\$ and notification of approval/refusal/deferment of development under the Physical Planning Act, 2008, respectively.

[22] Then, during further cross-examination at page 15 of the typed proceedings, the Appellant referred to the land at Kyamuswija village as follows:

"I applied for 50 acres in 1978. It is different from the suit land. We did not apply for this land as a family. We had issues over 50 acres applied for in 1978 but we resolved them. We even shared. D1 [1st Respondent] was also given his share. We shared equally".

[23] The 1st Respondent/DW1, on the other hand, as regards the land at Kyamuswija stated at p.18 of the typed proceedings thus;

"The suit land is at Kyamuswija-Rukayiga.....

The land at Kyamuswija has never been shared between us and plaintiff. It is my land".

At page 19 of the proceedings, the 1st Respondent, however, regarding the same land at Kyamuswija village explained thus:

"We applied 4 of us in 1975. We applied for 50 hectares We were not given a certificate of title in 1975. We did not have money. The land we applied for 4 of us is the same land that Banage Joseph, Banage Jane and Kaliisa James applied for later"..... Kyamuswija and Rukaiga are in Kikoboza LC I. The land at Kyamuswija was shared. The land we shared is not in dispute. The land that was not shared is at Rukaiga. I am using the land at Rukaiga. This is why I was sued".

[24] Clearly, the above evidence of both the Appellant and the ¹ Respondent as regards the land at Kyamuswija is documentary supported by D. Exhs. 1, 2 & 3. Though the application for rural land is undated and the acreage applied for is not reflected (D. Exh. 1), the Inspection Report (D. Exh.2) dated 8/5/1978 and the Instructions to Survey (D. Exh. 3) dated 7/8/1990 indicate the acreage to be surveyed as approx. 20 hectares and not 50 hectares as revealed by the parties.

- [25] Secondly, though it appears that the acquisition of this land at Kyamuswija, is under contest and therefore, its ownership, both the Appellant and his brother, the ¹ Respondent agree that it is not now in dispute. The conclusion is that it is different from the suit land at Rukaiga village. Documentary evidence regarding the land at Kyamuswija village are D. Exhs. 1, 2 & 3.
- [26] Further proof that the suit land is different from the now uncontested land at Kamuswija is found in the evidence of the ¹ Respondent who himself stated during cross-examination at page 18 of the proceedings thus;

"I have houses on the suit land".

This was a lie on part of the ¹ Respondent, his houses are not on During locus visit, it was found that the ¹ the suit land. Respondent (D1) was not using any part of the land in dispute save for his children (² & ³ Respondents) whom he placed there who were using part of the suit land for only cultivation of food crops. There was no evidence of his houses being on the suit land as he claimed in his testimony in court. The ¹ Respondent's houses are on the **Kyamuswija** land that is not as of now in dispute.

- [27] In the premises, I find that the trial Magistrate, indeed confused the land at Kyamuswija village and Rukaiga village to rule that it was the same land. The trial Magistrate therefore erred in law and fact when he found that exhibits D. Exh.1, 2, 3 & 4 to refer to the suit land. These exhibits were in respect of the Kyamuswija land whose certificate of title has never been processed and land which The suit land is that located at is not in dispute as of now. Rukaiga-Kikoboza L. CI whose documentary evidence is comprised of P. Exhs 1 & 2 made on \$6/1/2015\$ and \$15/1/2020\$ respectively.
- [28] As regards the suit land, the Appellant testified that he alone acquired the suit land by way of first occupation and that later it was allocated to him by the parish and sub-county chiefs. Though

there is no evidence to support such claims by way of a letter of allocation or otherwise since the documentation got lost during the 1978/79 Amin war, it is him and his siblings, Banage Joseph, Banage Jane and Kaliisa James who applied for its conversion from customary tenure to freehold tenure (P. Exh.1) after pooling resources together for its inclusion under the Registration of the Titles Act. There is no evidence that at the time, the \$1^{st}\$ Respondent or any member of his family was in occupation and or utilisation of the land or contributed to the pool for resources to have the land registered. The \$1^{st}\$ Respondent placed his children (\$2^{nd}\$ & \$3^{rd}\$) Respondents) on the suit land in around 2017 and thereafter, as the Appellant clearly testified and corroborated by the Area Land Committee which inspected the land, found it without any disputes and therefore recommended that it is available for conversion to freehold in favour of the Appellant and his co-The purpose of the family meeting of applicants (\$P.\$ Exh.1). \$25/12/1999\$ called by the Appellant was for mobilisation of money to have the suit land converted to freehold. There is no evidence that was adduced by the \$1^{st}\$ Respondent that he was either involved in the meeting or that he contributed to the cause of the meeting. It is those who pooled resources to the cause that were to benefit from the suit land the Appellant had acquired by way of first occupation and the \$1^{st}\$ Respondent was not among them.

[29] In conclusion, I find that the trial Magistrate erred in law and fact when he mixed up the 2 sets of application and processes of land at Kyamuswija village with that of Rukaiga village where the suit land is situate and ended up wrongly decreeing the suit land to the Respondents to the prejudice of the Appellant. However, I find the other claims of the Appellant for example that the late **Yoweri Banage** left a **WILL** which purportedly did not include the suit land as estate property, alleged inconsistencies in the evidence of the \$1^{st}\$ Respondent and the acreage of the suit land without merit. As regards the alleged **WILL** of the Appellant by the \$1^{st}\$ Respondent's father Yoweri Banage, there is neither evidence on record alluding to it nor was it pleaded. The alleged inconsistencies are in regard to the neighbours and boundaries of the suit land but this was

clarified and clearly indicated in the demarcation form (P. Exh.1). The parties were merely confused of the compass directions of the suit land. I find such inconsistencies minor and not deliberate to mislead court and therefore did not prejudice the Appellant, Baluku Samuel & Anor vs Uganda [2018] UGSC 26. As regards the acreage, parties were referring to mere estimation and not the actual acreage hence the reference to 43.5 and 50 hectares.

- [30] Therefore, **grounds 1, 2, 3 & 4 of appeal** are found to have merit and they accordingly succeed, while **ground 5** fails. The Respondents have no interest at all on the suit land and are therefore trespassers thereon.
- [31] The appeal is in the premises accordingly allowed. The judgment and orders of the Chief Magistrate's court are set aside and substituted with an order decreeing the suit land to the Appellant with costs of this court and in the lower court to the Appellant.

Dated at Hoima this \$18^{\text{th}}\$ day of October, 2024.

Byaruhanga Jesse Ruggyema **IUDGE**

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