

UGANDA / JUDGMENT

Biraaba v Byeitima (Civil Appeal 8 of 2022) [2025] UGHC 83 (10 January 2025)

[2025] UGHC 83

COURT

High Court of Uganda

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Appeal 8 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT HOIMA CIVIL APPEAL NO. 008 OF 2022

(Formerly MSD Civil Appeal No.001 of 2021)

(Arising From Hoima Chief Magistrate's Court, C. S No.27 of 2011)

ELIZABETH BIRAABA ::::::::::::::::::::::::::::::::::**VERSUS****SARAH BYEITIMA ::::::::::::::::::::::::::::::::::**

[Appeal from the Judgment and decree of H/W Atim Harriet, Magistrate Grade 1, the Chief Magistrate's Court of Hoima in C. S No.27 of 2011 delivered on the 15th day of September 2020]

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT**Background**

- This appeal is one of the files that survived the fire that gutted the Hoima High \$[1]\$ Court registry on the early morning of \$21/10/2023\$.

- [27] The Appellant/plaintiff instituted C. S No.027 of 2011 in the Chief Magistrate's Court of Hoima for inter alia, a declaration that the Appellant is a rightful owner of the suit land situate in Kyarwabuyamba village, Bujumbura **Division Hoima District** and that the Respondent/defendant is a trespasser.
- It was the Appellant's case that the Appellant is a widow to the late Gerson \$[3]\$ Biraaba who passed away in the 1980s. That the suit land originally belonged to the family of the deceased, Gerson Biraaba's mother, a one Sofia Kabajwiga (The Appellant/plaintiff's mother in law)
- The Appellant averred further that upon the death of her mother in law, Sofia \$[4]\$ Kabajwiga and her husband Gerson Biraaba in 2008, the suit land was divided between the Appellant as the widow of the late Gerson Biraaba and a one Nyakahara Christine, the late Gerson Biraaba's sister (Appellant's sister in law). The Appellant continued to utilize the suit land until on \$24th/3/2011\$ when the defendant/Respondent trespassed upon the suit land by deploying over 20 young men who while wielding sticks, hoes and pangas, forcefully entered the suit land, cleared it for cultivation and fenced it off.
- In her defence, the Respondent/defendant denied the Appellant/plaintiff's \$[5]\$ claims and contended that she has no interest or claim at all in the suit land save for being a care taker of Harriet Byeitima's interest on the suit land. The defendant averred that Harriet Byeitima had filed a suit in the Hoima Chief Magistrate's Court over ownership of the suit land vide C. S No.38 of 2008 against a one Nyakahara Christine, who gave the Appellant powers of attorney to defend the suit but later the said Harriet Byeitima withdrew the suit on the ground that the defendant Nyakahara Christine acknowledged in the Appellant's revocation of powers of Attorney document that she had no interest in the land.
- The learned trial Magistrate directed herself on the burden and standard of \$[6]\$ proof in civil suits, that the burden of proving a fact lies on the plaintiff to prove it and that the standard is on the balance of probability. Then found that the Appellant was married to Gerson Biraaba. That Gerson's father Stephen Kabajwiga never owned the suit land. That instead, Harriet Byeitima acquired the suit land from her father, Saulo Byeitima and thereafter acquired certificate of title thereto. That the defendant/Respondent was merely utilizing the suit land with the consent of the lawful owner, Harriet Byeitima and lastly, that the plaintiff did not adduce any evidence to impeach Harriet Byeitima's certificate of title. The plaintiff's suit was accordingly dismissed with costs to the Respondent/defendant.
- The Appellant was dissatisfied with the judgment and orders of the trial \$[7]\$ Magistrate and lodged the instant appeal on the following grounds;
- 1. The trial Magistrate erred in law and fact when she erroneously and against the weight of the oral, documentary and physical evidence led by appellant to the contrary held that the appellant failed to furnish adequate evidence to prove that the suit land belonged to her.

- 2. The learned trial Magistrate erred in law and fact when she erroneously entertained and considered mainly hearsay and unsubstantiated evidence led by the Respondent to the effect that her sister had acquired the suit land from their father thereby reaching a wrong conclusion that the Respondent was not a trespasser.
- 3. The learned trial Magistrate erred in law and fact when she, without any verifiable evidence and while ignoring the glaring contradictions in the respondent's evidence, upheld the respondent's claim of having been authorized by her sister to use the suit land as registered proprietor when such registration was procured after the filing of the suit.
- 4. The learned trial Magistrate erred in law and fact when she engaged in speculation and conjecture when she entertained evidence of a revoked power of attorney and upheld the wrong proposition that Civil Suit No.038 of 2008 was resolved in favour of Harriet Byeitima in holding as she did that the suit land did not belong to the appellant thus subjecting her to a miscarriage of justice.
- 5. The learned trial Magistrate erred in law and fact when actuated by actual or apparent bias ignored and failed to keep a proper record of the locus in quo visit pertaining to the plaintiff's oral and physical evidence of an old barbed wire boundary line crossed by the respondent in trespassing onto the suit land.
- 6. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and at the locus proving the appellant's ownership of the suit land thereby reaching the wrong conclusion that the respondent was not a trespasser.

Counsel legal representation

The Appellants were represented by Mr. Simon Kasangaki of M/s Kasangaki & Co. Advocates, Masindi while the Respondents were represented by Mr. Paul Mukiibi of M/s Mukiibi & Kyeyune Avocates, Kampala. Both counsel filed their respective submissions for consideration in the determination of this appeal.

Duty of the 1st Appellate court

This being an appeal from the Chief Magistrate's Court, a court of first instance, it is settled that this court as a first appellate court, is under duty to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate the evidence adduced and make its own conclusion, while bearing in mind the fact that this court never heard or observed the witnesses testify so as to test their veracity, Sanyu Lwanga Vs Sam Galiwango, SCCA No.48 of 1995.

Consideration of the Appeal

- [10] **Grounds 1,2,3 & 4** relate to the manner in which the trial Magistrate evaluated the evidence, they shall be dealt with together. **Grounds 5 & 6** relate to locus proceedings; they shall also be dealt with together.

Grounds 1-4: Evaluation of the Evidence

- [11] In evidence, the Appellant/plaintiff testified as **PW1**, that originally, the suit land was owned by her mother in law, Sophia Kabajwiga. Her husband Gerson Biraaba passed on in 1981 but before his death, his mother Sophia Kabajwiga had given him the suit land which he utilized as a cattle farm on one part and another part was used for cultivation.
- [12] That however, PW1's mother in law died in 1993 and the father of the Respondent, Byeitima in 1995 trespassed on the suit land. That as a result of the trespass, her sister in law (sister to her husband), Christine Nyakahara sued Byeitima Prima in L. C II court in 2007 which found that Byeitima had crossed the boundaries, thus judgment was given in favour of her sister in law, Christine Nyakahara. However, that in 2008, the family divided the land into 2 parts where Nyakahara Christine took one part and the Appellant as the widow of Biraaba, took another part of about 8 acres. Then some other portion was however given to the sister of Nyakahara a one Susan. The sharing document dated 5/9/2008 was admitted as P. Exh.1.
- [13] The Appellant/plaintiff however further testified that after the family had shared the land, Prima Byeitima (sister of the Respondent) gave powers of
- Attorney to the Respondent who sued Nyakahara Christine [vide C. S No.38 of 2008] over ownership of the suit land. According to the plaintiff, this suit was concluded by way of a consent judgment (P. Exh.2) which was to the effect that the plaintiff i.e, Prima Byeitima and another vacate the land.
- [14] To put the context of this consent (P. Exh.2) into proper perspective, I reproduce it below;

"CIVIL SUIT NO.038 OF 2008 1. HARRIET N. BYEITIMA <table>

2. MARY BRIMA BYEITIMA..... **VERSUS** NYAKAHARA
CHRISTINE

CONSENT JUDGMENT

$\mathcal{L} = \mathcal{L} \mathcal{L}$ IT IS HEREBY AGREED BY BOTH PARTIES AS FOLLOWS:

1. That civil suit No.038 of 2008 be and is hereby withdrawn. 2. Each party shall bear its own costs.

Sign Counsel for the plaintiffs

Sign Counsel for the defendants

JUDGMENT IS ENTERED IN THE TERMS ABOVE CONSENT

$\mathcal{L} = \mathcal{L} \mathcal{L}$

This 23rd day of March 2011. Sign Chief Magistrate"

- [1] According to the Respondent (DW1), however, this is the same land, the subject of C. S No.38 of 2008, the Appellant is claiming in the present suit. According to the Respondent, the reasons for the withdraw of the suit was based on a Revocation of a power of Attorney where Nyakahara Christine had appointed the Appellant to represent her in C. S No.38 of 2009 but revoked it on the grounds that she, Nyakahara Christine had no claim over or interest in the suit land and was no longer interested to defend the suit.
- [16] In brief, that as per the Revocation of the powers of Attorney, the land rightfully belonged to the plaintiffs, Harriet Byeitima and Prima Mary
- Byeitima since the defendant Nyakahara Christine acknowledged in the Revocation of powers of Attorney document that she had no claim over the suit or interest in the suit land.
- According to the plaintiffs' case in C. S No.38 of 2009, the plaintiffs acquired \$[17]\$ the suit land from their parent, the late Byeitima and because the L. C officials entertained the matter to the dissatisfaction of the plaintiffs, they opted to file C. S No.38 of 2009 against the defendant, Nyakahara Christine who had destroyed the fencing of the land thus they were seeking a declaration that the plaintiffs were the rightful owners of the suit land. A Consent judgment settled was however entered which settled the issue of ownership in favour of the plaintiffs when the defendant Nyakahara Christine acknowledged in the power of Attorney Revocation document that the land belonged to the plaintiffs and this prompted the plaintiffs to withdraw the suit because litigation against Nyakahara was no longer necessary.
- [18] So, it is not correct as the Appellant (\$PW1\$) stated in her evidence that by virtue of the Consent judgment (P. Exh.2), the Byeitima family sisters, Harriet and Prima were to vacate the land. The above evidence as adduced by the Appellant was in ignorance of the Power of Attorney Revocation document by Christine Nyakahara where in C. S No.38 of 2009, she withdrew the powers from the Appellant regarding the suit land on the grounds that she acknowledged having no claim or interest in the suit land. It should be noted that the Appellant claim to derive her interest in the suit land from the said **Christine Nyakahara** who had been battling it with the family of **Byeitima**.
- [19] It is the contention of the Respondent that she is taking care of the suit land on behalf of her sister, Tinkasimire Harriet Byeitima whom it is said is out of the country and the land is already registered in the said Harriet Byeitima's names as FRV 1334, Folio 17, plot 15-23, Byeitima Road, Hoima. The trial Magistrate however on page 33 of the proceedings rejected admission of this Revocation of powers of Attorney document on the grounds that it was neither addressed to the plaintiff nor was it in its original form yet as per the record, it had already been admitted as D. Exh.1 at page18 of the proceedings in C. S No.38 of 2009. Page 8 of the proceedings read as follows;

"Tumwine [counsel for the plaintiffs]: We have instructions to discontinue this suit because the plaintiffs have since learned from the defendants that the

defendant [Nyakahara] is not interested in the suit land and therefore to continue with this suit would be in vain. The defendant had personally entered into consent to withdraw this matter."

Namanya [Counsel for the defendant]

I have no objection to the withdraw. My reservation.... I.... have no knowledge of disinterest by the defendants in suit land.... **Court Ruling:** Court is desirous of knowing what has changed with the defendant over the last three years it suddenly decided (sic) that she has no interest in the suit land.... In the alternative counsel for the plaintiffs and counsel for the defendant on record should draw up a consent for

- withdrawal of the suit upon terms they deem just...."
- [2²⁴] As a result of the above, the Consent judgment (P. Exh.2) withdrawing the suit was accordingly entered. My understanding of the effect of the Consent judgment is that counsel Namanya agreed to the withdraw of the suit against the background as discerned by Mr. Tumwine, i.e the defendant, Nyakahara Christine had no claim or interest in the suit land. In any case, during cross examination, the Appellant at page 18 of the present proceedings stated thus:

"I know this document, I was given powers of Attorney by Christine Nyakahara to defend the family land but this was a case that was completed. I was removed from the case. The power of Attorney was removed from me."

- [21] In conclusion, I find that the power of Attorney was rightly admitted for it was conceded to by the Appellant. It appears it had been part of the proceedings in C. S No.38 of 2009 that concluded the issue of ownership of the suit land in favour of the Byeitima family thus tilting the suit in favour side of the Respondent who is the suit land care taker. There is no evidence of the alleged glaring contradictions in the evidence of the Respondent. It is apparent that instead of the trial Magistrate in C. S No.38 of 2009 entering the terms of the consent judgment just entered the withdraw of the suit but nevertheless the facts clearly show that neither Nyakahara Christine nor her donee of the powers of attorney, i.e, the Appellant had any interest in the suit land, Nyakahara having herself declared so in the power of attorney revocation document.
- In the premises, I find that grounds 1, 2, 3, 4 & 5 lack merit and these grounds [22]\$ accordingly fail. The trial Magistrate on the whole properly evaluated the evidence before the trial court and correctly found in favour of the Respondent.
 - Issue No.6: That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and at the locus proving the Appellant's ownership of the suit land and thereby reaching the wrong conclusion that the Respondent was not a trespasser.

- [23] Counsel for the Appellant while relying on the case of Odongo Vs Rajab, HCCA No.119 of 2018 submitted that the proceedings at the locus in quo and what was visible at locus like the physical boundaries, the old barbed wire line that was destroyed, the old tree stumps that had remained and the graveyard of the Kenyan man who was buried in the appellant's land were not considered by the trial Magistrate while deciding the matter.
- [24] However, upon this court considering the proceedings at locus dated 3/10/2019, the trial Magistrate recorded all that she could gather at locus but most importantly, I find that the decision of the trial Magistrate was based on the evaluation of the evidence she received in court when witnesses testified and therefore, if there are any lapses or omissions done at locus, they did not occasion any miscarriage of justice to the Appellant.
- This ground of appeal is found to have no merit and it also accordingly fail. [25] This court having therefore found that on the whole the learned trial Magistrate properly evaluated the evidence before her, it follows that this appeal would be found to lack merit and it is accordingly dismissed with costs to the Respondent.

Dated at Hoima this 10th day of January, 2025.

Bvaruhanga Jesse Rugyema JUDGE

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Prepared on 13 October 2026 · Esheria