

UGANDA / JUDGMENT

Kashongi Sub County v Bitega Jackson (Civil Appeal 107 of 2022)

[2024] UGHC 1282 (18 June 2024)

[2024] UGHC 1282

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

Civil Appeal 107 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-CA-0107-2022

5 (ARISING FROM MBARARA CHIEF MAGISTRATES COURT MBR-00-CV-CS-49-2014)

KASHONGI SUB COUNTY ----- APPELLANT

VERSUS

BITEGA JACKSON ----- RESPONDENT

10 BEFORE: Hon. Justice Nshimye Allan Paul M.

JUDGMENT**REPRESENTATION**

The Appellant was represented by State Attorney Asiimwe Bamanya Phionah 15 from the Attorney General's Chambers while the Respondent was represented by Advocate Albine Atugabirwe from the Legal Aid Project of the Uganda Law Society.

BACKGROUND

- 20 The facts as established from the trial Court's record are that; the Respondent (then Plaintiff) sued the Appellant (then Defendant) for trespass and prayed for compensation for loss and damage, a permanent injunction, special damages, general damages, interest and costs of the suit. The Respondent alleged that he applied for and after approval and consent of all relevant bodies, he acquired and
- 25 registered in his name land comprised in Freehold Register Volume 673 Folio 20 Plot 2 Kashari Block 15 at Kyenshama on 22nd September, 2009. That he built a home, cultivated and grazed his cattle thereon. That later on, the Appellant's officials trespassed on the land, destroyed the Respondent's crops, uprooted his barbed wire imprisoned him, burnt down his house and made off with all house
- 30 property.

In its defence, the Appellant alleged that the Respondent's certificate of title was issued in error because the neighbours' signatures in the application for a freehold were forged. They denied destroying the Respondent's property. The

- 5 Appellant counter claimed that they are the customary owners of the suit land and prayed for cancellation of the Respondent's certificate of title for having been issued through fraud, permanent injunction, general damages for trespass and costs of the suit.
- 10 The issues for determination before the trial Court were as follows;
- 1. Whether the Plaintiff/Respondent is the rightful owner of the suit land?
- 2. Whether the Plaintiff/Respondent fraudulently acquired the certificate of title for the suit land?
- 3. Whether the Defendant/Appellant committed acts of trespass?
- 15 4. What remedies are available to the parties?

In a judgment delivered on 19th October 2022, the then learned Chief Magistrate of the Chief Magistrate's Court of Mbarara at Mbarara, His Worship Twakyire Samuel held that the Plaintiff (now Respondent) is the rightful owner of the suit 20 land and that the Defendant (now Appellant) committed trespass. Court awarded the Plaintiff (now Respondent) general damages worth UGX10,000,000/= only, with 20% per annum interest, in addition to a permanent injunction restraining the Defendant (now Appellant) from further trespass.

25 The Defendant (now Appellant) being dissatisfied with the decision of the learned Chief Magistrate lodged this appeal in the High Court registry on 20th December 2022 outlining four grounds of appeal.

GROUND OF APPEAL

- 30 The grounds of appeal as stated in the memorandum of appeal as follows;
- 1. That the learned trial Magistrate erred in law and in fact when he held that the Respondent/Plaintiff is the owner of the disputed land hence occasioning a miscarriage of justice.
- 2. That the learned trial Magistrate erred in law and in fact when he failed to hear/address the Appellant's/Defendant's counter claim without any justification hence causing a miscarriage of justice.
- 3. That the learned trial Magistrate erred in law and in fact when he held that
- 5 Appellant/Defendant were trespassers on the suit land when there was sufficient evidence on record proving that the Defendant had occupied and used it before Bitega Jackson erroneously applied for it from Mbarara District Land Board and not Kiruhura District Land Board where the land was situated hence causing a miscarriage of justice.
- 10 4. That the learned Trial Magistrate erred in law and fact when he misdirected himself when he failed to thoroughly evaluate the evidence on record causing a miscarriage of justice.

SUBMISSIONS

15 The parties filed written submissions, which this court has considered.

Appellant's submissions

Counsel argued grounds 1 and 3 jointly, while grounds 2 and 4 were argued separately. Regarding ground 2, counsel submitted that the Appellant raised a 20 counter claim in their amended written statement of defence and indicated the same in the joint scheduling memorandum, but that the trial Magistrate did not make any findings on the counterclaim, nor making any factual findings against the Respondent yet evidence was led by the Appellant to that effect. Counsel contended that a counterclaim is an independent suit under Order 8 Rule 2 of the 25 Civil Procedure Rules and cited **DAVID SEGULANI VS ROSEMARY NATUKUNDA AND OTHERS CIVIL APPEAL NO.61 OF 1991**. Counsel also contended that the trial Court should have heard and determined the counter claim on its merits, and failure to do so occasioned a miscarriage of justice (see: **LONSUK EDWARD VS**

OPIRA THOMAS MAWADRI MISC CIVIL APPLICATION NO.0015 OF 2015).

Page 3 of 10 On ground 4, counsel contended that the testimonies of the Respondent and his witnesses before the trial Court were riddled with inconsistencies and contradictions on fundamental aspects like; the date when the Respondent applied for the land, neighbours of the suit land, size and location of the suit land.

That by relying on evidence with such contradictions, the trial Magistrate erred and occasioned a miscarriage of justice.

For grounds 1 and 3 which were argued jointly, counsel contended that the 5 Appellant particularised all acts of fraud committed by the Respondent in their counterclaim and further adduced evidence through various witnesses and annexures to their statements. Counsel argued that the totality of that evidence would prove that the suit land was not available for conversion to freehold, the neighbours were not involved in the process, and the Respondent's action of 10 applying to Mbarara District Land Board and not Kiruhura Land Board where almost 80% of the land is situate, signified fraud on the Respondent's part. Counsel prayed for the appeal to be allowed.

Respondent's submissions

15 Counsel argued grounds 1, 3 and 4 concurrently and submitted that Sections 59 and 176(c) of the Registration of Titles Act protects a registered proprietor of land against ejectment except on grounds of fraud (see: **OLINDA DE SOUZA VS KASAMALI MANJI (1962) EA 756**). Counsel added that the Respondent was never implicated in any fraud in the lead up to obtaining his certificate of title and that 20 the Appellant failed to prove fraud upon the standard which is heavier than a balance of probabilities (see: **KAMPALA BOTTLERS LTD VS DAMANICO (U) SCCA No.2 of 1992**). Counsel relied on **JUSTINE E. M. N LUTAAYA VS STIRLING CIVIL ENGINEERING CIVIL APPEAL No.11 of 2002** to define trespass and further submitted that that the trial Court rightly established that the Appellant had 25 trespassed onto the suit land and unlawfully evicted the Respondent.

On ground 2, counsel argued that the Appellant's counterclaim was grounded on fraud and that the trial Court evaluated evidence regarding whether the Respondent's certificate of title was obtained by fraud. That thereby, the 30 Appellant's counter claim was considered by the trial Court and rightly dismissed for lack of merit. Counsel prayed that this Court finds no merit in the appeal and dismisses it with costs.

DUTY OF APPELLANT COURT

The duty of a first appellate court was laid out in the case of **FR. NARSENSIO BEGUMISA AND 3 ORS V. ERIC TIBEBAGA SCCA NO. 17 OF 2002 [2004] UGSC 18** that;

The legal obligation on a first appellate court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. 10 *Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.*

15 The above principles will guide this court in the determination of the grounds of appeal that will be determined together.

SALIENT FACTS

- 1. The plaintiff (now respondent) applied for land from the Mbarara district
- 20 land board and the Mbarara district land board gave him an offer for land measuring approximately 7 Ha. The offer is PEX1.
- 2. The plaintiff (now respondent) is the registered proprietor of land comprised in freehold Register Volume 673 folio 20 plot 2 Kashari Block 15 at Kyenshama measuring 5.937 Ha. The certificate of Title was exhibited as 25 PEX3.
- 3. The land is situated partly in Mbarara District and in Kiruhura District.

DETERMINATION

30 Ground 1 & 3

It is trite that a certificate of title is conclusive proof of ownership of land as is provided in Section 59 of the Registration of Titles Act. It is not in doubt that the respondent is the registered proprietor of land comprised in freehold Register Volume 673 folio 20 plot 2 Kashari Block 15 at Kyenshama measuring 5.937 Ha. His certificate of Title was exhibited as PEX3.

Bitega Jackson testifying as Pw1 stated that he owns a title of the suit land and he 5 exhibited it as PEX3. He stated that he sued the appellant for trespass and destruction of property. He testified that when he got his land he fenced it and built a house, but He was later attacked, his property destroyed, His house burnt, his children and workers beaten and was later arrested. He was only released on police bond after the RDC's intervention. The police Bond was exhibited as PEX 5.

- 10 He identified one Justine Natukunda , the subcounty chief as the person that caused the damage of his house when people were seeing and led subcounty (appellants) workers that beat the respondent and damaged his property (see Page 7 line 13 and page 8 line 5-7 of the record of proceedings).
- 15 The appellant evidence on record does not challenge the evidence on the damage to property or assault, but Dw3 Nayebare Stephen testified that he is Senior Assistant Secretary of the defendant (now appellant) he noted that the subcounty is in possession of the suit land and the Dip tank is owned by the community of Kashongi. Later during re-examination, he noted that a survey showed that the
- 20 Dip Tank is not in the suit land (see Page 21 line 34 of the record of proceedings). This evidence of Dw3 regarding the appellant's community Dip Tank not being in the suit land tallies with what the respondent also said when testifying as Pw1 at page 6 line 6 that "the defendants (now appellants) have their land there is a Dip tank"
- 25

In analysis of the evidence on record, I find that the certificate of title of the respondent as proprietor exhibited as PEX3 clearly states thereon the land is situate at Kyenshama not kashongi. The respondent also exhibited as PEX5 a police medical examination form in which it was stated that he suffered blunt force trauma which tallies with his allegation that he was beaten, along with his children and workers who were also beaten.

Page 6 of 10 I find that the appellant did not lead evidence in the lower court to prove ownership of the suit land and they never carried out a survey before attacking the respondent to ascertain if the community Dip Tank was in the suit land, this explains why DW3 Nayebare Stephen, the Senior Assistant Secretary of the defendant (now appellant) first insinuated that the community Dip Tank is in the suit land but later during re-examination noted that a survey showed that the Dip

5 Tank is not in the suit land (see Page 21 line 34 of the record of proceedings). The respondent therefore proved on record that they own the suit land and that the appellants staff led by Justina Natukunda attacked him destroyed his property and as a result suffered assault due to blunt force trauma as was observed in PEX5.

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It was also NOT necessary for the subcounty officials to take the law into their hands attacking, beating and destroying property of the respondent who happens to be a disabled man. The appellant's hands are not clean, they should have sought redress in court rather than resort to high handed illegal and criminal acts.

I have perused the judgement of HW Twakyire Samuel, where at page 5 line 15 he states that it is his finding that the plaintiff (respondent herein) is the rightful owner of the suit land. He also condemned the defendants (appellant herein) acts and conduct of invading the respondent land. I cannot fault the HW Twakyire

20 Samuel in the decision he reached. Based on the evidence on record, the suit land belongs to the respondent and the appellant has not led evidence to justify presence on the respondent's land, thereby making it a trespasser. Grounds 1 & 3 therefore fail.

25 Ground 2 & 4

It is the law that a District Land Board has the power to allocate land within the district that which is not owned by any person or authority as provided in section 60 (1)(a) of The Land Act Cap 236. A person can therefore apply for freehold on completion of form 4 to the land regulations as is provided in regulations 10, 11 30 and 12 of the land regulations 2004.

Page 7 of 10 The respondents evidence on court record by Pw1 Bitega Jackson is that he applied for land and his application was approved. The application and approval were exhibited as PEX1 & PEX2 respectively. He also testified that the land

traversed two districts of Mbarara and Kiruhura , with the largest part being in Mbarara (see Page 6 lines 29 – 30 of the record of proceedings). He claims that he was advised to make the application where he has most land and a home, hence applying to Mbarara District Land Board (see Page 6 line 32 to 33 of the record of 5 proceedings). In his evidence on record, he also noted that after making the

- application a public notice was issued calling for a meeting (see Page 6 line 38 of the record of proceedings). He testified that in 2009 he Was given a certificate of title of the suit land which was exhibited as PEX3 (see Page 4 of the record of Proceedings).
- 10

Pw3 Muhaire Elias testified that he was the area chairperson of the land committee from 2008 to 2012. He Corroborated the evidence of Pw1, stating that the respondent applied for land on form 4 and a 14-day notice calling for a meeting was issued before they inspected the land and recommended its grant to

- 15 the respondent (see Page 11 line 15 to 30 of the record of proceedings). Pw3 also confirmed that a small piece of the land that the respondent applied for was in Kiruhura (see Page 11 line 26 & 27 of the record of proceedings).
- To counter the above evidence on the procedure that led to the grant of the suit 20 land to the respondent. the appellant's evidence in the lower court by Dw1 Bantanta Abel is to the effect that Kiruhura District was curved out of Mbarara District in 2006. Dw3 Nayebare Stephen testified that respondent has a title but got it illegally. He contended that the Dip Tank is not in the suit land (see Page 21 line 34 of the record of proceedings). The evidence regarding the appellant's Dip 25 Tank not being in the suit land tallies with what the respondent also said when testifying as Pw1 at page 6 line 6 that "the defendants (now appellants) have their land there is a Dip tank"
- In analysing the evidence above, I find that the respondent applied for land in 30 Form 4 as the law stipulates in the land Regulations 2004 to Mbarara District. The sub country area land committee issued a public notice according to the law and inspected the land. There is no evidence on record that the appellant responded to the hearing notice to appear and challenge the respondent's application for land.

It has been contended by the appellant that the respondent used the area land committee of Kashare subcounty in Mbarara district to inspect the land rather than use of the appellant, Kashongi sub country's area land committee in Kiruhura 5 district. I note that that it is not in doubt that the land straddles two sub counties each in a different district. Regulation 21 of the land Regulations 2004 dealing

with procedures of the area land committee is instructive on what happens when land straddles two sub counties as in this case. The law in regulation 21 (2) of the land regulations 2004 provides that;

(2) Where an application under these Regulations is made in respect of any parcel of land which lies partly within one sub-county or division and partly within another, the committee shall cause a notice to be forwarded to the chairperson of the committee of the other sub-county or division 15 *and thereafter a joint committee meeting of the affected sub-county or division shall proceed to deal with the application so far as it relates to that part of land that lies within the affected sub-counties or divisions in the manner prescribed by these Regulations."(* bold emphasis mine)

It would seem from the above that the respondents only duty was to make the 20 application for land and it was the duty of the area land committee of the subcounty to give a notice of the application to the other committee of the neighbouring subcounty. It was not the duty of the respondent to notify the appellant after he applied, the law in regulation 21 (2) of the land regulations 2004 places that obligation on the aera land committee where he made the 25 application. I therefore find that the applicant followed the law in making the application for land, he followed the procedure and was granted land.

The counter claim in the main suit was filed by the appellant herein, it means that the appellant had a duty to prove its allegations as is required by the law in ,

- 30 **SECTION 101 & 103 OF THE EVIDENCE ACT CAP 8.** The appellant did not adduce evidence that the respondent did not make an application, or that the appellant gave its objections to the area land committee when a public notice was put up notifying the public. The appellant claimed in its counter claim that it owns the land making reference to a Dip Tank, but I note that Dw3 Nayebare Stephen the
- 35 appellants witness in the lower court testified that the Dip Tank is not in the suit land (see Page 21 line 34 of the record of proceedings). This evidence regarding

the appellant's Dip Tank not being in the suit land tallies with what the respondent also said when testifying as Pw1 at page 6 line 6 that " the defendants (now appellants) have their land there is a Dip tank".

- I generally find that the Appellant did not bring evidence on record to prove the \$ \mathsf{S} \$ particulars of fraud it listed in its counter claim. Some of the claims where that the appellant owns the land, that the respondent used persons who are not neighbours forging signatures, and also that he surveyed the land at night.
- HW Twakyire Samuel, the trial magistrate stated at page 4 line 13 to 15 of his 10 judgement that

" in this instant case, I find no proof that the plaintiff (now respondent) forged signatures of the neighbours as alleged by the defendant (now appellant) Forgery is usually proved in court by handwriting experts. The persons who signed a chairperson of the land Committee then appeared in *Court and confirmed the signature"*

I cannot fault the HW Twakyire Samuel in the decision he reached, and it also cannot be said that he did not address the counter claim in civil suit 49 of 2014 20 because in my view he addressed the same concluding that the counter claimants' evidence to prove their case was wanting as I have also found after evaluating the evidence above. Grounds 2 & 4 therefore fail.

In conclusion, this appeal fails and is dismissed with costs to the respondent. 25

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..... NSHIMYE ALLAN PAUL M. JUDGE 18-06-2024

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Prepared on 14 October 2026 · Esheria