

UGANDA / JUDGMENT

Kayiya v Musenero (Civil Appeal 17 of 2020) [2025] UGHC 126 (24 March 2025)

[2025] UGHC 126**COURT**

High Court of Uganda

BEFORE

Batema, J

CASE / FILE NUMBER

Civil Appeal 17 of 2020

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT IGANGA****LAND CIVIL APPEAL NO. 017 OF 2020****(ARISING FROM CIVIL SUIT NO. 74 OF 2014)**

KAYIYA MUSIMAMI

VERSUS

MUSENERO AMOSI

BEFORE: HON. MR. JUSTICE BATEMA N. D. A, JUDGE**JUDGMENT****Introduction:**

This is an appeal against the Judgment of HER WORSHIP ACAA KETTY JOAN, Magistrate Grade 1 sitting at Iganga Chief Magistrate's Court but delivered by HIS WORSHIP NDIWALANA YUNUS on 21/2/2020.

Background:

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This appeal concerns a dispute over ownership of land located at Mawungwe LC1 B village, Nakaloke Parish, Namutumba District (suit land). The Appellant and the Respondent are cousin brothers that trace their common lineage to the late Waibi Kipaalu, their great grandfather. That the late Waibi Kipaalu had bought land, part of which forms the suit land from a one Kibenge. That prior to his demise, the said Waibi Kipaalu had bequeathed the two (2) portions of land divided/ separated by Igerere-izooba road to his only two sons, Musimami Tahbita (grandfather of the

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Respondent) and Musenero Namwima (grandfather of the Appellant). The Respondent claims that the portion of land that forms the suit land was inherited by his father, a one Waibi Sajjabi upon the death of his father, Musimami Tahbita while the other portion across the road was inherited by the Appellant's father, a one Musenero Mukama upon the death of his father, Musenero Namwima.

Both the Appellant and Respondent hold letters of Administration to their respective fathers' estates and claim ownership of the suit land. On the other hand, the Appellant at the lower court claimed that his great grandfather, the late Waibi Kipaalu had two portions of land. That the suit land situate at Mawungwe village, Namutumba District was bequeathed to the Appellant's grandfather, Namwima and the same was inherited by the Appellant's father, Mukama who upon his demise, devolved to the Appellant. The Appellant further states that the other portion of land located in Kamusio, Mbale was bequeathed to the Respondent's grandfather, Musimami Tahbita and it is where the Respondent's father, a one Waibi Sajjabi was buried. The Appellant finally states that the Respondent's claim is his beneficial share in the Mbale land and not the suit land.

The learned trial Magistrate heard the evidence of both parties and entered judgment in favor of the Respondent. The learned trial Magistrate found that the Appellant was a trespasser and ordered for his eviction from the suit land within 60 days. The Appellant being aggrieved with the decision of court lodged this instant appeal.

GROUND OF APPEAL

1. The Trial Magistrate erred in law and fact when she failed to evaluate the evidence on court record and held that the suit land belongs to the Respondent thereby occasioning miscarriage of justice.

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- 2. That the Trial Magistrate erred in law and in fact when she failed to hold that the suit land belongs to the estate of the late Waibi Kipaalu who died intestate.
- 3. The Trial Magistrate erred in law and in fact when she held that the Appellant is a trespasser on the suit land.

DUTY OF THIS COURT:

As the first appellate court, the duty of this court is to re evaluate the evidence on record presented to the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its own conclusion. (See: Father Nanensio Begumisa & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236). The first appellate court does re-evaluation of the evidence on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial court had no chance of seeing, hearing and observing the demeanor of witnesses. (See: Uganda Breweries Limited v Uganda Railways Corporation 2002 UGSC 40 E. A)

CONSIDERATION OF THE GROUNDS OF APPEAL:

Before, I proceed to resolve the grounds of appeal, I wish to note with great concern that the Appellant, Kayiya Musimami who filed this appeal failed to file his written submissions as directed by court. Only the Respondent filed his written submissions and I have considered the same in this judgment without the need to reproduce them.

Suffice to note, this court visited locus in quo on 4/03/2024 at Mawungwe village, Kizuba Parish, Namutumba District and the outcome of the visit was also considered in this judgment.

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I now proceed to resolve this appeal. I will combine grounds 1 and 3 together and resolve ground 2 separately.

Ground 1: That the Trial Magistrate failed to evaluate the evidence on court record and held that the suit land belongs to the Plaintiff thereby occasioning miscarriage of justice.

Ground 3: That the Trial Magistrate erred in law and in fact when she held that the Appellant is a trespasser on the suit land.

Counsel for the Respondent submitted that all the Respondent's witnesses as per pages 5- 28 of the record of proceedings told the lower court that they witnessed the handing over of the suit land to the Respondent as the heir of the deceased Waibi Kipaalu and that he took over land not until 2010 when the Appellant started trespassing on the same. Counsel for the Respondent further submitted that the trial court also considered and evaluated the defence evidence on pages 28- 41 of the record of proceeding before reaching a decision on a balance of probability that the Respondent is the rightful owner of the suit land. Counsel for the Respondent finally

submitted that as per pages 28-33 of the record of proceedings, the Appellant does not deny entering the suit land and as such the trial court was right to find him a trespasser.

When I visited the land in dispute, I found that it was the Appellant in possession of the same. I also saw a road separating the suit land from another portion of land called Igerere-izooba road.

In my humble view, I find that the learned trial Magistrate was right to find that the suit land belongs to the Respondent. My reasoning finds favour in the fact that the evidence by the Respondent that the Appellant was present to witness the installation of the Respondent as the heir to his late father, Waibi Sajjabi and also witnessed the handover of the suit land to the Respondent without raising any

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objection remained unchallenged. The piece of evidence that the Appellant's own brother, Jaffer Musenero was the one who handed over the suit land to the Respondent also remained unchallenged by the Appellant.

Furthermore, at locus I discovered that none of the Appellant's parents and grandparents were buried on the suit land. The Appellant's father and grandfather had been buried on the neighboring portion of land across the road. However, the Respondent's grandfather, Musimami Tahbita had been buried on the suit land. The road from Namutumba to Butaleja forms a clear boundary between the two estates in issue. This goes a long way to confirm that the Respondent has beneficial interest in the suit land since the same forms part of the estate of his late father, Waibi Sajjabi.

This court would rather believe that the suit land was bequeathed by the late Waibi Kipaalu whilst he was alive to the Respondent's grandfather, Musimami Tahbita. That upon Musimami's death, the suit land was inherited by the Respondent's father, Waibi Sajjabi. The fact that Sajjabi chose to purchase land and settle in Mbale with his family does not in any way mean that he had waived his beneficial interest in the suit land. It follows that upon his demise, the Respondent as heir to the deceased was handed the suit land as part of the estate of his late father to administer and manage.

One controversy that the Appellant failed to explain at the lower court is how he assumed rights of ownership from his brother, a one Jaffer Musenero who had been left to care take the suit land by the Respondent as per the witness testimony of PW4, Wabweyo Emmanuel on page 17 & 18 of the record of proceedings.

This court therefore upholds the finding of the learned trial Magistrate that the suit land belongs to the Respondent. I also uphold the finding that the Appellant is a

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trespasser since this court already found him to be in physical possession when it visited locus.

Grounds 1 & 3 fail.

Ground 2: That the Trial Magistrate erred in law and in fact when she failed to hold that the suit land belongs to the estate of the late Waibi Kipaalu who died

intestate. 130

> Counsel for the Respondent argued that this ground of appeal lacks merit since it was not one of the reasons for investigation by the lower court as per the issues framed. Counsel for the Respondent invited this court to reject this ground of appeal.

> I entirely agree with the Respondent's submissions. This 2nd ground of appeal is a non-starter since it was never framed as an issue in the lower court. Worse still, the Appellant never sought leave of court to introduce this new ground of appeal. In any case, this ground of appeal is not in dispute as a matter of fact. Both the Appellant and the Respondent agreed that the suit land originally formed part of estate of the late Waibi Kipaalu. There was therefore no reason for the Appellant to frame this particular ground of appeal in the first place.

Ground 2 fails.

In the final result, this appeal is dismissed with costs here and the lower court.

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BATEMA N. D. A JUDGE 24/03/2025

150 Order

> The mother file should be sent back to the Chief Magistrates' court at Iganga to give vacant possession to the successful respondent and further management in execution.

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BATEMA N. D. A

JUDGE

24/03/2025

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Prepared on 14 October 2026 · Esheria