

UGANDA / JUDGMENT

Maada Kiiza v Kasaija Kapere (HCT-12 LDCA 0072-2015) [2020] UGHCLD 6 (27 May 2020) [2020] UGHCLD 6

COURT

HC: Land Division (Uganda)

BEFORE

Gadenya, WJ

CASE / FILE NUMBER

HCT-12 LDCA 0072-2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

HCT-12-LD-CA-0072-2015

(ARISING FROM CIVIL SUIT NUMBER 003/2015, KAGADI MAGISTRATE GRADE I,
COURT)

MAADA KIIZA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

KASAIJA KAPERRE ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

1.0 Introduction

This appeal arises from the decision of His Worship Toloko Simon, Magistrate Grade I, , Kagadi, delivered on the 30th day of October 2015.

Briefly, Kasaija Kapere, hereinafter called the Respondent sued Maada Kiiza, hereinafter called the Appellant for trespassing on his land located at Nyamucumu LCI village.

The Respondent's case is that on October 2003, he purchased land at Nyamucumu LCI village in Kagadi district, from Kuganyira Machaku for five hundred thousand shillings. He alleged that the Appellant, who is his neighbor, in 2013, without any justified cause trespassed on his land and constructed therein a fish pond and planted sugarcanes and eucalyptus trees.

The Appellant on her part denied trespassing on the Respondent's land. She told court that she was the owner of the suit land because her land and that of the Respondent is separated by a path that leads to the well and that if anyone was a trespasser on this land, then it can only be the Respondent.

The trial Magistrate heard the case and gave judgment for the Respondent. In giving judgment for the respondent, the trial magistrate found that the Respondent had bought land from Kuganyira Machaku, which included the suit land in 2003. He also found that the Appellant and Respondent's land is not separated by a path but rather by other boundary marks. Lastly, the trial magistrate found that the path which the Appellant was relying on as a boundary mark was actually in the middle of the Respondent's land in as much as it led to the well, which was in the middle of the Appellant's land.

The Appellant being aggrieved by the decision of the Trial Magistrate filed the present appeal. The grounds of appeal are:

- 1. The learned trial magistrate erred in law and fact when he found that the Respondent Kasaija Kapere by Exhibit 1 on 13th October 2003 bought the suit land from Omuhereza Mashaku Kuganyira Atanazio.
- 2. The learned trial Magistrate erred in law and fact when he ignored and or disregarded the evidence of PW% and the defense of the existence of a boundary mark of a path leading to the wall separating the pieces of land owned by Maada Kiiza and Omuhereza Mashaku Kuganyira Atanazio.
- 3. The learned trial Magistrate erred in law and in fact when he failed to address himself to the correct procedure to be followed at the locus in qou thereby occasioning a miscarriage of justice to the appellant.

Representation of the parties.

The Appellant was represented by Mr. Simon Kasangaki, while the Respondent was represented by Mr. Ssentimba.

Arguments of the Parties: arguments of the appellant

Mr. Kasangaki, counsel for the appellant, submitted that the trial Magistrate failed to evaluate the evidence and as a result decided that the suit land belongs to the Respondent instead of the Appellant. He submitted that the evidence on the record supported the Appellant's claim to the suit land especially the evidence of PW5, defense witnesses and the proceedings at the locus in qou which showed that the land between the Appellant and the Respondent was separated by a

small path leading to the well, which was there before the Respondent bought the land on 13th October 2003.

He submitted that when the Respondent bought land from PW3, he did not know the boundaries of the Appellant's land because he was not present when the Appellant's father divided and gave out his land to the children including the Appellant. He also, submitted that despite the Respondent not knowing the boundaries of the Appellant's land, he did not bother to call her, as a neighbor and witness, when he was buying the suit land from PW3. He submitted that whereas the mother of the Appellant was present and witnessed the sale of the land by PW3 to the Respondent, she did not know the boundaries of the Appellant's land as she was not the owners.

Furthermore, counsel for the appellant submitted that the Respondent admitted that his land borders the appellant's land and goes up to the well. He submitted that the Respondent almost admitted that the path to the well was the boundary mark separating his land and that of the Appellant. Furthermore, counsel submitted that PW2 in cross examination admitted that the Appellant was using the land right from the stream and had a fish pond on the land- both facts which showed that the disputed land belonged to the Appellant.

Furthermore, counsel submitted that although PW3 told court that he had sold the Respondent all the land including the stream, this was a lie because the agreement of sale did not state so. He accused PW3 of lying that the path was in the middle of his land yet it was true that the path was the boundary between the Appellant and the Respondent.

Concerning the testimony of PW4, counsel submitted that although PW4 testified that there were *muramura* trees on the boundary, none of these were mentioned in the agreement.

Counsel also criticized the agreement for not being conclusive on the boundaries of the Respondent's land.

Turning to the appellant's case, counsel submitted that the evidence of PW5 supported the Appellant's case. He submitted that PW5 testified that there is a small path that goes to the well. That it was in the middle of the land that they inspected and that down the land, was the land of Balanda, the stream and the well. He submitted that the well is just in the middle of the land that belongs to the land that belongs to Maada Kiiza (Appellant). He submitted that the path was the boundary mark between the land of the Appellant and the Respondent.

With regard to ground 3 of the appeal, counsel criticized the Trial Magistrate for not following the procedure for carrying out the locus in qou. He blamed the Trial Magistrate for not drawing the sketch plan, with clear indications of the features, the trees, the vegetation, the graves, the ponds and the sugar cane when he visited the locus in qou. He also criticized the trial magistrate for not inviting the mother of the Appellant to testify about the boundaries. He said that the map that appeared on exhibit P1 was different from the agreement and the one at the locus in qou.

With regard to the locus in qou, counsel submitted that the trees at the locus in qou were more than 20 years old and could not have therefore been planted by the Respondent. He said that these trees must have been planted by the father of the Appellant.

Arguments of the Respondent

Mr. Ssentimba, counsel for the Respondent, supported the decision of the trial Magistrate in affirming that the suit land belonged to the Respondent. He submitted that the trial Magistrate correctly found that the Respondent bought the suit land from Omuhereza Machaku as evidenced by a sales agreement which was admitted in evidence as exhibit PE1.

He submitted that the agreement of sale was valid and that the PW3, who sold the land to the Respondent confirmed the sale and that no body contested the sale. He submitted that the agreement had a sketch map showing the boundaries and the neighbors to the land, who included the Appellant, Balinda Yozefu, and Anna Kiiza.

With regard to the accusation by the Appellant that the Trial Magistrate erred in law and fact when he disregarded the evidence of PW5 on the existence of the path as the boundary mark between the parties, counsel for the Respondent submitted that the evidence of this witness should be considered in tandem with the evidence of the respondent and his witnesses who gave evidence about the boundary marks of the land.

He added that unlike for registered land, it is difficult to get the exact details of the boundaries of none registered land and as such parties with such land must always come up with neighbors as was done in this. He submitted that in this case, one could tell the neighbors and features of the land from the sketch map.

He submitted that although there is a path on the land, the path does not form the boundary between the Appellant and the Respondent's land but rather passes through the Respondent's land.

With regard to the locus in qou, counsel for the Respondent submitted that the trial Magistrate conducted the proceedings in accordance with the law and made findings confirming the boundaries, the eucalyptus trees and took clarifications

Arguments of the Appellant in Rejoinder

Mr. Kasangaki in rejoinder submitted that the Appellant never signed the agreement of sale between Respondent and PW3 to confirm the neighbors to the land.

Secondly that the boundary mark between the land of the Appellant and the Respondent and the muramura trees was not indicated in the agreement.

He submitted that it was not true that the path was in the middle of the land that PW3 sold to the Respondent. He submitted that what was clear was that there was a straight line between the pieces of land owned by the appellant and the piece of land that was sold. He submitted that this piece of land stretches down up to the well.

With regard to the capacity of PW3 to sell the land, counsel for the Appellant submitted that whereas PW3 had capacity to sell the land, he could only sell land, which belonged to him. He had no authority whatsoever to sell the disputed land to the Respondent (the land outside his land separated by a path). Lastly, counsel maintained that according to the evidence of PW5, the path is the boundary that separates the Appellant and Respondent's land.

For brevity, the gist of the Appellant's evidence, which supports her claim to the land is:

- The path is the boundary mark that separates the land of the Appellant and Respondent;
- Old eucalyptus trees at the locus in qou, possibly planted by the Appellant's father;
- The evidence of PW5 that the path is in the middle of the land that they inspected and leads to the well that is in the middle of the Appellant's land.

As for the Respondent, the gist of his case is that the path to the well passes through his land and is not therefore a boundary between him and the Appellant and that therefore the Appellant, is committing trespass on the disputed land.

Consideration of the appeal.

Although the appellant framed three grounds of appeal, these grounds can be reduced to two grounds namely whether the trial magistrate failed to evaluate the evidence on record and as a result came to the wrong decision that the suit land belongs to the Respondent and secondly whether the trial magistrate did not follow the correct procedure for conducting the locus in qou.

Whether the trial magistrate failed to evaluate the evidence on record and as a result came to the wrong decision that the suit land belongs to the Respondent

The gist of the Appellant's case is that the suit land belongs to her because her land is separated from the land of the Respondent by a path leading to the well. On the other hand, the gist of the Respondent's case is that the path passes in between his land and has therefore never formed a boundary between him and the Appellant. As I indicated in the opening paragraphs of this judgment, the Trial Magistrate, dismissed the claims by the Appellant that the boundary between her land and that of the Respondent is a path leading to the well.

This being a first appellate court the parties are entitled to a fresh evaluation of evidence subject of course to the fact that I never had the opportunity of seeing the demeanor of the witnesses in the court below. This principle was emphasized in **Fr. Narsensio Begumisa and I3 Others vs. Eric Kibebaga SCCA no. 17 of 2002**, where the Supreme Court, held that the legal obligation of the first appellate court is reappraise the evidence is founded in the common law rather rules of

procedure. It is well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its

own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses.

According to the evidence of the Respondent he bought the suit land from Kuganyira Machaku, PW3 in 2003 for five hundred thousand shillings. He executed an agreement of sale was exhibited as PE1. This sale of land was preceded by inspection of the land by the buyer and seller in the presence of the executive committee members of the area LCI, where the land is situated.

According to the record, the parties signed an agreement which was witnessed by the executive committee of the village (LCI) whose members included the mother of the Appellant. Tibasaga Kaisagga, PW2, testified that he was the LCI Chairman of Nyamucumu LCI village where the land is situated. He testified that he and members of the LCI Committee, who included the mother of the Appellant were present and witnessed the sale, when the Respondent bought the land from Kuganyira Machaku. He described the boundaries of the land as: on one part of the land was a road that leads to Kyakabale; a stream belonging to Kasaija; land of Balinda and that on the side of the river was Kasaija and Balinda's land. He testified that the Appellant had trespassed on the Respondent's land right from the stream, dug therein a pond and uprooted the boundaries.

Muhereza Machalu Kuganyira, PW3, who sold the land to the Respondent testified that he was the owner of the suit land and that he sold the land and stream to the Respondent on 13th October 2013. He described the boundaries of the land he sold to the appellant in the following terms: Kiiza Maada, the Appellant is on the right hand side; Kachina on the left; Yosefu Balinda; a stream belonging to Kasaija. It was also the evidence of PW3 that the mother of the Appellant, who was a member of the LC I Committee, witnessed the sales agreement but most importantly was on the team that inspected the land before the Respondent bought it. He testified that he sold all the land including the stream to the

Respondent. It was however, doubtful whether PW3 had the capacity to sell the stream to the Respondent. In cross examination, PW3 insisted that the path, was not the boundary but was passing in the middle of his land. Mugisha Kasaija (PW4) a son to the Respondent gave similar evidence though he added that muramura trees were the boundaries of the land.

Turymuteba Garasi (PW5) gave evidence that he was part of the LCI Committee that was present when PW3 sold land to the Respondent. He told court that they inspected the boundaries of the land before the sale and that the mother of the Appellant was part of the team. He testified that there was a small path to the well that was in the middle of the land that they inspected. In cross examination, PW5 insisted that they inspected the land with the neighbors that share boundaries with Pw3, who included the mother of the Appellant. Nyakana Ronald (PW6), was the witness who wrote the agreement marked exhibit PE1. He testified that the well was not included in the agreement because it was outside the land that was being purchased.

The Appellant on her part denied trespassing on the Respondent's land. She testified that it is instead the Respondent who had crossed into her land. She testified that her land and that of the Respondent is separated by a path that goes to the well.

Banura Ponsiano (DW3) gave evidence that in 1999, the father of the Appellant the defendant, Kyamanywa and his wife, called Solome his land. He said that on the land was a well and trees near it. He did not know who had planted the trees. With regard to the boundaries of this land, DW3 testified that although the father of the Appellant showed them the three pieces of land he had distributed to his children and wife, he never inspected all the land. He testified that he never reached the well and told the court further that it's those who were present who inspected the land. He also testified that no boundaries were planted that day. I did not find this witness useful in as far as the

boundaries of the Appellant's land was concerned because did not fully participate in the demarcation of the land when the Appellant's father was giving it out to the Appellant and others and by his own admission he never inspected the portion of the land that was given to the girls.

Kyamanywa Lawrence (DW5) and a brother to the Appellant supported the Appellant's claim that her land and that of the Respondent is separated by a path leading to the well.

I have reviewed the evidence of the parties above and these are my findings:

Firstly, all the witnesses of the Respondent were consistent that before the Respondent bought the land in question, members of the LCI Executive Committee of Nyamucumu, were this land follows, were present and were taken through the boundaries of the land PW3 was selling before the agreement of sale – exhibit PE1 was signed.

Secondly, although the Appellant attacked the agreement for not being particular on the boundaries, the attack was unfounded as the agreement clearly indicated that the Respondent had bought land from PW3 for valuable consideration and witnesses to the agreement such as Tibasagga Kasaija, the then LCI Chairperson of the village described the boundaries of the land. The agreement indicated the neighbors to the land. This agreement was signed by both the seller and buyer. It was also witnessed by the LC1 members of the village who were present when the Respondent bought the land. Therefore, for all intents and purposes, exhibit P1, was a valid sales agreement for the land despite having some shortcomings. The trial Magistrate was therefore right to rely on this agreement as proof that PW3 sold the land to the Respondent.

Thirdly, although the Appellant as an immediate to the land which the Respondent bought was not present when the transaction took place, her mother, a member of the LCI Executive Committee was present and above all participated in inspecting the land

and even signed the agreement of sale as a witness. The presence and participation of the Appellant's mother in the land transaction is important because she knew the boundaries of the land, indeed this was confirmed by the Appellant herself and would have objected if PW3 had exceeded the boundaries of his land. She never objected because the boundaries had no disputes.

Fourthly, although the Appellant and her brother Kyamanywa Lawrence DW4, insisted that the path is the boundary that separates her land from that of the Respondent none of the other witnesses called by the Appellant were emphatic about this path being the separating boundary between the Appellant and the Respondent. This was in contrast to the Respondent's case which was consistent and solid with regard to the fact that the path was not a boundary mark but was passing through the land which PW3 sold to the Respondent.

I am aware that the Appellant's counsel tried to persuade court that PW5 gave evidence that the path is the separating boundary between the Appellant and Respondent's land. However, a critical review of PW5's testimony supports the view that the path is in the middle of the land that they inspected and was later on sold to the Respondent. PW5's testimony is also consistent with the testimony of the other witnesses who were present when the Respondent was buying the land. I do not therefore find any reason whatsoever to connect PW5's testimony as confirming that the path is a boundary between the Appellant and Respondent's land.

In conclusion therefore, I do not find merit in the first two grounds of the appeal.

Ground III: Whether the trial magistrate did not follow the correct procedure for conducting the locus in qou.

The Appellant strongly attacked the Trial Magistrate for not conducting the locus in qou in accordance with the procedures for doing the locus in qou. In particular, he criticized the Magistrate for not making a finding that the path separates the land between the Appellant and the Respondent. He also submitted that the magistrate should have made findings about the well. The Respondent on the other hand told court that the Trial Magistrate followed the procedures for conducting a locus in qou. He wrote down his findings and conclusions, which formed the basis of his decision.

The procedure for conducting a locus in qou has been distilled in various cases and codified into a practice direction. The procedure is as follows:

In **Kwebiiha and Another vs. Rwanga and two others Civil Appeal number 021 of 2011) [2017] UGHCCD 148**, Justice Wilson Masalu while considering the purpose of conducting a locus in qou had this to say:

In a nutshell, the purpose of visiting the locus in qou is to clarify on evidence already given in court. it is for the purposes of the parties and witnesses to clarify on special features such as graves and or grave yards of departed one on either side, to confirm boundaries and neighbors to the disputed land, to show whatever developments either party may have put up on the disputed land, and any other matters relevant to the case. ...Evidence at the locus in qou cannot be a substitute for evidence already given in court. It can only supplement.

He went on to say that: **all evidence at the locus in qou must be recorded and form part of court record.**

In this case, the Trial Magistrate allowed all the parties to call their witnesses at the locus in qou. He took their evidence down and even drew the sketch map of the land and

indicated thereon the features he saw on the land. In his judgment, the Trial magistrate made reference to his findings at the locus in qou in the judgment.

Given the procedure the Trial Magistrate followed in conducting the locus in qou, I am unable to fault him. Consequently, there is no merit in this ground and I accordingly dismiss it.

In the result, I dismiss the appeal with costs here and below and confirm the orders of the Trial Magistrate.

Before I take leave of this matter I noted that the decree as signed by the Trial Magistrate had fundamental errors as it is the opposite of what he decided in court. I direct the successful party to extract the correct decree and have it approved by the opposite party before it is signed by the court.

Decision:

I have not found merit in the appeal and it is accordingly dismissed with costs. The decision of the lower court is hereby confirmed. It is so ordered.

Gadenya Paul Wolimbwa JUDGE 27th May 2020

I direct the registry of the court to email this judgment to the parties on 2 nd June 2020.

Gadenya Paul Wolimbwa JUDGE 27th May 2020

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