

UGANDA / JUDGMENT

Turyareeba v Kahangirwe (Civil Appeal 3 of 2017) [2025] UGCA 82 (27 March 2025)

[2025] UGCA 82

COURT

Court of Appeal of Uganda

BEFORE

Muzamiru, JA, Mulyagonja, JA, Asa Mugenyi, JA/
JCC

CASE / FILE NUMBER

Civil Appeal 3 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

(Coram: Muzamiru M. Kibeedi, Irene Mulyagonja, & Dr. Asa Mugenyi, JJA)

CIVIL APPEAL OO3 OF 20L7

(Arisine from Hieh Court Mbarara HCT-O5-CV-CS-0027 of 2009l

TURYAREEBA YONAH ===== ⁼=
APPELLANT

I{AHANGIR*E ELrAB ===== :::: ===== REspoNDENT

JUDGMENT OF DR. ASA MUGENYI. JA

INTRODUCTION

1 This is an appeal arising from the judgment of High Court by David Matovu J. delivered on 25th October 20L6 whereby he ordered the appellant to grant vacant possession of a portion of the suit land to the defendant, awarded general damages of Shs. 16,000,000 and costs of the suit. The defendant being aggrieved appealed against the judgment.

BACKGROUND

2 The appellant and the respondent are brothers, disputing land situated at Kyobwe, Kayonza sub-county, Rushenya County in Ntunguma District. The respondent was the first born. The appellant claims that in 1966 that certain person intruded on their father's land. The father allowed the respondent as the elder son to litigate in court on behalf of the family. The dispute was resolved by the magistrate court II in their favour. The appellant moved to the land which was the subject of the litigation. The respondent claimed that he got the land

from his father in 1965 and has been in occupation since then. The respondent claims that in 2003 the appellant laid a false claim to the land and his case was dismissed by the Local Council court.

3. The respondent filed the above Civil Suit in High Court laying claim to the suit land allegedly given to him by their father. The court decided in favour of the respondent. The appellant being aggrieved by the decision of the High Court has appealed to this court.

GROUND OF APPEAL

- 4. The appellant raised the following grounds of appeal.
- 1) The learned Judge erred in law and fact when he heard the case as a court of first instance yet it had been heard and decided by another competent court.
- 2) The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion that the land in dispute belonged to the respondent and the appellant was a trespasser.
- 3) The learned trial Judge erred in law and fact when he awarded 7 acres of land to the respondent yet the disputed land is less than 3 acres.

ISSUES

- 5 Despite having raised grounds of appeal, the appellant raised 3 issues which correspond to the grounds stated in the memorandum of appeal
- 1) Whether Civil Suit 0027 of 2009 at Mbarara was res-judicata?
- 2) Whether the learned trial Judge erred in law and fact when he concluded that the land in dispute belonged to the respondent and the appellant is ^a trespasser?
- 3) Whether the learned trial Judge erred in law and fact when he awarded 7 acres to the respondent as the land in dispute?

Representation

6 The matter came up for hearing on 12th December 2024, the appellant was represented by Mr. David Henry Mukibi, while the respondent was represented by Mr. Henry Rwaganika.

ANALYSIS AND DETERMINATION

- 7. This court considered the conferencing notes as submissions of the parties.
- 8. This appeal is a second appeal arising from the decision of the High Court which listened to an appeal from a decision of the Chief Magistrate. The role of a second appellate court is stated in *Kifamunte Henry u Uganda Criminal Appeal 10 of 1997* as:

"On second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law."

Rule 32 of the Judicature (Court of Appeal Rules Directions) Rules states:

"On any second appeal from the decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have the power to appraise the inferences of fact drawn from the trial court, but shall not have discretion to hear additional evidence..."

Determination of Issue 1. Whether Civil Suit 0027 of 2009 at Ifibara was res-judicata?

a) Appellants submissions

- 9 Counsel for the appellant submitted that the High Court erred when it heard and determined a Civil Suit which had been heard and decided by another competent court. He cited Section 7 of the Civil Procedure Act which provides for res judicata. Counsel submitted that for res-judicata to apply the following conditions have to be met.
- 1) There has to be a former suit decided by a competent court.
- 2) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
- 3) The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

The counsel cited *Uganda Tax Operators and Drivers Association u Uganda Revenue Authority* SCCA 24 of 2019 and *Angelica Elsauko and others u Attorney General* CACA 115 of 2017

10. Counsel for the appellant submitted that the disputed land was first contested between the appellant and the respondent before the Local Council 1 (LC1) court of Omukibare village who delivered judgment in favour of the appellant on 9th September 2003. The dispute went before the LC2 court of Kyobe Parish who declined to hear it. The appellant filed a case in LC3 court of Kyonza sub county who delivered judgment in favour of the appellant on 3rd

August 2004. The judgment of the LC3 court was set aside by an order of a Chief Magistrate and the concerned parties ordered to file an appeal before a properly constituted court. On 6th April 2009 the respondent filed Civil Suit 0027 of 2009 from which this appeal arises. Counsel for the appellant stated that judgment of the LC3 court was set aside but the judgment of the LC1 court was still subsisting. This judgment was in favour of the appellant. He argued that while the judgment of the LC1 court was still subsisting, the respondent should never have filed Civil Suit 0027 of 2009 since the parties are the same, the land is the same and the LC I court is a competent court in handling customary matters.

Respondent's submissions.

- ¹1. The counsel for the respondent submitted that he does not agree that there was only one decision of court with competent jurisdiction that preceded the filing of Civil Suit 027 of 2009. He contended that there were several decisions that were taken by courts of competent jurisdiction. These included Civil Suit 36 of 1996 at the Magistrate's Court of Kayonza, the Local Council 1 Court of Omukibare, the Parish Court of Kyobwe, the Local Council 3 Court of Kayonza, the Chief Magistrate's Court of Mbarara. The Chief Magistrate's Court ordered the appellant to file his appeal from the Kayonza Sub-County Local Council 3 court in a properly constituted court, which he never did.
- 12. Counsel for the respondent submitted that the Local Council I judgment is not subsisting. It cited *Joan Semakula u Pope Paul IV Social Club Ltd.* Civil Appeal 6T of 2007 where the court stated in respect of Section 7 of the Civil Procedure Act Cap 71 that "The operative words in the Section 'is heard and finally determined by the Court'. The counsel submitted the LC I judgment was not conclusive and therefore not a bar to filing of Civil Suit 0027 of 2009
- 13. The counsel for the respondent cited *Uganda Taxi Operators Association u Uganda Revenue Authority* MA 24 of 2019 which on res judicata stated that "The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar." Counsel submitted that a reading of the pleading show that the matter in dispute in the suit before Local Council 1 and the one in the High Court were totally different. The issue in the Local Council 1 case were to do with the sharing of land belonging to the parties' late father Yokana Bazarirabusha. While the matter in respect of the Civil Suit were to do with trespass. Therefore, the decision in the Local Council 1 Court is not a bar to the Civil Suit.
- 14. Counsel for the respondent submitted that the decision of the Magistrate Grade 3 Kayonza Court is the only subsisting judgment. He submitted that it was a decision delivered by a competent court. The subject matter is the same as that of the above Civil Suit. In that case the current respondent was the plaintiff who was successful. The counsel submitted that the appellant is bound by the decision of the Kayonza court.

c) Appellants submissions in rejoinder

15. The counsel for the appellant submitted that the issue of res judicata though not expressly stated as an issue in the High Court arose by implication during the course of the hearing. He submitted that in *Fang Min u Belex Tours and Trauel*,^{td} SCCA 06 of 2013 and in *Crane Bank Ltd u Belex Tours and Trauel Ltd*, SCCA L of 20 14 it was held inter alia that, the correct position of the law is that a point of law though not raised in the lower court maybe raised on appeal and the parties must be given an opportunity to address court on it before the court makes a decision. Counsel submitted that the parties to the appeal have submitted extensively on the issue of res judicata and it arises by necessary implication from the record of the lower court. The parties to the present appeal are the same parties before the LCI court. It submitted that the filing of High Court Civil Suit OO27 of 2009 was an abuse of court process.

d) Analysis and determination

16. The appellant contends that the trial Magistrate erred in law and fact when he heard the case as a court of first instance yet it had been heard and decided by another competent court. On the other hand, the respondent contended there were more than one decision of courts with competent jurisdiction that involved cases concerning the suit land where the parties were the same as the civil suit which is the subject of this appeal. He also submitted that the matters were different.
17. Res Judicata is provided for in Section 7 of the Civil Procedure Act which reads: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."

For Res Judicata to apply the matter in the suit must have been finally determined in a former suit between the same parties or persons claiming under the same title in a court of competent jurisdiction.

- 18. The respondent, in the plaint filed in the High Court in filed Civil Suit OO27 of 2009, states the appellant laid false claims on the suit land. The appellant filed case in the LCII court which was dismissed on 18th October 2003. The appellant appealed to the LCIII Court and was successful but the said judgment was set aside by the Chief Magistrate. The appellant in his defence admitted that the said claim was dismissed in Civil Appeal 21 of 2008. He stated that he will contend that the suit filed was res judicata. A perusal of the decree of the Magistrate's shows that the appeal was allowed. The judgement of the LC3 was set aside.

- 19. At the trial, the issue of res judicata was not addressed though it was raised in the pleadings of the defendant. The trial Judge ought to have raised it as an issue and addressed it in his judgment. His failure or omission to do so does not preclude this court from addressing it. An illegality brought to the court's

attention takes precedence over all pleadings and admissions. See Mukula International u Cardinal Dmanuel Nsubuga CACA 4 of 1981

20. The respondent contends that the matters in the case in the LC1 court was different from that filed in the civil suit which is the subject of this appeal. In order to address whether the civil suit was res judicata there is need to ascertain whether the subject matter and the parties in the suit were the same as that in the former suit. There is need for the courts to look at the pleadings in both suits and then determine whether there are the same or not. The pleadings of the first court were not attached. Therefore, it is difficult to say the subject matter in the said suit are the same as in this one. When the Chief Magistrate set aside the judgment of the LC3 court he stated that the parties should file an appeal in the proper forum. The court noted the appeal should be allowed on the sole ground of lack of a properly constituted court that passed judgment. Therefore, the said matter was never disposed of on merit by a competent court. Therefore, I cannot fault the trial Judge on ground 1 of the appeal. It is answered in the negative.

Issue 2. Whether the learned trial Judge erred in law and fact when he concluded that the land in dispute belonged to the respondent and the appellant is a trespasser?

a) The appellant's submissions.

21. The appellant submitted that the trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion that the land in dispute belonged to the respondent and the appellant was a trespasser.

b) Respondent's submissions.

- 22. The respondent submitted that the trial Judge properly evaluated the evidence on record and came to the right conclusion that the appellant was a trespasser on the suit land. The respondent stated that in reaching his decision, the Judge relied on the pleadings of the parties.
- 23. The respondent submitted that the trial Judge looked at the evidence of the witnesses. The respondent had 4 witnesses while the appellant had 3. The trial Judge then addressed himself on the burden of proof. Having addressed himself on the burden of proof, the court noted that it had a certified copy of the judgment of his worship E. R Rwamutemba Magistrate Grade 3 delivered on 2nd August 1966. The court noted that the although the appellant was not a party to the decision in Civil Suit 36 of 1996 he was bound by the decision

of the Parish Court of Kyobwe. The respondent cited Kaia and another u Attorney General and others [2005] 1 EA 83 where the court found that the defendants who were not party to the judgment in the previous case were liable because the judgment was ^a judgment in rem. The respondent submitted that a judgment in rem binds the whole world. The judgment in Civil Suit 36 of 1996 was binding on the appellant. The Judge evaluated the evidence on record and came to the correct decision.

c) Determination of issue 2

24. The trial court in its Judgement, finding for the respondent stated

"Although the Defendant was not a party to the decision in Civil Suit No. 36 of 1996 he is bound by the decision of the parish court of Kyobwe where the defendant was a party and which decision was admitted in this case as exhibit P3. The Parish court of Kyobwe upheld the judgment of the Magistrate Grade I I I in Civil Suit no. 36 of 1996.

It is important to state that in his judgment the Magistrate found as follows.

.. PW1 was Y. Bazarirabusha, the father of the plaintiff who told this court the he was the one who was given the land in question to the plaintiff and therefore he knew it very well."

I therefore find that the evidence on record proves that the seven acres now in dispute were given to the Plaintiff Kahangirwe Eliab by his late father Yokona Bazarirabusha prior to 1966. The first issue is therefore resolved in favour of the Plaintiff."

The trial Judge in finding in favour of the respondent relied on a judgment of the Magistrate Grade 3 which decision was upheld by the Parish court of Kyobwe. The evidence he relied on was of Yokona Bazarirabusha, the father of both the appellant and the respondent. Though the said Yokona Bazarirabusha did not testify in the civil suit which is subject of this appeal because he had passed away, he testified in a suit where he admitted that he had given the suit land to the respondent. The judgment in the suit where the admission was made was an exhibit which the appellant did not object to. The Judge took judicial notice that the father of the parties had testified that he had given the suit land to the respondent. The fact that the appellant would sue trespassers and not the father indicates that the former was the owner of the land. There was evidence from PW2, Elifaz Rutagaruhira who testified he was cultivating on the said land. He stopped using it and surrendered it to the respondent. PW4 Wilson Mutabazi also admitted to using the said land belonging to the respondent. The said evidence was not rebutted. The evidence by the respondent's witnesses corroborates that in the judgment which the court relied on.

25. The evidence on record is not sufficient to dispel the finding on record by the trial Judge that the respondent is the owner of the suit land. Therefore, ground 2 fails.

Issue 3: Whether the learned trial Judge erred in law and fact when he awarded 7 acres to the respondent as the land in dispute?

a) The appellant's submissions.

- 26. The counsel for the appellant submitted that the trial Judge erred in law and fact when he awarded 7 acres of land to the respondent yet the disputed land is 3 acres. He stated that whereas the respondent who was the plaintiff in Civil Suit 02 of 2009 pleaded ownership of 7 acres of land, he only said it was an estimate. The appellant, defendant in his testimony stated that the land in dispute is about 3 acres. DW3 one Kyarikunda Azaria testified that the land was about 1.5 acres.
- 27. The counsel for the appellant submitted that the failure of the trial Judge to establish the size of the land in dispute and the failure to establish the presence or absence of boundaries occasioned a miscarriage of justice. He submitted that the trial Judge should have visited the land in dispute.

b) Respondent's submissions.

- 28. The counsel for the respondent submitted that there is no evidence on the record that the suit land is 3 acres. It is not also true that the respondent in Civil Suit 0027 of 2009 pleaded ownership of 3 acres. Paragraph 6 of his amended plaint showed he was seeking for damages, mesne profit for the illegal use of land which is approximately 7 acres. He stated that the land is estimated to be about 7 acres because he is not a professional surveyor.
- 29. The counsel for the respondent further submitted that the size and boundaries of the land in dispute is well known. He submitted that the size and boundaries of the suit land are not in issue because they are well known. He concluded that the trial Judge was right in his decision.

c) Submissions in rejoinder

- 30. In rejoinder, the counsel for the appellant submitted that in Civil Suit 36 of 1996 7 acres of land was not mentioned. The judgment stated that "the dispute is over a small area of land which is situated in the territorial bounds of court." The respondent pleaded in the lower court that the land is approximately 7 acres but he confirmed that he only estimated the size of the land. The appellant testified that the land in dispute was 2 acres of land at Kibaare and 1 acre at Nyakgera. DW2 Kyarukunda Azailia testified that the land was 1.5 acres.
- 31. The counsel for the appellant submitted further that Civil Suit 36 of 1996 was between the respondent and other parties. The appellant was never a party to that suit. Therefore, the trial court should not have relied on Civil Suit 36 of 1996 to determine Civil Suit 0027 of 2009

d) Resolution of issue 3

32. I have had the opportunity to look at the pleadings in Civil Suit OO27 of 2009 which was the basis of this appeal. In Paragraph 6 of the plaint, the plaintiff pleaded:

"The plaintiff further contends that he has suffered loss of user of the suit land which the defendant is subjecting to waste and seeks mesne profits for the illegal use of the land which is approximately 7 acres at an average rate of Shs. 1 million per month i.e. Shs. 12 million per annum from August 2004 until the cessation, now standing at Shs. 60 million for 5 years."

Therefore, from the onset, the respondent was seeking to recover 7 acres of land. The appellant in his defence did not deny that the land in dispute was not ⁷ acres. PW1, the respondent, testified in re-examination that the land in dispute is 7 acres. A reading of the pleadings and the court proceedings do not show that the size of the land was in dispute. The respondent pleaded that it was ⁷ acres and the appellant did not deny it. The trial court found that the respondent was entitled to 7 acres as pleaded. I do not find fault with it. Therefore, I do not see the basis of the respondent denying that the land in dispute was not 7 acres. Issue 3 is found in the negative.

33. Taking the above into consideration, the appeal is dismissed. I note that the parties are brothers. Each party will bear his own costs.

Dated at Mbarara LIH a"y or h--"k ⁰²⁵

DR. ASA MUGENYI JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

Coram: Kibeedi, Mulyagonja & Mugenyi, JJA

CIVIL APPEAL NO. 003 OF 2017

(*Arising from Mbarara High Court HCT-05-CV-CS-0027 of 2009*)

BETWEEN

TURYAREEBA YONAH ::::::::::::::::::::::::::::::

AND

KAHANGIRWE ELIAB ::::::::::::::::::::::::::::::

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother, **Asa Mugenyi, JA**. I agree with the decision that the Appeal be dismissed for the reasons given, and with the order that each party should bear its own costs.

Dated at Mbarara this 27th day of March, 2025

Irene Mulyagonja

JUSTICE OF APPEAL

5 THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**

(Coram: Muzamiru M. Kbeedi, Irene Mulyagonja & Dr. Asa Mugenyi, JJA)

CIVIL APPEAL NO. 003 OF 2017

TURYAREEBA YONAH APPELLANT

VERSUS

KAHANGIRWE ELIAB RESPONDENTS

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI. JA

I have had the opportunity of reading in draft the judgment prepared by my learned brother, Dr. Asa Mugenyi, JA. I agree that the appeal is devoid of any merits and ought to be dismissed as proposed. 15

As Hon. Justice Mulyagonja, JA likewise agrees, the unanimous decision of the Court is that the above appeal is dismissed with each party bearing its own costs. 20

It is so ordered.

2s Delivered and dated this 27th day of ²⁰²⁵

Muzamiru Mutangula Kibeedi JUSTICE OF APPEAL

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