THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 59 OF 2009

1. BALAMU BWETEGAINE KIIZA :: APPELLANTS
2. ISMA RUBONA

VERSUS

ZEPHANIA KADOOBA KIIZA :: RESPONDENT

CORAM: HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE RICHARD BUTEERA, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

This is a second appeal arising from the original decision of Hoima Land Tribunal sitting at Hoima (hereinafter referred to as the "Tribunal") rendered on the 8th August 2005. On first appeal of that decision to the High Court Land Division, the first appellate Court upheld the decision of the Tribunal and hence this second appeal.

The background to this second appeal is that the respondent sued the appellants in the Land Tribunal at Hoima for a declaration that the suit land belonged to him and that the appellants were trespassers thereon. The respondent's claim was that on the 17th day of August 2000, he was given the suit land by the residents (Bataka) of Kyamugenzi and Local Council officials (L.C.) of Butema and Buhanika Parishes in Hoima district. The respondent immediately took possession of the same and constructed a semi-permanent residential house thereon. The respondent further claimed that in the same year, the first appellant without his

consent, brought the second appellant onto his land together with approximately 100 heads of cattle and constructed a temporary house on the suit property as well, which was an act of trespass. The second appellant is the herdsman of the first appellant.

The first appellant on the other hand, denied that he was a trespasser and claimed that the suit land originally belonged to his uncle, one Siira Babyesiza who in turn had acquired it from one Mukoro Womugongo. That Siira Babyesiza had grazed his cattle on the suit land without contest for the last thirty years and eventually gave the suit land to the first appellant and later advised him to apply for a lease on the suit property. It is the case for the first appellant that he applied for a lease over the land and that he obtained a lease offer dated 3rd January 1998 from the Masindi land office. It is therefore the case for the first appellant that the suit land belonged to him long before the respondent laid claim to it in 2000 and he was surprised that the respondent challenged his attempt to survey the suit land.

In their amended memorandum of appeal of 16th February 2015, the appellants formulated the following grounds for determination by this Court:

1. **The learned Judge erred in law in finding that the grant of the suit land by the Bataka and LC officials in 2000 and the subsequent settlement and development of the land by the respondent amounted to a customary tenure and was lawful**
2. **The learned Judge erred in law when he omitted to take into consideration that the first appellant had obtained a lease offer from the lawful authority mandated to deal with the land in dispute.**

3. .... *(abandoned)*

Mr. L. Tumwesigye represented the respondent whereas Mr. Francis Gimara appeared for the appellants.

We wish to recall the duty of a second appellate Court. **Section 72 of the Civil Procedure Act, Cap 71 (CPA)** provides:

" (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-

(a) The decision is contrary to law or to some usage having the force of law

(b) The decision has failed to determine some material issue of law or usage having the force of law

(c) A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits..."

Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10 (hereinafter referred to as the "Rules of this Court") further provides:

"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 by the trial Court, but shall not have discretion to hear additional evidence..."

The role of a second appellate Court was exhaustively discussed in the case of **Kifamunte Henry V Uganda, SC (Cr) Appeal No 10 of 2007** where it was held:

> *"...the first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it...On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles..."*

The court went on to hold that:

> *"This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, Court of Appeal misapplied or failed to apply the principles set out in such decisions as* ***Pandya v R [1957] E.A 336***"

Finally the Court also held that:

> *"...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 probably, that it would not have 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:* ***R V Hassan bin Said (1942) 9 EACA 62***"

We shall keep the above principles in mind when addressing ourselves to the grounds of appeal in this matter.

Ground 1:

The learned Judge erred in law in finding that the grant of the suit land by the Bataka and LC officials in 2000 and the subsequent settlement and development of the land by the respondent amounted to a customary tenure and was lawful

Arguments for the Appellant

Counsel for the appellant submitted that the issue of customary tenure was not proved during trial as required under **Section 46** of the **Evidence Act, Cap 6.** Counsel for the appellant relied on the cases of **Ernest Kinyanjui Kimani v Muira Gikanga [1965] E.A 735, Kampala District Land Board and anor v Venansio Babweyaka and Ors, SCCA No. 2 of 2007** and **R v Ndembera s/o Mwandawale (1947) 14 EACA 85** for the proposition that customary tenure must be proved. Counsel submitted that nowhere in the record was it shown that an expert on Bunyoro custom was called to testify as regards customary land ownership and no legal authority was cited to prove the existence of that custom. Counsel therefore submitted that The Land Tribunal and the first appellate Judge therefore erred in holding that allocation of land by the Bataka amounted to a customary practice in Bunyoro. Counsel further submitted that on the other hand, the appellant proved that he had acquired an interest in the land by his uncle grazing cattle on the suit land for over 30 years which interest was passed on to the first appellant who then went ahead to apply for a lease on the suit land.

Arguments for the Respondent

Counsel for the respondent agreed with the decisions of the Land Tribunal and first appellate Court and submitted that when the Bataka granted the suit land to the respondent, he acquired in it a customary interest. Counsel buttressed his arguments with the authorities of **Jakobo Lomolo v Kilembe Mines [1978] HCB 157** and **Marko Matovu & others v Sseviri & another [1979] HCB 174** for the proposition that customary tenure may be established by the cultivation only of seasonable crops or the grazing of cattle and related construction of wells to water cattle.

Counsel further argued that the respondent proceeded to carry out developments on the land unlike the appellant which in turn made him a customary tenant. Therefore, the Land Tribunal and the High Court did not err in their decisions and prayed for those findings to be upheld.

Resolution by the Court

We have considered the submissions of both Counsel and perused the Court record. The ground as framed is on a point of law. The point of law to be determined here is whether the respondent is a customary tenant as decided by the Land tribunal and first appellate Court. **Section 46** of the **Evidence Act, Cap 6** which counsel for the appellant relied upon, provides thus:

"46. Opinion as to existence of right or custom, when relevant

When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant"

The expression *"general custom or right"* includes customs or rights common to any considerable group of persons. What has to be determined therefore is whether there exists a custom among the Banyoro in which the Bataka and LCs allocate land which then amounts to customary ownership. In the case of **Ernest Kinyanjui Kimani v Muira Gikanga [1965] E.A 735, Duffus, JA** it was held that:

> *"As a matter of necessity, the customary law must be accurately and definitely established. The Court has wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case"*

The above dictum was cited with approval by **Odoki, C.J** (*as he then was*) in the Supreme Court case of **Kampala District Land Board and anor v Venansio Babweyaka and Ors, SCCA No. 2 of 2007**, where he held that:

> *"It is well established that where African customary law is neither well known nor documented, it must be established for the Court's guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases, relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties"*

The claim of the respondent (as claimant) in the Tribunal is quite interesting. In the Amended Statement of Claim in the Tribunal dated 12th August 2004 paragraph 5, it is written;

"5. The Cause of Action arose as hereunder:

(a) That on the 17th August 2000 the claimant lawfully acquired a piece of land situate at Kyamugenzi LC 1, the same having been given to him as **a gift** from the residents (Bataka) of Kyamugenzi, LC 1, Butema Parish, Buhanika Sub-county, Hoima District

(b) That the claimant immediately took possession thereof, constructed a semi-permanent residential house, fenced part of the land and started practicing animal husbandry thereon..." (*emphasis added*)

It is therefore clear that the respondent's legal claim to the land was that it was a gift to him from the Bataka. The respondent's pleadings are silent on the issue of customary tenure nor is there an averment that it was a custom in that area among the Banyoro to create a customary tenure through a gift from the Bataka. In any event it is a trite law of pleadings that there shall be no departure from pleadings without the leave of the Court or tribunal. A perusal of the proceedings at the tribunal shows that no witness even referred to a form of customary tenure. Indeed even the question of customary tenure was not one of the 3 issues to be determined by the Tribunal. It appears that the question of customary tenure was first raised during the submissions of the parties to the tribunal.

We have carefully perused the record, and it is our finding that there was no evidence led or adduced to prove the custom that LCs and the *Bataka (local elders)* can allocate land in the form of a gift from which arises a customary interest in Bunyoro. First and foremost, as found by the Land tribunal, ownership

of the suit property lay with the Hoima District Land Board by virtue of **Section 59(1)(a)** of the **Land Act, Cap 227** and not the Local Council or *Bataka* of the area. The Tribunal found that:

"..We wish to note that we agree with counsel for the respondents' submission that LCs or the Bataka do not own land in the district. We also wish to agree with Counsel for the respondent's submission that land in the district, which does not belong to anybody, is held by (the) Land Board in the District in trust of the people and can be given out by the District Land Board..."

On this point of Law we find that the Tribunal made a correct finding. The Tribunal however goes on to find:

"...Nevertheless, it is a practice that a person who does not want to acquire a registrable interest in the land can go to the local people of the area who upon allowing him to occupy such land which does not belong to anybody and upon occupation and developing such land, it becomes his/her customary holding..."

At the Tribunal, Businge Robert (PW2, Page 54 of the record being the notes of the Chair of the tribunal), the LC 1 Chairman at the time who was instrumental in giving the respondent the suit land testified that the suit land was about 80-100 acres which the respondent paid for by *"...ekita kyomwenge"* in terms of money (a calabash of beer).

The first appellate Court found that the suit land was vacant land and therefore fell under customary or traditional land tenure (P. 81 of the record). The learned appellate Judge then found:

"...it is my finding that when the Respondent settled on the vacant land in question and developed it, he immediately acquired customary interest on the disputed land..."

In order to have come to this finding the first appellate Court should have reviewed the evidence on record and reconsidered the materials before the Tribunal. However clearly, there was no evidence adduced at the Tribunal as to whether the respondent had acquired a customary tenure on the suit land by way of a gift from the Bataka. If the Bataka did not own the land then how could they in law give it out as a gift which then became a customary tenure? What is even stranger is that a gift had to be paid for with a calabash of beer. We wonder what kind of gift that was.

Therefore, without proof of that custom we do not agree with the finding of the Land Tribunal and the first appellate Court, that LCs and Bataka can grant customary land tenure. We also disagree with the finding that as a general rule when one occupies or develops land then *ipso facto*, a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't. In any event this was not proven in evidence and, as a general proposition of customary law, would be unacceptable. It is clear from the authorities above that customary law must be accurately and definitely established and sweeping generalities will not do under this test.

Native custom must be proved in evidence and cannot be obtained from the Court's assessors or supplied from the knowledge of the trial Judge (*see:* ***R v Ndembera s/o Mwandawale (1947)14 EACA 85***). However, it seems to be the

case here as the Land Tribunal held that this was common practice in Bunyoro without any proof from the respondent, which burden lay upon him to accurately and definitely prove. In this regard the respondent did not in law discharge the required standard of proof as no experts were brought to guide the Court on any existing customs relating to land nor were any scholarly materials of customary land law in Bunyoro referred to. In this regard, the appellate Court in reaching its findings did not apply the principles required of the first appellate Court to review and reconsider the evidence and materials before it on this ground.

We therefore find that the appellate Court erred in upholding the finding that when the Bataka gave the respondent the suit land in 2000 that amounted to a customary tenure as there is no evidence to support that finding of fact.

This ground of appeal therefore succeeds.

Ground 2:

The learned Judge erred in law when he omitted to take into consideration that the first appellant had obtained a lease offer from the lawful authority mandated to deal with the land in dispute.

Arguments for the Appellant

Counsel submitted that the first appellant applied for a lease over the suit land in 1995 and his application was considered and approved by the Department of Land Administration, Ministry of Lands vide ULC MIN: 3/95(a) 25 of 6/3/1995 Appl. No. 5927. The appellant received a lease offer from the Commissioner Land Administration dated 30th January 1998. In that respect, the appellant acquired equitable interest which only required to be perfected into a legal interest; unlike

the respondent who had no title at all. Counsel for the appellant also submitted that the *Bataka* and LCs had no authority to give vacant land to the respondent when the authority over suit land lay with the Hoima District Land Board. Consequently, the grant of the suit land by the *Bataka* and LCs when the District Land Board had already previously allocated the same land to the first appellant was unlawful and did not vest any title in him.

Counsel for the appellant further argued that assuming, the respondent had also acquired an equitable interest, then it followed that the first appellant's interest was the first in time. In this regard he relied on the authority of **John Katarikawe v William Katwiremu (1977) HCB 187**.

Arguments for the Respondent

Counsel for the respondent submitted that the lease offer given to the appellant did not create any interest in the suit land. It was merely an "*offer*" as the title suggests and was subject to the land being available and free from disputes at the time of the survey. Counsel pointed out that the land was never even surveyed as the respondent disrupted the exercise. He contested the interest of Babyesiza which the first appellant allegedly acquired because there is no evidence to show that he either occupied the land or made any developments on it. Therefore, the appellant did not have either equitable or legal interest on the land and this appeal should be dismissed for lack of merit.

Resolution by the Court

We have considered the submissions of both parties for which we are grateful.

It would appear to us that there are two claims of competing interests regarding the suit land by both parties to this appeal. The determination of these competing interests is a point of law though it will also be necessary in resolving this to consider the facts of this appeal. Under classical land law, there are two interests that the law recognizes. These include legal and equitable. According to **D.J Bakibinga, Equity & Trusts (LawAfrica, 2011)**, at **pages 46 & 47**, it is generally recognized that a legal interest is valid and enforceable against the whole world (*in rem*). This means that if, subsequently, a person obtains a legal or equitable interest in the same property, his or her interest is subject to the interest of the first owner. Equitable interests however are enforceable as against another claimant (*in personam*).

Where there are competing equities therefore, the maxim *qui prior est tempore, potior est jure* (he who is first in time has the stronger right) becomes applicable. It deals with priority where there is a conflict between two competing equitable interests in property and the general rule is that equitable interests in property take priority according to the order in which they are created.

In the instant case, the appellant obtained a lease offer in 1995 in respect of the suit land from the Department of Land Administration, Ministry of Lands, having followed all the preliminary steps to establish its availability. This included consultations with the *Bataka* and LC institution in the area who confirmed that indeed, the suit property was available for leasing (as evidenced in Exhibit D4).

In a subsequent development in 2000, the respondent also got recommendation from the same *Bataka* and LCs who gave him a go-ahead to occupy the suit property in exchange for, among other things, some local brew. At the Tribunal

the respondent testified that the offer to the first appellant from the Hoima Land Board of 1998 was a forgery. However during the hearing before the Tribunal the allegation of forgery or fraud was not proved in evidence.

As earlier decided here, the local authorities and residents did not have any authority over the suit land. The authority over the suit land lay with the Land Board. Following the procedure to acquire land from the Land Board, the authority of the Bataka or LCs ended with the recommendation as to the availability or unavailability of land so as to establish any encumbrances. We find under the law that the grant of the land beyond a recommendation to the Land Board by the LCs and Bataka was irregular. From the record, the appellant testified that he acquired the land from one Sira Babyesiza who had grazed his cattle there uncontested for over 30 years. Sira Babyesiza (Dw3) also testified to that effect. This evidence was not challenged at all.

We acknowledge that both the appellant and respondent at some stage occupied the suit property. The appellant did so through the lease offer and subsequent occupation and the respondent through occupying the land purportedly granted by the local authorities.

The Tribunal in its Judgment (p.66 of the record) found that a lease offer was not a certificate of title and therefore was not evidence of ownership of land. The Tribunal referred to the lease offer EX D1 and referred to the last paragraph which read:

"*...The offer is subject to the land being available and free from disputes at the time of survey...*" The Tribunal found that when the first appellant tried to survey the suit land in 2000, the land was already occupied by the respondent and a

dispute ensued so, technically the lease offer collapsed. The Tribunal further held that from their visit on the site (*locus in quo*) the respondent settled on the suit land a few months before the first appellant so the first appellants had to be the trespasser.

The appellate Court (P 83 of the record) found that:

"...The legal position is that a lease offer if (sic) a step in the procedure for acquiring the land in question. It does not bestow any superior interest on the land. It is subject to other conditions applicable to all offers for instance the availability of land..." The appellate Judge then faulted the first appellant for taking long to develop the land and only rushed to do so when the respondent took possession of this *"...very important source of wealth and means of production..."* which should not be allowed to go to waste. He then went on to hold that the land was free and that the respondent had acquired a customary tenure over it.

It has already been found as a fact that the jurisdiction over the suit land lay with the Hoima District land Board. It is also an uncontested fact that the Hoima District Land Board in 1995 vide Min ULC Min: 3/95 (a) (25) of 6/3/1995 approved and granted the first appellant a lease offer. It is not in doubt that in 1995 the respondent was not on the suit land. He only came in 2000. This is all on Court record. It is also on Court record that a formal lease offer for an initial period of 5 years was only issued to the first appellant 3 years later on the 30th January 1998. This again was before the respondent came on to the suit land. The stamp on the lease offer shows that fees were paid by the first appellant on the 13th November 2000. At this time the respondent was on the suit land. From the evidence, it is

clear that the first appellant had started the process of obtaining a legal title 5 years before the respondent came on to the suit land. The fact that the first appellant had not yet obtained the land title by the year 2000 does not mean the first appellant had nothing as the Tribunal would seem to suggest. Until he perfected the legal title in law the first appellant had an equitable interest in the land by virtue of the lease offer. The process of perfecting the title was protracted as can be seen from the relevant time lines on record and that is not unusual in Uganda. In our considered opinion and finding, the respondent cannot benefit from the last paragraph of the lease offer as to availability of the land by placing himself on the land 5 years after the lease offer had been given to the first respondent. It would be a dangerous precedent and indeed it is not the law that every unoccupied piece of land in Uganda is free land for anyone by whatever means to acquire.

The evidence on record would point to the respondent simply trying to frustrate the legal process that the first appellant was undertaking to perfect his equitable interest in order to acquire a legal interest.

It is our finding both on the law and fact that if the first appellate Court had properly applied the principles in relation to its task it would have found that the first appellant's equity was the first in time and hence in law in terms of ownership of the suit land. It erred in ignoring the grant of the lease offer in 1995.The maxim of competing equities thus applies resolving this matter in favour of the first appellant.

We answer this ground in the affirmative and it accordingly succeeds. We subsequently overturn the decision of the Land Tribunal and that of the first

appellate Court and find that the first appellant is the lawful owner of the suit property. The first and second appellants are therefore permitted to utilize the suit land without further interference from the respondent.

Final Result

This appeal succeeds with costs to the appellants in this Court, the first appellate Court as well as those in Hoima District Land Tribunal Claim/Application No. 091 of 2003.

We so Order

Dated this ....30th..... day of ....June..... 2015

HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE RICHARD BUTEERA, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA