**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – 01 – CV – CA – 049 OF 2016**

**(Arising from KAS – 00 – CV – CS – N0. 038 of 2015)**

**1. BALUKU NOZIMU**

**2. MUSUNGU LAWRENCE ................................................................APPELLANTS**

**VERSUS**

**BWAMBALE PURUTAZI.....................................................................RESPONDENT**

**BEFORE: HIS LORDHSIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE**

**Judgment**

This is an appeal against the decision of His Worship Matenga Dawa Francis, Chief Magistrate at Kasese delivered on 17/08/16.

**Background**

The Respondent instituted a Civil Suit against the Appellants for; a declaration that he was the rightful owner of the suit plots; a declaration that the Appellant’s occupation of the suit land amounts to unlawful conversion and trespass; a permanent injunction; an eviction order; general damages, interest and costs.

The Respondent’s claim was in trespass and conversion. He alleged that he got the suit land from his father in 1963 and in 2001 the Appellants started laying claim on the suit land as theirs. Attempts to resolve the land dispute were futile.

The Appellants on the other hand denied all the contents of the plaint and averred that the suit land was family land which was agreed to be subdivided however; the Respondent disagreed and instead came to Court.

Issues for determination in the lower Court were;

1. Whether the Plaintiff is the rightful owner of the suit land?
2. Whether the Defendants trespassed on the suit land?
3. What remedies are available to the parties?

The trial Magistrate found that the suit land belonged to the Respondent; the Appellants were not trespassers, a permanent injunction was issued, eviction order issued, and each party was ordered to bear its own costs.

The Appellants being dissatisfied with the above decision lodged the instant appeal whose grounds are;

1. That the learned trial Chief Magistrate erred in law to have held that there was no trespass and conversion committed by the Appellants and yet went ahead to give judgment in favour of the Respondent instead of dismissing the suit for failure to disclose a cause of action which error occasioned a gross miscarriage of justice to the Appellants.
2. That the learned trial Chief Magistrate erred in fact to have held that the suit land was given to the Respondent by his late father yet there was overwhelming and unchallenged evidence on Court record that the disputed land was given to the Respondent’s late mother by her late father one late Mithonde which error occasioned a gross miscarriage of justice to the Appellants.
3. That the learned trial Chief Magistrate erred in law and fact when he misapplied the law relating to the acquisition of land which burred his decision to come to a wrong decision otherwise he would have found for the Appellants which error occasioned a gross miscarriage of justice to the Appellants.
4. That the decision of the learned trial Chief Magistrate is against the weight of evidence otherwise he would have found in favour of the Appellants, which error occasioned a gross miscarriage of justice to the Appellants.

**Representation:**

Counsel Kizito Deo of M/s Legal Aid Project of Uganda Law Society appeared for the Appellants and M/s Guma & Co. Advocates represented the Respondent. By consent both parties agreed to file written submissions.

**The law**

In all Civil cases the burden of proof lies on the Plaintiff or Appellant to prove their case on a balance of probabilities. A party can only be called to dispute or rebut what has been proved by the other side. This is so because the person who alleges is the one who is interested in the Court believing their contention. **[See: Nsubuga versus Kavuma (1978) HCB 307, Sebuliba versus Co-op Bank (1982) HCB 19 and Lugazi Progressive School & Others (2001-2005) HCB 121].**

The duty/power of this Court is derived from **Section 220** of the Magistrate’s Court Act, and **Section 80** of the Civil Procedure Rules, and **Order 43 Rule 27** of the Civil Procedure Rules. This has been interpreted by the Courts to mean that the High Court sitting as the first Appellate Court must re-evaluate all the evidence on record and come up with its own independent conclusion. **[See: Mugunda versus Semanda, HCCA No. 76 of 2012].**

In the case of **Fredrick Zaabwe versus Orient Bank Ltd, Supreme Court, (2007), Uganda Law Reports, Volume 1, Page 98 at 130**, it was held that the first Appellate Court must evaluate all the evidence which was adduced before the trial Court and arrive at its own conclusion as to whether the findings of the trial Court can be supported.

**Resolution of the Grounds:**

I will resolve the Grounds separately.

**Ground 1: That the learned trial Chief Magistrate erred in law to have held that there was no trespass and conversion committed by the Appellants and yet went ahead to give judgment in favour of the Respondent instead of dismissing the suit for failure to disclose a cause of action which error occasioned a gross miscarriage of justice to the Appellants.**

In the instant case the Appellants contested the Respondent’s claim saying that the suit land belonged to their grandmother, the mother to the Respondent and therefore they were entitled to the same owing to the fact that their fathers were brothers to the Respondent. That it was not true that the suit land belonged to the Respondent’s father which he eventually inherited in 1963.

Counsel for the Appellants submitted that the Respondent’s action was premised on the claim that the Appellants had trespassed on the suit land. However, the trial Magistrate found that there was no trespass as defined in the case of **Sheikh** **Mohammed Lubowa versus Kitara Enterprises Ltd** and thus the suit should have been dismissed since there was no cause of action. That much as the Respondent enjoyed a right, this right was contested by the Appellants, and there was no right that was violated by the Appellants. **[See: Auto Garage versus Motkov (No. 3) (1971) E.A 514]**. That from the trial Chief Magistrate’s findings at locus the suit should have been dismissed because the Respondent had no locus standi.

Alternatively, that the Respondent should have stuck to his pleadings otherwise he lied to Court when he told Court that the Appellants had trespassed on the suit land and upon visiting locus it was found that the Appellants had not trespassed on the suit land.

Counsel for the Respondent on the other hand submitted that a cause of action can be determined from looking at the plaint/pleadings. That in case Court finds that trespass as one of the issues was not proved then it can look at other issues that were pertinent before the trial Court. The Respondent upon looking at the merits of the case was found to be the lawful owner of the suit land.

The Respondent, in the instant case laid his claim in trespass and conversion however, upon visiting locus, the trial Chief Magistrate found that the Appellants had not trespassed on the suit land. However, trespass was not the only issue for determination before the trial Court and thus the suit could not be dismissed on that ground. The Respondent’s cause of action was laid out in his plaint and it is very clear that the Appellants were also claim entitlement to the suit land and thus, Court minus finding they were not trespassers had to determine if indeed they had any actual interest in the suit land as they alleged. I find that the trial Chief Magistrate’s decision was well thought out and justified in the instant case.

This ground fails.

**Ground 2: That the learned trial Chief Magistrate erred in fact to have held that the suit land was given to the Respondent by his late father yet there was overwhelming and unchallenged evidence on Court record that the disputed land was given to the Respondent’s late mother by her late father one late Mithonde which error occasioned a gross miscarriage of justice to the Appellants.**

Counsel for the Appellants submitted that the Appellants told Court that the suit land was owned by their grandmother which evidence was supported by DW3 and Annexture “A” to his witness statement. That this evidence was not challenged by the Respondent. That also from the Respondent’s evidence he stated that the suit land was given to his father by Milhode who is his grandfather and the same person that gave Imelda Nyamukundi the Respondent’s mother and the Appellants’ grandmother land. Thus, the suit land belongs to the estate of Imelda Nyamukundi who died before distributing it to her children including the Respondent. That the Appellants as beneficiaries of their respective late fathers had an equitable right in the suit land.

Counsel for the Respondent submitted that it was the evidence of the widow that the suit land belonged to the Respondent who inherited the same from his father. From the locus visit it was found that the Respondent had been in occupation of the suit land even when his father was alive. The Appellants have never owned or utilized the suit land and live in a different village and have so far sold most of their land.

I have perused the evidence on record and given regard to the submissions of both Counsel however, I find that the suit land belongs to the Respondent. It was the evidence of PW2 the mother to the Respondent that the suit land belonged to her husband, the father (late Lawrence Musungu) of the Respondent and the same was inherited by the Respondent. PW2 being the widow told Court that she had no knowledge as to whether Imelda her co-wife was ever given land by their late husband. It is therefore very clear that the suit land did not form part of the late Imelda’s estate. I therefore, find that indeed the Respondent is the rightful owner of the suit land.

This ground also fails.

**Ground 3: That the learned trial Chief Magistrate erred in law and fact when he misapplied the law relating to the acquisition of land which burred his decision to come to a wrong decision otherwise he would have found for the Appellants which error occasioned a gross miscarriage of justice to the Appellants.**

Counsel for the Appellants submitted that it was very clear from the evidence adduced that the suit land belonged to the Respondent’s mother and grandmother of the Appellants. This was confirmed even during the clan meeting and the same was not challenged by the Respondent who also read the report at his mother’s (Imelda Nyamukundi) funeral as the clan speaker, that she should be buried on the suit land because it was hers and he did not contest.

Counsel for the Respondent on the other hand reiterated his submission on Ground 2 and also submitted that the Appellants used the family resolution to grab the Respondent’s piece of land. That the family had no title to pass on in making the resolution to subdivide land that did not belong to them but belonged to an individual who passed on the same to the Respondent. The Appellants after selling their respective pieces now want to grab that of the Respondent which is illegal and Court cannot sanction this.

I agree with the submission of Counsel for the Respondent and do reiterate my findings on Ground 2.

This ground too, fails.

**Ground 4: That the decision of the learned trial Chief Magistrate is against the weight of evidence otherwise he would have found in favour of the Appellants, which error occasioned a gross miscarriage of justice to the Appellants.**

Counsel for the Appellants submitted that had the trial Chief Magistrate analysed the evidence properly he would have found that the suit land belonged to the Respondent’s mother, the Appellants’ grandmother and not to the father of the Respondent; the land was used by both the Respondent and his mother; that the Appellants’ fathers were brothers to the Respondent and they died before receiving their share in the suit land; and that the land dispute was resolved by the clan after hearing the evidence of both parties.

Counsel for the Respondent submitted that the evidence was properly evaluated. At locus, there was a permanent house, established gardens, and burial grounds and the Appellants have never occupied the same.

It is my considered opinion that the evidence as adduced both in Court and at locus was properly evaluating and I find no fault in the decision of the trial Chief Magistrate.

This ground also fails.

In a nutshell, this appeal fails on all grounds, lacks merit and is accordingly dismissed with costs. The lower Court decision is upheld.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**

Judgment read and delivered in open Court in the presence of;

1. Counsel Kizito Deo for the Appellant.
2. Counsel Guma Denis for the Respondent.
3. James Court Clerk.

In the absence of both Parties.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**