THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO. 044 OF 2010

(From Rukungiri Civil Suit No. 043 of 2008)

HANNS BESIGYE :::APPELLANT

VERSUS

CHARLES NDYAHIKAYO:::RESPONDENT

BEFORE HON MR. JUSTICE J.W. KWESIGA

J U D G M E N T

Hanns Besigye, hereinafter referred to as the Appellant sued his uncle **Charles Ndyahikayo**, the Respondent, in the Chief Magistrate's Court at Rukungiri vide Civil Suit number 043 of 2008 alleging that he is the owner of the Suit Land and seeking a declaratory order to that effect plus an injunction to restrain the

Respondent from using the Suit Land or claim over the Suit Land. The Respondent denied the claims by the Appellant and contended that the Suit Land belonged to him and was different from the piece of land that the Appellant's exhibits referred to. The trial Magistrate made a finding that the Respondent committed no trespass because the Suit Land belonged to him and dismissed the Appellants Suit with costs to the Respondent. The Appellant's Appeal has two grounds of Appeal which are basically one namely; ***"That the trial Chief Magistrate erred in Law and fact when she failed to evaluate the evidence as a whole and reached a wrong decision that the Defendant was not a trespasser on the Suit Land."***

Mr. Murumba Wilfred represented the Appellant while Mr. Bakanyebonera Felix represented the Respondent. By consent the two Advocates filed written Submissions which I have read as I re-evaluated the evidence. Mr. Murumba submitted and I agree with the submissions that this court should follow the principles of Law settled by the decision in **PANDYA VS R. (1957) EA 336**. It is the duty of this court as the first appellate court to evaluate the

evidence on record as a whole and come to its own conclusion. This shall be the approach keeping in mind that where the trial court may have decided based on the **demeanor** of the witness, that opportunity or advantage is not available to the appellate court. The evaluation of the evidence in a case of this nature requires examination of the evidence given by the witnesses called by both parties, reconciling the oral testimony with the parties' exhibits and the evidence obtained by the trial court at the **Locus in quo** and after exhaustive examination on the balance of probabilities the court makes a finding.

The paramount fact that must be proved to the satisfactory of this court, on the balance of probabilities is the ownership of the Suit Land. The burden of proof is upon the Plaintiff/Appellant to adduce evidence to prove how he acquired the Suit Land from PW 1 Bakamuhata John. The first criticism by the Appellant on the trial court's decision is the Magistrates' believing in the evidence of PW 1 Bakamuhata when he testified that the Suit Land belonged to the Respondent.

P.W 1 appears to be the crucial witness in this case for the reasons that each of the parties' claims to have acquired the Suit Land from P.W 1 Bakamuhata. The Appellant case is that he purchased a customary tenure land from Bakamuhata John (PW 1) and the Respondent ratified the sale which took place on 30th October, 1998. The Respondent on the other hand contends that the Suit Land is a different piece of land altogether. Bakamuhata's evidence set out the following facts:-

(i) That the Respondent is his brother and the Appellant is their nephew.

(ii) That in 1998 he sold to the Appellant a piece of land at Nyakatare cell Mirambi village which first belonged to the Respondent, he sold it for 300,000/= (see exhibit P.1) He gave the Appellant ½ Acre, which had no trees. The plot with trees belonged to the Respondent outside the Appellant's land. The Appellant's land had no trees at all.

(iii) The Suit Land forms part of the land belonging to the Respondent which he sold to the Defendant/Respondent and not to the Appellant.

(iv) The Appellant, since 2004 has been cutting trees on the Suit Land, belonging to the Respondent. The Appellant fenced the land belonging to the Respondent.

PW 1 is a principal witness in this case because both the Appellant and the Respondent derive their claim of ownership from him. He previous owned the land in dispute and therefore he is the most appropriate person to testify on its movement from him to any of the parties. This is an un surveyed piece of land held as a customary tenure and I find his evidence plausible when he testified that the Appellant took advantage of the fact that there were no boundary marks separating the Appellant's land and that of the Respondent and he fenced the part of the Respondent's land now the Suit Land. The trial Magistrate considered the fact that PW 1 gave a testimony which was not favourable to the plaintiff who called him. She was criticized by the Appellant's Advocate that she

based her decision on this witnesses evidence and disregarded the evidence of PW 2, PW 3 and PW 4 to determine the ownership of the land. There is no doubt the Magistrate erred when she dismissed the evidence of PW 2, PW 3 and PW 4 without giving reasons for it. However this does not discredit the evidence of PW 1 as a hostile witness or being capable of treatment as a hostile witness a misconception derived from the Appellant's Advocate's Submission at the trial. It is not every witness that gives evidence against the party that calls him that can be treated as a hostile witness. If the witness is telling the truth that it not favourable to the party that calls him, like it is the case now, that evidence must be weighed like any other witnesses' evidence and accorded its due weight and credibility depending on the evidence as a whole.

PW 2 Severeno Twesigomwe corroborated PW 1 when he testified that the first piece of land at the bottom belonged to the Appellant (Plaintiff). That there were no boundary marks other than trees and a trench and that he expected PW1 to know the boundaries of his land. However the alleged transaction presided over by PW 2 as LC 1 Chairman is doubtful. No single member of his LC 1 Committee

was present and the Defendant/Respondent who was supposed to sign was absent.

PW 3 confirmed that this was exchange of two plots in lieu of money and interest owed to the appellant arising from a dispute over a transaction dated in 1998 as proved by P.E.1. This evidence is given by PW 1, PW 2 and PW 3. This evidence is further supported by DW 1. The Respondent that he ratified the agreement dated 30th October, 1998 in 2002. The subject matter was the land he had bought from SHOKORI in 1998 which is different from the Suit Land he bought from PW 1 Bakamuhata in 1984.

DW 2 AKANKUNDA JOHN a son of PW 1 confirmed in 1993 he was engaged by the Respondent to Plant trees on the Suit Land which the Respondent had purchased from PW 1 Bakamuhata. He confirmed that PW 1 had land below the Respondents land separated by a trench. He confirmed that the trees he planted for the Respondent had been cut and the land was fenced off in 2007 by the Appellant. The above evidence shows that whereas PW 1 sold land to PW 3, Appellant which was ratified by DW 1 Charles

Ndyahikayo in 2002, this particular piece of land is not in dispute. The Suit Land is totally different and was sold to DW 1 Ndyahikayo by PW 1 in 1984. He planted trees on the land in 1993/94 and the trees were cut in or about 2007 by the Appellant who illegally alienated the land and fenced the land.

I will now examine the evidence given at the Locus in quo. I agree with the Appellant's Advocate that the trial Magistrate's Judgment did not discuss the evidence given at the Locus in quo. Apart from this criticism the manner in which the proceedings were conducted left a lot to be desired. The Plaintiff/Appellant and the Defendant/Respondent should have been present and should have indicated, if they had any evidence to give to clear what may not have been clear during their evidence in court. The purpose of visiting Locus in quo is to shade more light on the evidence given in court and not to call fresh witnesses. 8 witnesses were called but it is not clear which of the two parties called these witnesses and if they were court witnesses their purposes was not clear. I did not find any assistance from the evidence given by the witnesses at the Locus in quo. It is not surprising that the trial Magistrate did not

mention in her Judgment her visit to the Locus in quo. I am unable to agree with the Appellant's submissions that the visiting of the Locus in quo defeated justice or caused a miscarriage of justice. On the contrary the intention was good except that the results of the proceedings did not add to or make subtraction from the available evidence. There is no explanation given as to why the parties did not give evidence at the Locus in quo. There is no explanation as to why Bakamuhata did not testify at the Locus in quo. The purpose of this visit is supposed to have amplified or clarified what had been stated in court and Bakamuhata would have been the best witness if the Magistrate needed to see the boundaries. Despite the procedural errors at the Locus in quo there is sufficient evidence for determination of the parties' rights. It is not the number of witnesses called that matters and it is not the volume of the testimony that determines who is right because a single cogent witness can prove the case.

The Plaintiff/Appellant testified as PW III/IV, Hanns Besigye. This litigant as a plaintiff had the burden to prove ownership of the Suit Land which included the boundaries of what he claimed. His

evidence which runs from pages 13 to 19 of the proceedings is so disjointed and full of irrelevant materials. Instead of testifying on how he acquired the land in issue and how it is different from what PW 1 Bakamuhata testified on he concentrated on matters such as protracted criminal disputes with his uncle the Respondent and disagreements with PW 1, also his uncle. He testified, ***"…..the defendant trespassed on my land because he reported to Police that I cut his trees yet they are not his. I was arrested and detained for 3 days on defendant's false allegation. I was charged with the Criminal case brought to court and it is awaiting conclusion of the Civil case."***

I must take this opportunity to note that the Plaintiff lost direction in pursuit of his claim and it is difficult to ascertain what he can achieve from his complaint about the Advocate not being from a firm he expected him to be. He spent a lot of effort in swearing affidavits to impeach the Advocate's identity instead of giving evidence to prove his case. The above notwithstanding the following facts have been gathered from his evidence; that Bakamuhata (PW1) gave him land under the sale in 1998 and gave him more

land as a payment for costs arising from Rukungiri Civil Suit No. 019 of 2002. That Bakamuhata had better knowledge of the boundaries and features on the land. His testimony corroborated the Respondent's evidence and claims that since 2004 up to the hearing date the Appellant is in occupation of the disputed land and cutting the trees that constitute the claim in the pending Criminal case of trespass.

DW 1 Ndyahikayo confirmed that he ratified P.EX 4 the agreement made between the Appellant and PW 1 John Bakamuhata because Bakamuhata had sold to the Appellant land that belongs to him. This was land that Ndyahikayo had bought in 1998 from Shokori.

All the evidence led by the Plaintiff to impeach the sale between Shokori and Ndyahikayo is irrelevant because this piece is not in dispute. What is in dispute is the piece that Appellant entered and cut trees belonging to Ndyahikayo since 2004 and fenced it in 2007 as proved by the overwhelming evidence given by both the Appellants witnesses and the Respondents witnesses. The trial Chief Magistrate was right to dismiss the Plaintiff's Suit in view of

the above examination of the evidence. Both parties agree in their evidence that Bakamuhata knows best the boundary of the land and the trial court correctly ordered that Bakamuhata opens the boundary marks of the piece of land for both the Appellant and the Respondent.

I have noted that the litigants are close relatives and neighbours and their immediate neighbours including LC I Committee over a long time have become party to these disputes as witnesses or sympathizers for different sides of the disputes.

In view of this it is hereby ordered that Bakamuhata shall, in the presence of the parties, under the supervision of the LC III Chairman of the Sub-County in which this land falls and in presence of Police Officer in charge of the area who shall witness the opening of the boundary and restoration of the possession of the part of the land that belongs to the Respondent that was fenced by the Appellant illegally leading to this protracted conflict.

In view of the above this Appeal is dismissed for lack of merits with the following specific orders:-

1. *The Appeal is dismissed with costs ordered against the Appellant both in the Lower Court and on Appeal.*

2. *The Suit Land belongs to the Respondent and his possession of the land shall be restored after Bakamuhata, under supervision of LC III Chairman and Police, has opened the relevant boundary.*

Dated at Kabale this **21st** day of **February, 2012**.

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J. W. KWESIGA

JUDGE

21-2-2012

Delivered in the presence of:

Mr. Wilfred Murumba for the Appellant

Mr. Felix Bakanyebonera for the Respondent.

Appellant absent.

Respondent present in court.