

**THE REPUBLIC OF UGANDA**  
**THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**CIVIL APPEAL NO. 41 OF 2021**

5 **(ARISING FROM ENTEBBE CHIEF MAGISTRATES COURT CIVIL  
SUIT NO. 69 OF 2014)**

**FRANK BEZIRE TURINOMUJUNI ..... APPELLANT**

**VERSUS**

**LUZZI FRANCIS ..... RESPONDENT**

**JUDGMENT**

10 **BEFORE. HON. LADY JUSTICE ELIZABETH JANE ALIVIDZA**

**Representation**

The Appellant is represented by M/s Sociis Path Advocates and the Respondent is represented by Uganda Christian Lawyers Fraternity.

15 **Background.**

This is a first Appeal against the judgment and orders of Her Worship Nakitende Juliet of Entebbe Chief Magistrate's Court delivered on the 16<sup>th</sup> August 2021. In the lower Court, the Appellant sued the Respondent for a declaration that he is the rightful owner of the suit  
20 land, a permanent injunction, general damages and costs.

The suit land is situate in Senny-Kasanje measuring approximately 3 acres. It was alleged that on the 5<sup>th</sup> July 2014, the Respondent together with his agents went to the Appellant's land in Serinyabi-Kasanje and without any right or claim arrested his worker and  
25 stopped any works on the suit land. That the Respondent has since



been in possession of the suit land and denied the Appellant access to the suit land and used it for his personal benefit.

30 During trial in the lower Court, it was the Appellant's case that he had bought the suit land from a one late Samuel Gayira by an agreement dated 28<sup>th</sup> July 1986 for UGX 200,000 and he took over possession exclusively until 5<sup>th</sup> July 2014 when the Respondent apparently trespassed on the suit land, removed boundary marks, arrested the Appellant's workers and forcefully took over possession denying the Appellant access hence the lower Court case.

35 The Respondent on the other hand asserts that he rightfully acquired the suit property through purchase of the said Kibanja on 24<sup>th</sup> April 2001 from Lumbuye James Grace who in turn had bought from a one Mega Meemetereka in 1981. Currently, it is the Respondent that uses the said Kibanja for farming.

40 The lower Court went for a locus visit and established that the suit land measures 1 acre and is neighbored among other people; the Appellant on the upper side but it has demarcation and is under the possession of the Respondent. During trial, the Appellant had two witness including himself while the Respondent had 5 witnesses.

45 After hearing both parties, Her Worship Nakitende Juliet found that it wasn't in dispute that the suit land is under Kibanja interest on land owned by the Late Gayira Samuel and that since 2014 to date, the suit land has been in the Defendant's/Respondent's possession.

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The trial Magistrate then held that Defendant/Respondent proved  
50 ownership of the suit land and therefore is the rightful owner. Thus  
implying that he could not be a trespasser on his own land.

The trial Magistrate stated that it was the Plaintiff/Appellant who  
tried to fence off land that didn't belong to him. The Court then issued  
a permanent injunction against the Appellant. However I noted that  
55 she did not indicate who had been in possession before 2014. This  
would have helped clarify the history of the ownership of the suit  
land.

I noted that on 24<sup>th</sup> November 2020, the lower Court had a locus visit  
and in her judgment, the learned Chief Magistrate made an analysis  
60 that the suit land is neighbored by Nasita at the bottom, Late Gayira  
[with graves] on the top left and the Appellant on left bottom. That it  
was approximately one acre. That it had potato heaps yet the  
Plaintiff/Appellant had told court that the suit land is 3 acres. That  
there was an unclaimed portion but none of the parties was claiming  
65 it.

The Court noted while at locus, that a consistent line of ownership  
was established and concluded that the current owner of the suit  
land was the Defendant/Respondent.

The Appellant was dissatisfied with the decision of Her Worship  
70 Nakitende Juliet hence this Appeal on the following grounds;

- 1. The learned trial Magistrate erred in law and in fact when she  
failed to evaluate the Appellant's evidence on adverse possession*

of the suit kibanja land in Serinyabi – Kasanje thereby reaching an erroneous decision.

75 2. The learned trial Magistrate erred in law and in fact when she held that the Plaintiff did not adduce evidence of his ownership of the suit Kibanja land in Serinyabi – Kasanje thereby reaching an erroneous decision.

### *The law Applicable*

80 This being a first Appeal, this Court is under an obligation to re-hear the case by subjecting the evidence presented to the trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004]  
85 KALR 236 as thus;

“It is a well-settled principle that on a first 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 a case of conflicting evidence the Appeal Court has to make due allowance for the fact that it has neither  
90 seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

The parties are entitled to obtain from the Appeal court its own decision on issues of fact as well as of law [Pandya v. R [1957] EA. 336]. It is incumbent on this Court therefore to weigh the conflicting  
95 evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and



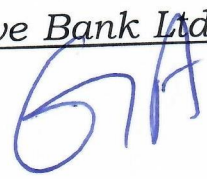
remembering to make due allowance for the fact that it has neither seen nor heard the witnesses.

100 The Appellate Court is confined to the evidence on record. Accordingly, the view of the trial Court as to where credibility lies is entitled to great weight. However, the Appellate Court may interfere with a finding of fact if the trial Court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the  
105 opinion of the trial Court.

*Burden and Standard of proof*

The burden of proof is upon the Plaintiffs to prove their case on a balance of probabilities. Section 101, 102 and 103 of the Evidence Act provide that he who asserts a fact must prove it. Whoever desires  
110 any Court to give the judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The Court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that,  
115 the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345 and SebulibaVs Cooperative Bank Ltd (1982) HCB130)



120 The cardinal principle in civil cases is embedded under *Section 101(1)*  
*of the Evidence Act* that whosoever desires any Court to give judgment  
as to any legal right or liability dependent on the existence of facts  
which he or she asserts must prove that those facts are in existence.  
It is further a cardinal principle of law that in civil suits all evidence  
125 is proved on a balance of probabilities. *See the cases of Miller V*  
*Minister of Pensions [1947] 2 All.E.R 372 and Katumba V Kenya*  
*Airways, Civil Appeal 9 of 2008 (SCU)*

In the instant case, Court is not bound necessarily to follow the trial  
Magistrate's findings of fact if it appears either that the lower Court  
130 clearly failed on some point to take account of particular  
circumstances or probabilities materially to estimate the evidence or  
if the impression based on demeanor of a witness is inconsistent with  
the evidence in the case generally.

### *Resolution*

135 To rule all out, I will go on to resolve the grounds as raised by the  
Appellant concurrently.

It is evident that both grounds aimed at bringing out the fact that the  
Appellant while in the lower Court brought out the issues of  
ownership and adverse possession to the attention of the learned  
140 Magistrate but the latter did not apparently give them due attention  
which accordingly occasioned an erroneous conclusion.

On perusing the record of proceedings in the lower Court together  
with the judgment, I have taken note that the Appellant was put on

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record as PW1 and looking at his witness statement under paragraph  
145 6-8, he states that he had been in possession for over 28 years since  
purchasing the suit Kibanja from the Late Gayira in 2000 and 1986  
respectively.

However, there is no exhibited evidence on record to this effect save  
for the sales agreement that was attached on the Plaint but neither  
150 submitted/exhibited nor interpreted hence not considered as  
evidence by the lower Court.

As an attachment on the pleadings, I have sought for the facts in this  
agreement and realized that the Appellant bought from Gayira  
Samuel land with Kibanja interest at 200,000/= on the 28<sup>th</sup> of July  
155 1986. Though it was not a point of contention in the lower Court, the  
Appellant's Counsel submitted extensively on adverse possession  
insinuating that the Appellant has been on the suit land undisturbed  
for a period of 12 years until 5<sup>th</sup> July 2014 when the Respondent  
interrupted his possession.

160 Counsel for the Appellant further stated that the Nemo dat quod non  
habet principle applied implying that whoever sold to the Respondent  
didn't have a right to do so as the land was already owned by the  
Appellant.

Counsel for the Respondent countered this and stated that Gayira  
165 was not in any position to transfer any ownership to the Appellant as  
the land was in possession of a one Mega Memetereka in the 1980s  
who in turn sold to Lumbuye Grace and in turn the

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Defendant/Respondent purchased the suit land from Lumbuye Grace.

170 Counsel also stated that the Respondent started paying busulo as evidenced in the receipts on record and he was in possession. DW5 who is a grandson to the late Gayira and in his evidence in chief stated that he was responsible for caretaking his grandfather's property and on the list of bibanja holders, the Appellant was not on  
175 but the Respondent was.

The trial Magistrate established that Mega Memetereka was the Kibanja owner of the suit land which belonged to Gayira. That she sold to Lumbuye in 1981; who sold to the Respondent in 2001 who has been in possession to date. There are land sale agreements on  
180 record to this effect that show systematic ownership of the land till the Respondent's purchase in 2001.

It was Counsel for the Respondent's submission that the chronological ownership of the suit land deters the Appellant from claiming the principle of adverse possession because ownership of  
185 the suit land has been consistent.

This argument and evidence relied on by the trial Magistrate would have been justified apart for the following reasons.

1. The owner landlord and owner of the disputed Kibanja was Gayira.
- 190 2. The sale agreement between Mega Meemeterka and Grace Lumbuya has no description of the actual Kibanja. The usual

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practice is for a description of the Kibanja including the neighbors are included in the agreement. There is nothing that convinces the Court that this is the disputed Kibanja.

195 3. It was never disputed that the Appellant was in possession from 1986 to 2014. If the Respondent bought the disputed Kibanja in 2001, he never was in possession until 2014.

200 Court takes judicial notice that "Adverse Possession" is a recognized method of acquiring title to land, accomplished by an open, visible, and exclusive possession uninterrupted for a set period of time. It is trite law that uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see Perry v. Clissold [1907] AC 73,  
205 at 79).

The essential elements of an adverse possession sufficient to create title to land by a claimant are; that the owner is ousted of possession and kept out uninterrupted for the requisite period of time by an open, visible, and exclusive possession by the claimant, under a  
210 claim of right, with the intention of using the land as his own, and without the owner's consent.

However, in respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "Extinctive  
215 Prescription" reflected in Sections 5 and 16 of The Limitation Act. (see:

Justice Mubiru in Akena Christopher & 9 others v Opwonya Noah Civil Appeal No. 35 of 2016.)


It is my finding that the disputed Kibanja belonged to the Appellant through adverse possession. He was in possession from 1986 to 220 2014. There is no evidence that the Respondent ever took possession in 2001 when he claimed to have bought the disputed Kibanja.

Extensively dealing with this ground implies dealing with ownership of the suit land to ascertain the Appellant's claim of adverse possession.

225 It is not proof of ownership to identify previous owners of the Kibanja. What is important is the actual possession of the Kibanja especially since adverse possession can extinguish another's equitable and legal rights of ownership.

It was in error for the trial Magistrate to conclude that the Appellant 230 was a trespasser. I also noted that the report from the locus visit indicates that the disputed Kibanja was almost one acre though Appellant was claiming that the suit Kibanja was approximately 3 acres. Since its unsurveyed land, the exact measurement cannot be ascertained. Therefore this should not be used against the Appellant.

235 I also noted that the Trial Magistrate rightly quoted this requirement under *Section 31(3) of the land Act cap 227* to the effect that a tenant by occupancy shall pay to the registered owner an annual nominal ground rent which shall with the approval of the Minister, be determined by the Board.





240 I also note that under Section 31(3) for purposes of this Section,  
nominal ground rent shall mean reasonable ground rent-taking into  
consideration the circumstances of each case and in any case of a  
non-commercial nature. Unfortunately, this Court does not see how  
this is related to the issue of possession.

245 Therefore, I allow the Appeal in part and make the following orders.

1. Since the Appellant has been in possession for a considerable  
period of time, the Respondent should compensate him for any  
developments he had made.

2. Each party bears their own costs in this Court and in the lower  
250 Court

I so order



255 **Elizabeth Jane Alividza**

**Judge**

**19<sup>th</sup> June 2023**

29/6/2023

Judgment +  
Eccmis

posted on

