

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 19 OF 2015
(ARISING FROM CIVIL SUIT NO 164 OF 2012)

1. HAJJATI ZIYADI NALUBULA NAKAWUNGU
2. SSALONGO MAKYA LEONARD.....APPELLANTS

VS

1. SSEGUJJA HUSSEIN
2. NTAMBI DALAUS.....RESPONDENTS

JUDGEMENT

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

This is an appeal from the Judgement of the Magistrate G1 Her Worship Aisha Nabukeera sitting at Masaka. The Appellant was represented by Baridawa-Ngobi and Co Advocates while the respondent was represented by Mbeeta Kanya and Co Advocates. Both parties filed written submissions.

The facts constituting this appeal are that the respondents are the administrators of the estate of Masuudi Naise Mutanda. They sued the appellants for a permanent injunction restraining the appellants, their relatives, children, servants, and agents from undertaking any further dealings/ interfering with the suit property, a declaration that the respondents are legal owners of the suit property, an order nullifying all the transaction made by the appellants or their agents, an eviction order against the appellants or their agents, general damages and costs of the suit. The appellants filed a written statement of defence and counterclaim.

At the hearing, counsel for the respondents raised the following three preliminary objections upon which the magistrate relied to strike out the defence:

1. That the 1st appellants' claim was barred by limitation
2. That the sale/transaction between the appellants for the suit property was barred by law
3. That the 2nd appellants claim of a bona fide purchaser for value without notice was barred by law

The trial magistrate upheld the objections and the appellants were dissatisfied hence this appeal.

The Appeal is anchored on the following:

- (1) The learned trial Magistrate erred in law and fact in that she ignored the appellants' submissions which were on the court file and ruled that "the defendants never filed a reply in the preliminary objections.
- (2) The learned trial Magistrate erred in law and fact in that she denied the appellants a right to be heard in defence of the suit when she determined the same in a summary manner.
- (3) The learned trial Magistrate erred in law and fact in that she failed to appreciate that the issues raised by counsel for the respondents as points of law could only be proved by adducing evidence
- (4) The learned trial Magistrate erred in law and fact in that she ignored the fact that by the time the respondents obtained letters of administration, the estate of the late Naisse Mutanda Masuudi had already been distributed among the rightful beneficiaries, there was no dispute among the rightful beneficiaries and there was no residue to be administered by the respondents
- (5) The learned trial Magistrate erred in law and fact in that she failed to realise that the respondents' letters of administration were being challenged as having been obtained fraudulently.
- (6) The learned trial Magistrate erred in law and fact in that she exhibited decided bias against the appellants thereby arriving at a wrong decision in the matter and occasioned a miscarriage of justice

It is my duty as the first appellate court to scrutinize and re-evaluate the evidence on record and come to a fair decision. **S. 80 of the Civil Procedure Act Cap 71** is alive to this fact. The same position was stated in *Fredrick Zaabwe VS Orient Bank Ltd C/A NO.4 of 2006*. See also *Kifamunte Henry VS Uganda SCU CR. Appeal No.10 of 1997*. The responsibility of the Appellate court was more clearly states in the case of *Baguma Fred VS Uganda SCC in appeal No7 of 2004* Justice Order stated that

First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own

conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court

Ground 1

The learned trial Magistrate erred in law and fact in that she ignored the appellants submissions which were on the court file and ruled that “the defendants never filled a reply in the preliminary objections.”

Counsel for the appellant argued that the appellants filled written submissions and were received by court as directed by court.

The respondent argued that the appellants did not file written submissions and they never served their submissions on the respondent’s counsel.

I need to state from the onset that submissions are not provided for in the rules of procedure. It is a rule of practice. Nevertheless, they guide court to understand the averments of the litigants properly. Court therefore can take a decision with or without submissions. That said, I was unable to see the submissions from the appellants on file. Counsel for the appellant should have attached a copy of his submissions in the lower court received by Court on his submissions to High Court to avoid a situation where such documents could have been removed from the file.

Ground 2:

The learned trial Magistrate erred in law and fact in that she denied the appellants a right to be heard in defence of the suit when she determined the same in a summary manner.

Counsel for the appellant argued that all the points of law that were raised by counsel for the respondent required adducing evidence before a decision could be made on them.

Counsel for the respondent argued that the counterclaim by the appellants to have letters of administration revoked could not be upheld since the letters were issued by the High Court and

the Magistrate had no powers to revoke them. He argued that the suit was challenging the legality of the sale between the appellants and that did not require adducing of evidence

With respect, I think the Magistrate should have taken trouble to listen to the testimonies of the appellants and how their transactions took place before she could conclusively state that the transactions were illegal. For example, there were allegations that the deceased left a will and that properties were distributed according to that will. Though the appellants should have obtained probate if there was a will, such evidence of a will would not have made the respondents legitimate owners as the magistrate ruled. This was not a case that could be determined in a summary manner on preliminary points of law, since the magistrate needed to understand whether the transaction was as a result of inheritance or succession. I therefore uphold this ground. There is no need to delve into other ground. I did not identify any evidence of bias on the part of the trial Magistrate.

Nevertheless, I need to comment on the Magistrate's orders having upheld the plaintiff objections. After upholding the plaintiff's objections, the Magistrate proceeded to issue the following orders:

- (a) That the plaintiffs are the Legal owners of the suit property
- (b) Court cancels out/revokes the defendants transactions on the suit property
- (c) Court declares the defendants as intermeddlers/trespassers in the suit property
- (d) Permanent injunction.....
- (e) General damages for trespass and mental anguish of Sh 5,000,000/=
- (f) Coats of the suit

This was erroneous on the part of the Magistrate. What she should have done was to set down the suit for formal proof after striking out the defendants defence to prove averments in the plaint.

Regarding general damages, the law is that they are awarded at the discretion of court but they are natural consequence of the defendant's act or omission and they are intended to compensate the plaintiff for the injury suffered. See **Robert Cuossens vs. Attorney General SCCA No. 08 of 1999**

In the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the inconveniences that the party was put through at the instance of the opposite party, and the nature and extent of the breach. See: ***Uganda Commercial Bank vs. Kigozi [2002] 1 EA. 305.*** A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the injury/damage. See: ***Charles Acire vs. Myaana Engola H.C.C.S No. 143 of 1993; Kibimba Rice Ltd vs. Umar Salim, SCCA No. 17 of 1992.***

However, general damages must be strictly proved. I do not understand how the trial magistrate arrived at the quantum of damages of 5 Million when they were never proved. Was it by impulse? The reason why the damages were never proved is because the Magistrate did not set down the suit for formal proof.

In the result, I find merit in this appeal and it is hereby allowed with the following orders:

- (a) The orders of the Trial Magistrate are hereby quashed
- (b) The case should be tried and heard on its merits before another Magistrate
- (c) The cost of this appeal should be borne by the respondents

I so order

Dr Flavian Zeija

Judge

30/10/2017