

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 50 OF 2010

(Arising from the decision of His Worship Byarugaba John B. K. Magistrate Grade I of Luwero on 12th June, 2009)

BITULENSI NABUKENYA ::: APPELLANT

VERSUS

PAULO MATOVU ::: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

This was an appeal arising from the judgment and decree of His Worship Byarugaba John B. K, Magistrate Grade I Luwero given on 12th June, 2007.

The background facts of the case can be summarised as follows:

The Appellant is the daughter of the Late Yakobo Musoke who died intestate being survived by eight daughters and no son. The late Yakobo left property in various places including a residential holding comprised in Bulemezi Block 45 Plot 29. The Respondent who was the Appellant's cousin was installed as customary heir of the Late Yakobo Musoke as Yakobo had left no male child.

In that capacity the Respondent claimed ownership of the deceased's residential holding of the late Musoke to the exclusion of the Appellant and all other beneficiaries of the late Musoke's estate. The Appellant sued the respondent for declarations that the suit property comprised in Bulemezi Block 45 Plot 29 belonged to her and that the Respondent's stay on the land constituted trespass and for an order of eviction, general damages, interest and costs. The appellant sued as the administrator of the estate of the late Yakobo Musoke. The case for the Respondent was that he was heir to the late Yakobo Musoke who was his uncle and that he had been in occupation of the suit land with full knowledge of the Appellant and had developments on the said land.

The learned Magistrate decided in favour of the Appellant. The court ordered and decreed as follows:-

- 1. That the Plaintiff/Appellant was the lawful Mailo owner of the suit land by virtue of being the administrator of the estate of the late Yakobo Musoke the former registered owner.***
- 2. That the Defendant/Respondent went on the land with the consent of the Plaintiff/Appellant and her sisters and by virtue of being the heir of the late Yakobo Musoke he was not a trespasser on all the suit land.***
- 3. That the Defendant/Respondent was to and should remain the owner of the Kibanja or the bona fide occupant of all the suit land and should remain on the piece of land where his house was with its holding to utilize the same as he has been during before.***
- 4. That no order was made as to general damages.***
- 5. That each party was to bear own costs.***

The Appellant appealed to the High Court on the following grounds:-

- (1) The learned Trial Magistrate erred both in law and fact when he failed to order the eviction of the Respondent from the suit land/Kibanja.***
- (2) The learned trial Magistrate erred in law when he failed to order the Respondent to pay general damages to the Appellant and to declare the Respondent a trespasser.***
- (3) The learned Magistrate erred in law when he failed to amend cost of the court of first instance to the Appellant.***
- (4) The learned Trial Magistrate erred when he signed and sealed a decree which was contrary to the terms of the judgment delivered by court.***

The Appellant prayed for the following orders:

- (a) That the Respondent be declared a trespasser on the suit land.***
- (b) That the Respondent be evicted from the suit property.***
- (c) That the Respondent pays costs both in the court of 1st instance and for the appeal.***
- (d) That the decree signed and sealed by the lower court be nullified and a decree in proposed terms be substituted.***

Issue No. I: Whether the learned Trial Magistrate erred in law and fact when he failed to order the eviction of the Respondent from the suit land.

In his judgment the learned Trial Magistrate found that the Respondent entered the land by consent of the Appellant and her sisters. He was allowed to stay in the house as a heir to the deceased estate and allowed to remain there until he built his own. That he built the same on the 3 acres of land which had been given to him by Nakanwagi. Having given ownership of the suit land to the Appellant the learned Trial magistrate should have proceeded to order his eviction from the suit land thereby allowing him to remain on the land given to him by Nakanwagi where his residential holding is. The Respondent took advantage of the lacuna in the judgment and threatened to charge the Appellant and Nandaula with trespass on the suit land which had been decreed in favour of the Appellant, and her sisters. It is therefore my conclusion that having declared the Appellant the owner of the suit land the court should have restricted the Respondent's interest only to the 3 acres given to him by Kezia Nakanwagi on Block 45 Plot 28 thereby evicting him on Block 45 Plot 29 which had been decreed in favour of the Appellant.

The Second Issue was that the learned Trial Magistrate erred in law when he failed to order the Respondent to pay general damages to the Appellant and to declare the Appellant a trespasser.

As far as trespass is concerned, it is clear that the Respondent had entered the suit land with consent of the Appellant and her sisters. The Respondent entered as a heir to the estate of the late Yakobo Musoke. To constitute trespass one has entered into the land without the consent of the owner: See **Sheikh Mohamud Lubowa v Kitale Enterprise Limited, Civil Appeal No. 4 of 1987.**

In the instant case the Respondent entered the land as heir and therefore could not be called a trespasser as there was consent. The learned Trial Magistrate was right not to declare the Respondent a trespasser. A heir in Buganda custom is a recognised person in the estate of deceased persons. He looks after the estate of the deceased and has option to live in the deceased's house.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Respondent.

It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the Respondent's actions. The Applicant failed to adduce evidence to show that she suffered loss or damage. Having allowed the Respondent to take occupation of the house, the Appellant could not challenge him for not allowing them to access the house at their will. The security of the house was vested in the hands of the Respondent as a heir. Therefore there was no reason for awarding damages to the Appellant.

Ground 3: The learned Trial Magistrate erred in law for not awarding costs to the Appellant.

Section 27 of the Civil Procedure Act provides for costs. It provides that costs shall be in the discretion of the court and that costs shall follow the events unless the court has some good reasons otherwise to order. In **UDR vs Muganga (1981) HCB 35 Manyindo J** (as he then was) held that costs should follow the events unless the court orders otherwise. That the law gave court discretion but that the discretion must be exercised judicially. That a successful party can only be denied costs if it is proved that for his conduct the action

would not have been brought. Costs should follow the event even where the party succeeds only in the main purpose of the suit.

In the instant case, the learned Trial Magistrate passed judgment for the Appellant and ordered each party to bear own costs. In making the said order the learned Trial Magistrate did not give reasons backing his order that each party was to bear own costs. A successful litigant would want to know the circumstances under which he or she would be denied costs which is part of the fruits of justice. It is the giving of reasons in judgments that the court is said to have acted judicially. In denying the Appellant costs without reasons, the learned Trial Magistrate acted arbitrarily and perfunctorily. All indicators from the evidence on record show clearly that the Respondent acted in bad faith and in abuse of his responsibilities as heir with intentions to disinherit the Appellant and the children of the late Yakobo Musoke of their estate. He was the one who forced the appeal to go to court. For such an action I would condemn him to costs.

Issue No. 4: The learned Trial Magistrate erred in law when he signed and sealed a decree which was contrary to the terms of the judgment delivered by court.

Order 21 Rule (1) of the Civil Procedure rules provides law governing judgment and decree of court:

“The decree shall agree with the judgment, it shall contain the number of the suit, the names and description of the parties and particulars of the claim and it shall specify clearly the relief granted or other determination of the suit.”

The salient part of the judgment of the learned Trial magistrate is found on page 5 and 6 of this judgment.

“That the Plaintiff has been declared to be the owner of the suit land I hereby declare her so. The Defendant has been found not to be a trespasser on the suit land as he had joined with the consent of the Plaintiff and her sisters and being a heir. The Plaintiff prayed for a eviction order. The Defendant has already built his house on a portion of land which had been severed from Nakanwagi. That is Bulemezi Block 45 Plot 28 registered into the names of Sewankambo son of Nakanwagi.

Considering him to have been on land by consent and have built a house thereon, and being a heir to the deceased estate, he is hereby allowed to remain on the piece of land where his house is, with its holding. It is claimed that he was given 3 acres of land on Sewankambo’s land and I hereby order that he remains and utilizes the same as he has been doing before.”

The Defendant has been on the land as heir. He has utilized this land by cultivating it and putting to use the proceeds of his benefit. The use of the land included harvesting coffee, bananas, trees and other seasonal crops. The beneficiaries have not benefitted directly from these proceeds as they were not staying on the land. He has managed to build a residential house on the part of that land given to the mother of Sewankambo. The land title was seen and exhibited to court in respect of a one Sewankambo as a proprietor of land where the Defendant has built a house.

The Defendant benefitted as heir and as someone who was staying on the land. At the same time he acted as a custodian to the land and properties of the deceased Yakobo and they are able to lay a claim over them. I preserve the

above benefits to be treated as a remind and motivation to the Defendant to enable him to be a custodian.

I am therefore inclined not to grant general damages on the Defendant as a heir and custodian to the deceased estate...”

From the above judgment the following decree was extracted:

(1) The Plaintiff is the lawful Mailo owner of the suit land by virtue of being the administrator of the estate of the late Yakobo Musoke the former registered owner.

(2) That the Defendant having come on the land with the consent of the Plaintiff and her sisters and by virtue of being the heir of the late Yakobo Musoke is not a trespasser on all the suit land.

(3) The Defendant is to and shall remain the owner of the Kibanja or bonafide occupant of all the suit land and shall remain on the piece of land where his house is with its holding to utilize the same as he has been doing before.

(4) No order is made as to general damages.

(5) Each party to bear own costs.

I have perused paragraph 1 and 2 of the decree. I have also perused the relevant part of the judgment of the learned Trial Magistrate where the decree was extracted from. I find the decree and the judgment are at par. However I have difficulties with the 3rd paragraph of the decree.

The equivalent part from the judgment is:

“Considering him to have been on the land by consent and to have built a house therein and being heir to the deceased estate, he is hereby allowed to remain on the piece of land where his house is, with its holdings. It is claimed that he was given 3 acres land on Sewankambo’s land and I hereby order that he remains and utilizes the same as he has been doing before.”

The decree and judgment are at variance. The judgment did not declare the Respondent **owner of the Kibanja or bonafide occupant of all the suit land.** The judgment allowed the Respondent to stay on the 3 acres of land from Sewankambo and which was where he had built a residential house. The disputed land was about 24 acres. The decree was therefore erroneous as it altered the rights and remedies given to the Appellant. For the above reasons it should be set aside.

In conclusion the appeal is accordingly allowed with costs both before this court and the lower court.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

12/9/2011

13/9/2011

Richard Mugenyi for Respondent.

Respondent absent.

Appellant present.

Judgment read in Chambers.

**HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE**

13/9/2011