THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0015-2011

(Arising from CS No.72 of 2009 Ibanda Court of Mag.Grade 1)

BISHANGA SILAGI :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

BATAHA JOSELIN :::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. MR. JUSTICE BASHAIJA K. ANDREW.

JUDGMENT

Background.

This appeal arises out of the judgment and orders of the Magistrate Grade 1 at Ibanda, Her Worship Mbabazi Edith Mary *(hereinafter referred to as "the trial court").* The Respondent had sued the Appellant claiming that that the latter grabbed her land at Nyinibare 1 in the Ibanda District. She sought, *inter alia*, for a declaratory order that she is the rightful owner of the suit land, eviction of the Appellant, a permanent injunction, and costs of the suit. The trial court found in her favour and granted the orders sought hence this appeal.

The Appellant advanced five grounds of appeal. He was represented by *M/s. Katembeko & Co Advocates,* while the Respondent was unrepresented both at trial and on appeal.

Grounds of Appeal.

1. ***The learned trial Magistrate erred in law and fact to rely on tangled record of proceedings and sketchily and intelligible evidence to make a decision and this error occasioned a substantial miscarriage of justice.***
2. ***The learned trial Magistrate erred in law and fact to make a judgment not based on evidence on record and this resulted into a substantial miscarriage of justice.***
3. ***The trial Magistrate erred in law and fact to hold that the respondent had interest in the suit contrary to the evidence record.***
4. ***The Learned trial Magistrate erred in law and fact to hold that Moses Rwakiseta did not pass good title to the appellant after selling him the suit land.***
5. ***The trial Magistrate erred in law and fact to give an award of Shs.1, 000,000/= as general damages without any legal basis.***

Principles of the Law.

It is the duty of this court, as a first appellate court, to re-evaluate the evidence of the trial court and re-appraise it afresh, and to draw its own conclusions. In doing so, however, it should make allowance for the fact that it neither saw nor heard the witnesses as they testified. See ***Selle v. Associated Motor Boat Co (1968) EA 123 at page 126; Banco Arabe Espanol v. Bank of Uganda, SC Civ. Appeal No. 8 of 1998; Kifamunte v.Uganda, SC Crim. Appeal No 10 of 1997; Begumisa v. Tibebaga SC Civ. Appeal No.17 of 2002.*** These are the guiding principles which this court will follow in resolving the issues raised in the instant appeal.

GROUND 1

<u>The learned trial Magistrate erred in law and fact to rely on tangled record of proceedings and sketchily and intelligible evidence to make a decision and this error occasioned a substantial miscarriage of justice.</u>

Mr. Katembeko Hilary, Counsel for the Appellant, raised issues with the record of the trial court, that it does not indicate who asked questions in cross-examination and /or who answered them. That it is very difficult for this court to make a proper re-evaluation and analysis of the evidence on record.

I entirely agree with the complaint levied by Counsel for the Appellant. The trial court's record of the typed copy of proceedings *(at page 3)* shows that the trial court never followed the correct procedure for receiving and recording of the evidence of the Appellant/Defendant before the Respondent/Plaintiff presented her case in court.

For instance, the record shows that after the Respondent/Plaintiff had testified, the trial court straight away put the Appellant/Defendant on his defence; only later to introduce other Plaintiff's witnesses, such as "PW No.4" one Tabaro Gideon to the witness stand. The other witnesses, such as "PW2" and "PW3" are not known from the record.

Secondly, the record of proceedings (both typed and hand written) does not show evidence that DW1 Silagi Bishanga, now the Appellant, was first either sworn or affirmed before he gave his evidence.

Furthermore, on page 3 of the typed copy of proceedings, there appears a "PW4" named as *"Tabaro Gideon aged 28 years"*, yet thereafter on page 4, another "PW4" a one *"Katushabe Monica a female aged 30 years"* appears on the record.

In addition, there are witnesses, such as a one *"Tumuhairwe John aged 65 years"* and *"Nuwagaba aged 52 years"*, who are actually not clearly indicated as either Plaintiff's or Defence witnesses. Also on page 1 of the typed record, the Plaintiff gave her testimony as "PW1", but did not call evidence of any "PW2" or "PW3", but only a one *"Tabaro Gideon"* appears on page 2 of the same record as "PW4". It is not clear where the evidence of the other witnesses is.

The manner of receiving and recording evidence adopted by the trial court was grossly irregular, and exhibits a tangled mesh- mash of confusion. One only derives from the record a general hazy impression of what the case is all about due to the poor methods of receiving and recording the evidence by the trial court.

O***rder 18 r.2(1),(2) &(3)*** of the ***Civil Procedure Rules***, about the hearing of the suit and examination of witnesses, should have been instructive, had the trial court addressed itself to the said provision. It states:-

1. ***On the day fixed for hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which she or he is bound to prove.***
2. ***The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.***

3. ***.The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply."***

The record is obviously tainted with multiple gross irregularities which should not be left to stand, as they certainly led to a miscarriage of justice. This ground of appeal succeeds.

GROUND 2.

The learned trial Magistrate erred in law and fact to make a judgment not based on evidence on record and this resulted into a substantial miscarriage of justice.

The gross irregularities in receiving and recording of the evidence, and particularly the reliance, for its judgment, on witnesses who did not appear on the record of proceedings is a sad commentary on the general mishandling of the entire case by the trial court. Ground 2 also succeeds.

GROUND 3 & 4.

- ***The trial Magistrate erred in law and fact to hold that the respondent had interest in the suit contrary to the evidence record.***
- ***The Learned trial Magistrate erred in law and fact to hold that Moses Rwakiseta did not pass good title to the appellant after selling him the suit land.***

What can roughly be gathered from the evidence is that the suit land belonged to one Moses Rwakiseta, apparently who is the husband to PW1 Bataha Joseline, who was the Plaintiff before the trial court and now Respondent. The

Appellant contended before the trial court that he had validly purchased the suit land from Moses Rwakiseta around 1995 and paid him Shs.300,000/= for it. For her part, the Respondent did not deny the sale transaction of the suit land, but only contended that the sale was not valid because the said Moses Rwakiseta was a drunkard, and had sold the land without her consent as a spouse.

It appears from the evidence on record that the Appellant had occupied and used the suit land from the time he purchased it in 1995 until 2008, when he resisted the attempt by the children of Rwakiseta who wanted to take possession of it. It also appears from the evidence of a witness, one Tumuhairwe John,(on page 4 of the proceedings) that at the time Rwakiseta sold the suit land, his wife, the Respondent was no longer staying at their matrimonial home because of domestic misunderstandings.

Considering the time from 1995 to 2008, when this suit was lodged in court, it clearly puts the Respondent's case out of time prescribed for bringing such an action. It is statute barred. ***Section 5*** of the ***Limitation Act (Cap 18)*** states that:-

> ***"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."***

Apart from being statute barred, it is clear that the land was sold to the Appellant in 1995 by Rwakiseta well before the coming into force of the ***Land Act of 1998(Cap 227),*** which was relied upon by the trial court to hold that the purchaser required spousal consent or to inform the Respondent before he could purchase the land. ***Section 39(1)*** thereof states that:-

> "***No person shall -***

(a) sell, exchange, transfer, pledge, mortgage or lease any land;

(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage o r lease of any land; or

(c) give away any land inter vivos or enter into any other transaction in respect of Law

(d) In the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse."

Counsel for the Appellant submitted, and correctly so, that such a provision should not have been relied upon by the trial court in determining the case.

John B Saunders in his book "Wards and Phrases legally Defined, 3rd Edition 1990, Butterworths,, London at page 92, states that:-

> ***"It has been said that 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing."***

Needless to add that as a general rule all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective and retrospective effect is not to be given to them

unless by express words or necessary implication, it appears that this was the intention of the legislative.

The ***Land Act of 1998 (Cap 227)*** does not show; either by express or by necessary implication, such intention. It follows that the two grounds of appeal succeed.

GROUND 5.

The trial Magistrate erred in law and fact to give an award of Shs.1, 000,000/= as general damages without any legal basis.

Counsel for the Appellant submitted that the Respondent in her evidence in court did not ask for general damages as one of the remedies to be given to her. That there is no basis as to how and why the trial court should have awarded the general damages.

It is, indeed, true that the trial court never bothered to assign any reason as to why it opted to grant the remedy of Shs.1,000,000/= as general damages to the Respondent, when she had not led evidence to prove that she deserved such remedy.

In addition, *Order 21 r. 4 of the CPR* provides that judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision on the case and the reasons for the decision. It was incumbent upon the trial court to assign reasons to justify the award of Shs.1, 000,000/= as general damages. In ***Bonnarm Carter v. Hyde Park Hotel Ltd. (1948) 64 TLR 17745;*** **Sheldon, J.** held in regard to the claim and award of general damages as follows:-

> ***"On the question of damages, I am left in an unsatisfactory position. The Plaintiff must understand that if they bring an***

action for damages, it is for them to prove their damages, it is not enough to write down the particulars and so to speak, throw them at the head of the court saying;

This is what I lost; I ask court to give me these damages. They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory."

From the above, it is clear that the trial court misdirected itself as to the law and fact in awarding Shs.1,000,000/= as general damages without assigning any reason to justify, or evidence on the record proving the same. This ground of appeal too succeeds.

The net result is that the entire appeal is allowed with costs on an appeal and the court below. The judgment and orders of the trial court are set aside.

.....

BASHAIJA K. ANDREW

J U D G E

21/09/2012