THE REPUBLIC OF UGANDA
INT THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-APPEAL No. 081 OF 2011
(Arising from HCT-05-CV-MA No. 38 0F 2011)

(Arising from HCT-05-CV-MA No. 54 0F 2003)
AND
***(Arising from MBARARA CHIEF MAGISTRATE'S COURT MISCILLENEOUS** APPLICATION No. 67 OF 1993)*
AND
(Arising from MBARARA CHIEF MAGISTRATE'S COURT CIVIL MISCILLENEOUS APPLICATION No. 151 OF 1991)
AND
(Arising from KIRUHURA-ORIGINAL SUIT No. 20 OF 1986)

1. JESSICA BASHAIJA
2. ENID NYANKUBA ::::::::::::::::::: APPELLANTS

VERSUS

1. MUTATINA JANE
2. AINOMUGISHAANNET ::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K ANDREW

JUDGMENT

This is a second appeal from the judgement and orders of the first appellate court - the Chief Magistrate's Court at Mbarara *(hereinafter referred to as the "1st Appellate Court")* where His Worship J B Katutsi (as he then was) upheld the judgment and orders of the Kiruhura Magistrate Grade 2 Court *(herein after referred to as the "the trial court")* dismissing the Appellants' case. For ease of reference the parties are, in this judgment, simply referred to as the "Appellants" and "Respondents" respectively.

Appellants filed in this court ***HCT-05-CV-CA-81-2011***, (*arising out of HCT-05-CV-MA-38-2003, MA-67-1993, CA 151-1991 and CS-20-1986)* seeking, *inter alia*, orders that the appeal be allowed, judgment and orders of the first appellate court be set aside, cancellation of the certificate of title, and costs of the appeal.

Background.

The current parties are legal representatives of the original ones in both lower courts, who were Amos Karamuzi and James Kaihura as Appellants, and Eriyazari Mutatina as the Respondent. The case for the Appellants at the trial was that they jointly held land under customary tenure, situate at Omukiyonza, Kenshunga in Mbarara District *(hereinafter to be referred to as "the suit land"*).

The Appellants settled on this land way back in 1968, from Rubare, in Kajara, now Ntungamo District. The land was allocated to them by the sub-county chief of the area at the time, one Micheal Bashaija. In 1974 another sub-county chief determined the extent of the boundaries of the suit land for the Appellants, which they used for cattle grazing and crop farming.

In September 1982, during the Obote II regime, the Appellants were chased out as being Banyarwanda refugees, and their houses were burnt down and property destroyed. They returned to the suit land in 1986 after the overthrow of the Obote 11 Government, and found that the land was fenced off and a house made of blocks had been constructed thereon.

The Appellants learnt that it was one Mutatiina (the original defendant in the trial court) who had built the block-house and fenced off the suit land and had it surveyed. They lodged a caveat on the land title, and then proceeded to file a suit in the trial court at Kiruhura.

As the case was still pending in the trial court, the Chief Registrar of Titles deemed the caveat to have lapsed, and registered Mutatiina as the proprietor of suit land, now comprised in ***LRV 1527 Folio 14 No.7***, situate at Omukiyonza, Kenshunga in Mbarara District. The Respondent was also granted a certificate of title.

The Appellants then filed ***Miscelleneous Application No.59 of 1987*** in the High Court at Kampala against the Chief Registrar of Titles seeking, *inter alia*, for orders that the Chief Registrar of Titles be directed to reinstate the caveat which they argued was wrongfully vacated, and cancellation of the certificate of title which they contended was wrongfully issued.

The High Court granted the application, only with the order that the caveat be reinstated pending the conclusion of the suit in the trial court at Kiruhura. The trial court subsequently decided the suit in favour of the Respondents.

The Appellants then filed an appeal in the Chief Magistrate's Court at Mbarara, which was dismissed, and the judgment and orders of the trial court upheld. The Appellants sought leave to appeal the Chief Magistrate's decision, but the application was dismissed by the first appellate court. The Appellants then sought leave in the High Court, which too was dismissed as being filed out of time. The Appellants sought for the extension of time within which to seek leave and to file the appeal, and both applications were granted, which set this appeal on course.

The Appellants advanced seven grounds of appeal as set out below:-

1. ***The learned Chief Magistrate erred in law and fact in upholding the Judgment of the trial Magistrate Grade II on the ratio decidendi of "who had a superior title" inexcusably by-passing his earlier finding that the High Court had ruled in MA-59 of 1987 that the caveat on the suit land be reinstated and the suit proceeds to be heard on the footing that no certificate of title had been issued, resultantly this ratio decidendi and the decision itself occasioned a miscarriage of justice.***
2. ***The learned Chief Magistrate erred in law and fact when he neglected to fault the trial Magistrate Grade II for deciding the suit on the footing of indefeasibility of title, not withstanding that the original suit was instituted in pursuit of customary land holding rights over untitled land.***
3. ***The learned Chief Magistrate made a grave error of judgement, when he neglected to address his mind to the glaring evidence on record that Amos Karamuzi and James Kaihura, had (2) two cattle wells and (2) two banana plantations on the suit land thus his finding that Benjamin Trust Mutatina found the suit land vacant was premised on conjecture, speculation and personal opinion.***
4. ***The learned Chief Magistrate erred in fact when, he disregarded his own finding of fact that Amos Karamuzi and James Kaihura were in occupation and resultantly this wrong preposition of fact occasioned a total miscarriage of justice.***
5. ***The learned Chief Magistrate erred in law and fact when, he disregarded his own finding of fact that Amos Karamuzi and James Kaihura were in occupation of the suit land since 1968 but were forcefully evicted by powerful forces at the time.***
6. ***The learned Chief Magistrate erred in law and fact when he neglected to take Judicial Notice of the infamous Rwandese expulsion scheme carried out by the Obote II Government authorities and thereby gave a judicial Stamp of approval to racial discrimination and use of force as means of land allocation by government.***

7. ***The learned Chief Magistrate erred in law and fact when he permitted himself to be overridden by personal opinion, thus failing in his duty to subject the evidence before him to fresh scrutiny and evaluation, resultantly his decision aused a miscarriage of justice.***

The grounds of appeal will be resolved in the order they were presented and argued by both Counsel. It should also be observed at the outset that the cross – cutting issue in the entire case intrinsically revolves around ownership of the suit land, which stems from the Appellants' customary claim based on prior occupation on the one hand, and the Respondents' assertion of their registered legal interest on the other. Consequently, the resolution of this crucial issue renders pronouncing upon other grounds purely an academic exercise.

It is called for to restate the duty of this court. As a second appellate court, it is not required to re-evaluate the evidence unless the first appellate court failed to re-appraise the evidence, and as such drew wrong inferences of fact, and did not properly consider the judgment from which the appeal arose. See ***Kifamunte Henry v. Uganda S.C. Crim. Appeal No. 10 of 1997; Baingana Kanona Willy v. Uganda S.C.Crim. Appeal No.26 of 2009.*** Bearing this duty in mind, I proceed to resolve the grounds.

Ground 1 and 2

The two grounds are quite interrelated and were argued together by both Counsel. The main complaint by the Appellants is that the first appellate court based its decision on the wrong premise of the indefeasibility of title and who had a superior title, notwithstanding that the original suit was instituted in pursuit of customary land holding rights over untitled land.

According to Mr. Kanduho Frank, Counsel for the Appellants, this led the first appellate court to inexcusably by-pass its earlier finding that the High Court had, in *Misc. Application No.59 of 1987* ruled that the caveat on the suit land be reinstated, and the suit proceeds to be heard on the footing that no certificate of title had been issued. Counsel opined that by adopting the wrong premise, the first appellate court made a wrong decision and occasioned a miscarriage of justice.

The particular part of the first appellate court's judgement which Counsel for the Appellants strongly criticised is found on page 4 thereof, where the court had this to say:

"It appears to me that the issues which the lower court was called upon to decide were;

(1).....

(2).....

(3) Whether the plaintiffs had superior title to that claimed by the defendant."

Counsel attacked the court's approach, in that it was bound to reach an erroneous finding since it had employed an equally erroneous premise of ***"who had a superior title",*** which was neither informed by the pleadings nor by the issues before the trial court for determination.

Counsel strongly maintained that the case before the trial court was in regard to customary land holding and not titled land, and that the first appellate court should have faulted the trial court for relying on the evidence of; and deciding the case on basis of indefeasibility of title. Counsel crowned his arguments on this point noting that since the certificate of title was obtained by the Respondents after the caveat lodged by the Appellants had been wrongfully removed; which was later reinstated by the High Court, the matter was to be treated as before the caveat was removed.

On their part, Counsel for the Respondents, Mr. Kwizera, premised their submissions fully on the existence of the certificate of title. He argued that even though the caveat was re-lodged pursuant to the ruling in ***High Court Misc. Cause No. 59 of 1987,*** no order as to cancellation of the certificate of title was issued as had been sought by the Appellants.

Further, that the High Court ruling does not feature the statement, as claimed by Counsel for the Appellants, that "*the suit should be heard on the footing that no certificate of title had been issued*". Counsel argued that no consequential orders could issue against the Respondents who, in any case, were not parties to the application, and that the certificate of title remained unaffected by the ruling; and to that effect the Respondents had a superior title in the suit land as against the Appellants.

Counsel also pointed out that the issue of superiority of title was considered by the lower courts because it was first raised by the Appellants themselves at the point

when they lodged the caveat on the Respondents' certificate of title, and alleged fraud, yet they had not pleaded and proved it in court.

I had the benefit of reading and appreciating the ruling in ***High Court Misc. Application No. 59 of 1987,*** but did not come across any order for the cancellation of the certificate of title. On page 6, its ruling the court in no uncertain terms stated that it could not issue any consequential order without a declaratory judgment for recovery of land since; in any case, the issues of ownership of the suit property were yet to be determined. The ruling then concluded thus:

> ***"There would be no basis for a cancellation in the circumstances of this case.***
>
> ***For the aforesaid reasons this court would be declined (sic) to make an order directing the Chief Registrar of Title as to cancel the title apparently mistakenly issued to Mutatina before the final determination of the of the suit pending in the Magistrate's court."***

The clear and unambiguous import of the ruling is that the certificate of title was not cancelled. If there was to be any decision affecting the certificate of title it would have to await the resolution of the ownership issues, which were still pending in the trial court. At the same time, the ruling clarified that the caveat would be reinstated against the Respondents' title pending the conclusion of the suit in the trial court; but this did not have a cancelling effect on the certificate of title. To the extent that the suit got determined in the trial court, the caveat's purpose would be rendered unnecessary.

At the same time, the ruling in ***H.C. Misc. Application No.59 of 1987*** neither features the statement that *"the suit should be heard on the footing that no certificate of title had been issued"*, nor could it be inferred from the terms of the ruling. The conclusions made, on page 6 thereof, dispel any suggestion for such an inference. The specific prayer for an order of cancellation of the certificate of title was consciously rejected, and the High Court assigned reasons; which I will not delve into now since they are not subject of this appeal. Therefore, while the matter proceeded in the trial court, only the caveat subsisted.

For clarity let me emphasise that the re- lodged caveat did not, and could not have the "cancelling effect" on the certificate of title as it would be contrary to logic. The

High Court could not order for the reinstatement of a caveat on a certificate of title which it had ordered cancelled at the same time.

I have found that the expression that "*...**the caveat be reinstated and the suit proceeds to be heard on the footing that no certificate of title had been issues"*** only appears on page 3 of the first appellate court's judgment, but was never part of the High Court ruling. It does not exist, nor could such a meaning be implied from the express terms of the ruling. It appears to have been an unfortunate and strange inclusion or conclusion that was bound to cause confusion; as indeed it seems to have done.

Given the foregone position, the criticisms levied against the first appellate court as regards its findings on the "superior title", are unjustified. Indeed, the certificate of title was in existence and it was only proper that the court addressed it in determining who, as between the parties, as at the time of re – lodging the caveat had a better claim to the suit property.

After re-evaluating the evidence, it is evident that the first appellate court came to the conclusion, and rightly so in my view, that the Respondents had a superior title as against the Appellants, who only laid customary claim to the suit land. I will revert to this point about the customary claim of the Appellants later in this judgment.

There is no doubt that the first appellate court considered all material evidence before it in coming to the conclusion it did. At page 6 of its judgment, the court made valid findings that the Respondent went to the suit land innocently, like any other person would, after he had inquired from the neighbours as to any alleged previous or existing interests in the land. Finding none, he proceeded to develop the suit land, and subsequently obtained a certificate of title by the time the Appellants returned to lay their claim.

In addition, the records of both lower courts reveal in much detail that the Appellants neither pleaded nor proved the issue of fraud on part of the Respondents, which would have been the only basis to impeach his certificate of title. It would follow then that both the lower courts' findings on basis of indefeasibility of title, especially in absence of proof of fraud, are quite unassailable. See also ***Katarikawe v. Katweiremu & A'nor, CS No 2 of 1973.***

Counsel for the Appellants advanced another argument that the superiority/ indefeasibility of title was never raised as an issue at the trial, and hence should not have been resolved by both lower courts. He particularly faulted the first appellate court for failure to criticise the trial court for basing its decision on a non-existent issue.

Once again I do not find merit in Counsel's criticism of the courts' findings on that point. It was, in fact, the Appellants themselves who first raised the issue at the stage when they lodged the caveat on the certificate of title - at the same time when they raised the issue of fraud, which they had not pleaded - and as such, could not prove what they had not pleaded. This was a finding of fact by both lower courts, which this court in its role as the second appellate court would be reluctant to interfere with.

In addition, the Appellants contends that when the Respondent came to the suit land he found two wells which were dug by the Appellants, and two banana plantations, and that these should have put the Respondent on notice of the previous occupation and interest by the Appellants. Counsel cited ***Uganda Posts &Telecommunications Corporation v. Abraham Kitumba Petero Mulangila Lutaaya, SCCS No. 36 of 1995*** as authority to back his proposition

For their part the Respondents maintained that there was nothing on the suit land as evidence of prior occupation, and that the two wells/ponds referred to had, according to the neighbours' information, been dug by nomads and belonged to no one.

After revisiting the record of the lower courts, on page 9 of the trial court's proceedings, particularly the testimony of a one Karamuzi Amos (PW1) it is an inescapable conclusion that, indeed, the said wells could have been dug by nomads. This appears to corroborate the Respondent's version of evidence that on inquiry from neighbours, he was informed that the wells/ponds had no owners. The same testimony suggests that the ponds pre- existed the Appellants' occupation of the suit land.

The other evidence as to the existence of the appellants' three huts was discounted, and properly so in my view, by the trial court. It was clear that they were put in

place after the Appellants returned, since they had evidently been destroyed during the expulsion of the Appellants under the Obote 11 regime.

Given the above, it would follow that the existence wells and recently erected huts could not constitute evidence of the Appellants' prior occupation of the suit land, and the first appellate court was justified to hold as it did, on page 2 of its judgement, that there was ample and credible evidence to show that the suit land was vacant by the time the Respondent come on it.

Both courts below had also found that the Respondent had properly and lawfully acquired the suit land. Therefore, ***UP& T C v. Abraham Kitumba Petero Mulangila Lutaaya, case (supra)*** is inapplicable to the facts of the instant case as no fraud was proved or could be imputed against the Respondent. I find the first appellate court was at no fault in finding as it did, and the two grounds of appeal fail.

Ground 3.

The chief complaint in this ground is that the first trial court neglected to consider the evidence that the appellants had two cattle wells and two banana plantations on the suit land; and for the finding that the Respondent found the suit land vacant, and that the findings were premised on conjecture, speculation and personal opinion.

Responding on the same ground, Counsel for the Respondents raised issue with Ground 3 of the appeal as being argumentative, and argued that it should be struck out with costs. Further, that the first appellate court found that the Respondents came on to suit land when it was vacant, did a due diligence and occupied and developed the land; for which he obtained a lease.

In resolving Ground 3, I have found that there is no doubt that it is intensely argumentative and grossly narrative in nature, and offends provisions of ***Order 43 r.1(2) of the CPR*** to the effect that:

> ***"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from with any argument or narrative and the grounds shall be numbered consecutively."***

Courts have pronounced authoritatively on this rule, and Lawyers would do better to always keenly adhere to the dictates of the rules in order not cause undue hardships to their clients which would arise due to the non – compliance. A few will

suffice. In ***Jeninah Nanyonga & 2 O'rs v. Amos Kyangungu, H.C.Civil Appeal No.41 of 2008,*** Gidudu J. held that the ground of appeal must only state the objection to the decree without any argument or narrative, and that a ground of appeal is a ground of objection without argument and without details which may be constructed as the narrative.

Similarly in ***National Insurance Corporation v Pelican Air Services, CA No.15 of 2005*** **(**unreported) the Court of Appeal held that a ground which offended the rules of court in as far as how grounds of appeal shall be framed should be struck off.

The above is the correct statement of law. However, given that this matter touches and concerns proprietary rights of the parties over land, it would be in the interest of justice to invoke provisions of ***Article 126(2((e) the Constitution,*** and to determine the ground on merit. This is obviously done without losing bearing of the caution I have thrown to the concerned lawyers.

It is noted that *Ground 3 and Ground 4,* are very much similar in substance. The underlying contention in both of them is that the first appellate court erred in fact to find that there was ample and credible evidence to show that when Respondents went on the suit land they found it vacant. This point has amply been canvassed under *Ground 1 and 2* above; and there is no need for repetition.

Returning to the Appellants' claim based on customary holding, there is need to point out some salient legal aspects, which both lower courts seemed not to have been alive to; but are invariably pertinent to this case. The claim over the suit land on basis of prior occupation and customary land holding, in my view, did not exist in the first place for the reasons I have assigned below.

The evidence on record shows that the Appellants were allocated the suit land in 1968 by one Bashaija (PW3), the then sub- county chief, when they migrated from Rubare in Kajara. It could, therefore, not be customary land which was allocated to them, because no such land could be acquired from, or be granted by a sub – county chief, who was a Government official. Customary land could only be acquired ether by inheritance or, purchased from one who held such an interest. Government could not; and does not grant customary land.

It would follow that the Appellants were, at most, Licencees of the Government, notwithstanding that their licence was undocumented. It should be recalled that all

such licences were abolished with the coming into force of the ***Land Reform Decree, 1975,*** and converted to tenancy at sufferance, and land could be allocated by Government to any person. By the 1982 Banyarwanda expulsion, this was the legal state of affairs still obtaining, and the suit land became available for leasing by the Controlling Authority, who leased it to Respondents.

I have gone to these lengths to underscore the point that the moment the Respondents acquired legal interest in the suit land, they had superior claim as against the Appellants, who laid customary claim which, as stated above, was legally non – existent. Even if the Appellants lay claim based on prior occupation, they could not under any circumstances be tenants by occupancy, even under the post – 1995 Constitution legal regime, because they were not in occupation of the suit land twelve years prior to the coming into force of the said Constitution.

As stated earlier, it is uncalled for to resolve the remaining grounds purely for academic purposes. The net result is that the entire appeal fails and is dismissed with costs.

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BASHAIJA K. ANDREW
JUDGE.
16/11/2012