

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 38 OF 2009

DDUNGU LILLIAN APPELLANT

VERSUS

MARC WIDMER & ANOTHER RESPONDENTS

(Arising from Entebbe Chief Magistrates Court Civil Suit No. 52 of 2007)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The appellant, Lillian Ddungu, was a neighbour to the respondents, Marc Widmer and Rehema Najjingo Widmer, the registered proprietors of land comprised in LRV 2533 folio 6 situated at plot 16 Circular Drive, Entebbe. The appellant allegedly encroached on the respondents' land and started constructing a structure thereon, whereupon they sued her for trespass to land. The trial court delivered judgment in favour of the respondents hence the present appeal.

A memorandum of appeal filed on 9th July 2010 entailed three (3) grounds of appeal as follows:

- 1. The learned trial magistrate generally erred when she failed to properly evaluate the evidence on record and/ or failed to apply the same to the relevant law thus making a wrong judgment/ orders in favour of the respondents.**
- 2. The learned trial magistrate failed to visit the locus, which requirement was absolutely necessary; or if she did, the locus record of proceedings was messed up, or the same does not appear on the court record.**
- 3. The learned trial magistrate violated the land law regime of Uganda.**

At the hearing of the appeal Mr. Valentine Magala appeared for the appellant, while Mr. Ssebuliba Kiwanuka represented both respondents. Mr. Kiwanuka informed court that he had never been served with either a notice or memorandum of appeal in the present case. Pursuant to respondent counsel's prayer, Mr. Magala was ordered to serve a copy of the requisite documents upon Mr. Kiwanuka. Both parties were then directed to file written submissions in respect of

this appeal as follows: appellant's counsel was to file his submissions in court and serve the same upon Mr. Kiwanuka by or on 12th November 2012 at 9.00 am; respondents' counsel was to file his response thereto and serve the same upon Mr. Magala by or on 14th November 2012 at 9.00 am, and any reply by learned appellant counsel was to be filed by 5.00 pm on 14th November 2012. On 15th November 2012 this court received a letter ref. FM 76/04 bearing that day's date (15th November 2012) in which learned counsel for the respondents informed court that contrary to court's earlier orders, they had not been served with either the notice or memorandum of appeal hereof.

Appeals to the High Court in civil matters are instituted by memorandum of appeal. See Order 43 rule 1(1) of the Civil Procedure Rules (CPR). It is not in dispute that a memorandum of appeal was filed in this court on 9th July 2010. This is borne out by a minute on the court file indicating receipt of the memorandum on that date and duly signed by the registrar, as well as the memorandum of appeal on the court record that bears the same date of receipt – 9th July 2010. Further, at the hearing of the appeal on 5th November 2012 Mr. Kiwanuka did not contest the existence of a memorandum of appeal in this matter but simply prayed for an order directing appellant counsel to avail him with the same. It would appear this order was not complied with. I find no reason to disbelieve learned counsel for the respondents on this. However, this court did not have the opportunity to hear from counsel for the appellant with regard to this unfortunate and unprofessional turn of events, if true.

Order 43 rule 14(2) of the CPR mandates courts to hear an appeal *ex parte* where the respondent does not appear for the hearing thereof. An aggrieved respondent against whom judgment on appeal is delivered may then find relief by recourse to Order 43 rule 18 of the CPR, which provides for such respondent to apply for the appeal to be reheard upon proof to the satisfaction of court that the hearing notice in respect thereof was not served or that he was prevented by sufficient cause from attending the hearing of the appeal, as seems to be the case presently. On that basis, this court shall proceed to hear the present appeal *ex parte*. It is trite law, nonetheless, that the appellant shall be required to prove his claim against the respondents to the required standard of proof, their absence notwithstanding. In the case of civil proceedings, such as the present appeal, the applicable standard is proof by balance of probabilities.

In his written submissions, Mr. Magala abandoned ground 2 of the appeal. On the first ground of appeal, Mr. Magala argued that the respondents bore 2 'burdens' of proof which had not been considered by the trial magistrate, and that the leaned trial magistrate violated the applicable standard of proof and based her judgment on irrelevant and extraneous matters. Learned counsel argued that as plaintiffs before the lower court, the respondents bore the burden of proof of the alleged trespass onto their land by the appellant but this issue was not addressed by the trial magistrate. Counsel further argued that the appellant having been in possession of the suit premises, the burden to prove that she was not the owner thereof lay with the respondents but was not duly discharged. He referred this court to the provisions of **section 109 of the Evidence Act**, as well as the case of **Hassan Sserwadda vs. Namutebi Kasozi Civil Appeal No. 55 of**

2001 (HC) in support of this argument. Learned counsel faulted the trial magistrate for not, in his view, applying the appropriate standard of proof to her evaluation of the evidence adduced before her but, rather, unfairly faulting the appellant's evidence and submissions. Finally, with regard to ground 3 of the appeal, it was Mr. Magala's contention that the trial magistrate erroneously merged 2 land tenure systems and arrived at a wrong conclusion.

This court proposes to address the 2 outstanding grounds of appeal simultaneously, given that the gist of the first ground of appeal is to fault the trial magistrate's application of the rules of evidence in her determination of the substantive land issues highlighted in the second ground. I shall not belabour the point on which of the parties bore the burden of proof before the trial court. I do agree with learned counsel that the respondents bore the general burden of proving their case by balance of probabilities. See sections 101 and 102 of the Evidence Act, as well as the cases of **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130** and **Miller vs. Minister of Pensions (1947) 2 All ER 372**.

The cause of action that was under consideration by the trial court, which was indeed framed as an issue, was that of trespass to land. In a nutshell, while the respondents sought to claim vacant possession of the suit land by virtue of their having been registered proprietors of the land; the appellant claimed to be a kibanja holder on the same land with a right to and indeed in possession of the said land.

The law on trespass to land was clearly stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**. In that case, Mulenga JSC held:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. ... Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended.”

His lordship cited with approval the decision in **Moya Drift Farm Ltd vs. Theuri (1973) E.A. 114 at 115**, where the Court of Appeal for East Africa had considered the issue in light of Kenyan statutory provisions. In that case the trial court had dismissed a suit by the registered proprietor of land on the ground that at the time of the unlawful entry complained of the proprietor was not in possession. On appeal, although counsel for the proprietor argued that while the decision may have been in conformity with the English law, it was inconsistent with s.23 of the Registration of Titles Act of Kenya; Spry V.P held:

“I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor on registration and, unless there is any other person *lawfully* in possession such as a tenant, I think that title carries with it legal possession.”

Noting that s.23 of the Kenya statute was similar to then s.56 of the Registration of Titles Act (RTA) of Uganda, his lordship further held:

"I think the decision in Moya's case represents what the law should be in Uganda. It is an authority. I therefore, hold that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass."

The provisions of the then section 56 of the RTA are reflected in section 59 of the RTA as amended. Section 59 provides as follows:

“No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.” (*emphasis mine*)

For present purposes, section 64(1) of the RTA is quite pertinent. It reads:

“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud, hold the land or estate or interest in land subject to such incumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other incumbrances.” (*emphasis mine*)

In light of the foregoing legal provisions, it would appear to me to be quite clear that a certificate of title *inter alia* represents 2 positions. First, it is conclusive evidence of the registered proprietor’s ownership thereof and, secondly, such registered proprietor is by virtue of the certificate of title seized with possession of the land stated therein. Further, section 64(1) of the RTA does appear to largely grant superior title to a registered proprietor notwithstanding the existence of an alleged kibanja holder as is the case presently. Furthermore, a certificate of title can only be impeached on account of fraud, which was never in issue in the present appeal.

In the present case, a certificate of title was admitted on the court record as Exh. P1 and reflected the respondents as joint proprietors of the suit land. As stated earlier, learned counsel faulted the trial magistrate for disregarding the burden of proof purportedly placed on the respondents by section 109 of the Evidence Act. With due respect to learned counsel, the applicable provision on who would bear the burden of proof of ownership is **section 110** and not 109 of the Evidence Act. For ease of reference, the section reads as follows:

“When the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner.”

This court’s construction of both section 59 of the RTA and section 110 of the Evidence Act is that the latter provision might only be applicable in the absence of a certificate of title or a duly registered proprietor. Where a duly registered proprietor exists, as is the case presently, the certificate of title is conclusive evidence of ownership and therefore no further proof of ownership is required save for where there are allegations of fraud. Having found that the respondents were the duly registered proprietors of the suit land, which fact was not contested, it follows that they were seized with legal possession of the suit land and with a right to sue the appellant in trespass to land. See **Moya Drift Farm Ltd vs. Theuri** (supra).

The question, then, would be whether or not the appellant did in fact trespass onto the suit land. On this issue, the appellant testified that she was given the suit land by her father in 1990 before he died. She stated that she had no proof of the issuance of that gift but could present witnesses to prove it. The only witness that she did produce attested to having sold a one Charles Lubega (from whom the respondents purchased the suit land) land registered as plot 37. The suit land, on the other hand, was described as LRV 2533 folio 6, plot 16 Circular Drive, Entebbe Municipality. There is nothing on record to show that plot 37 has anything to do with the present appeal. I therefore find no proof either of a kibanja interest as by law required or any other interest in the suit land by the appellant. This court, therefore, cannot fault the trial magistrate for her finding that the appellant was a trespasser on the suit land.

Before I take leave of this issue, I wish to address the issue of lawful or bonafide occupancy raised by Mr. Magala at page 5 of his written submissions. Counsel refers to these 2 notions as being akin to customary kibanja holding. With utmost respect, I take the view that this was erroneous. A tenant by occupancy is defined in the interpretation section of the Land Act as ‘the lawful or bona fide occupant declared to be a tenant by occupancy by section 31.’ Who would amount to a lawful or bonafide occupant is defined in section 29 of the Land Act and must be sufficiently proved. Having proved that a person is either a lawful or bonafide occupant, it must also be proved that such person has been declared to be a tenant by occupancy as provided for in section 31 of the same Act. No such evidence was adduced in the trial court.

I would therefore dismiss this appeal with costs in this and the trial court to the respondents. It is further ordered that a copy of this judgment is served upon the respondents.

Monica K. Mugenyi
JUDGE

23rd November, 2012