THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0089-2010

(Arising from Tororo Chief Magistrate's Court Civil Suit No. TL-038-2005)

1. **WASEN ERIC**
2. **AWOR D. FRIDAY……..…….……APPELLANT**

VERSUS

1. **JOHN STEPHEN PAPAKANYANG**
2. **GRACE PAPAKANYANG.…..……..…….RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

As outlined by **Mr. Mukwana** learned counsel for the appellants (**Wasen Eric** and **Awor D. Friday**) the respondents to wit **John Stephen Papakanyang** and **Grace Papakanyanga** sued the appellants in the Chief Magistrate's Court of Tororo jointly and severally for trespass, forceful fencing off part of land comprised in plot 35-37 Bugwere road and illegal occupation of the same.

The appellants denied trespass, fencing off and occupation of the suit land and/or having any interest equitable or otherwise in the suit land.

At the trial in the lower court, two issues were framed for determination as follows:-

1. Whether the plaintiffs have a cause of action.
2. What are the remedies available?

The trial magistrate found that the defendants, now appellants had trespassed on the plaintiffs', now respondents' land and awarded 2,000,000/= as general damages to the respondents plus costs of the suit.

The appellants were dissatisfied with decision of the learned trial magistrate hence this appeal.

Two grounds of appeal were raised that:-

a) The learned trial magistrate erred in law and fact by finding that the appellants were trespassers against the weight of evidence before the court.
b) The learned trial magistrate erred in law and fact by failing to evaluate the evidence and thus arrived at an erroneous decision.

Court allowed both **Mr. Mukwana** for the appellants and **Mr. Isodo** for the Respondent to file written submissions in support of their respective cases. I will not reproduce the submissions in this judgment but suffice to mention that I have dutifully studied the respective submissions in relation to the lower court's record.

As a first appellate court I am mindful of my duty to re-evaluate the evidence on record and reach my conclusions. I will deal with both grounds of appeal together.

After a careful evaluation of the evidence on record and study of the lower court's judgment I am satisfied that the learned trial Magistrate properly evaluated the evidence before her and reached the correct verdict on a balance of probabilities.

During the scheduling conference it was agreed that Plot 35-37 Bugwere road belong to the respondents. In her judgment at P.1 thereof the trial Magistrate pointed out that:

> ***"During the scheduling conference, it was agreed that plot 35-37 Bugwere Road belongs to the plaintiffs (respondents now)."***

Thereafter the learned trial Magistrate went ahead to analyse the whole evidence on both sides. I therefore agree with the submission by **Mr. Isodo** that with the agreed facts and issues it is wrong for learned counsel for the appellant to turn round on appeal and say that ownership was not proved. Since ownership was agreed upon, there is no question whether the respondents owned the suit property or not. They complained that the appellants were trespassing on the suit land with a view of owning it.

The respondents therefore had a cause of action in light of the celebrated decision in ***Auto Garage v. Motokov (No.3) [1971] E.A. 514, 519*** where **Spry V.P** in his lead judgment concluded that:

> "***I would summarise the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that right has been violated, and that the defendant is liable, then in my opinion a cause of action has been disclosed."***

In the instant case, since ownership was not contested then the respondents-

- Enjoyed a right
- That right was violated.
- The defendant was liable.

From the evidence on record these ingredients came out on a balance of probabilities. Five witnesses testified for the respondents.

PW.1 John Stephen Papakanyang testified that he found the 1st appellant with his team taking measurements on the suit land while part of it was already fenced off. When he confronted him the 1st appellant abused and ridiculed him as a poor bicycle rider who cannot argue with a person with pajero. Upon more threats from the 1st appellant PW.1 (1st respondent) reported to police where **Detective Sergeant Watuwa Johnson** was detailed to visit the scene. PW.1 produced all documents of ownership at police and in the alternative decided to file a civil suit from which this appeal emanates against the 1st appellant. He later added the 2nd appellant when she threatened to cut him with a hoe after he asked her why she was cultivating his property.

PW.2 Grace Papakanyang wife to PW.1 did not see what happened but told court that plot 35-37 belongs to them.

PW.3 No. 20243 D/Sgt Watuwa Johnson testified that on 12 August 2005 while at Tororo Police Station the 1st respondent reported that someone was busy fencing his plot and upon visiting the scene he found people busy fencing the suit property.

Upon inquiring he was told that it was the 1st appellant who had authorized them. He instructed the 1st appellant to go to police where a case was opened under CRB 796/2005 and allocated to **D/AIP Opule** to investigate.

PW.4 Michael Okumu told court that he is a neighbour to the suit property about 300 meters away. That one day while on his way somewhere he saw people gathered under a mango tree. He branched there. After inquiring he was told that the 1st appellant had bought the suit property. He later saw the 2nd appellant tilling the suit land. The 1st respondent also claimed the same land.

PW.5 John Lawrence Opio told court that his home is 90 metres away from the suit land. That in August 2005 he heard noise and when he went to inquire as a neighbour, he found the 1st appellant who explained to him that a certain gentleman was disturbing him claiming that he had encroached on his land and has called police to arrest him.

On the other hand, the **DW.1 Wasen Eric** denied owning any land in Bison but stated that he went there in August 2005 to rescue his surveyor. **DW.2 Awor** Margaret testified that she digs for people and denied threatening the 1st respondent with a hoe and or digging his land.

DW.3 Ochapa Francis the LC.I Chairperson western Division Bison A testified that he did not know the 1st respondent and or that the 1st respondent owns land in his area of jurisdiction. That he was not aware of any trespass case because the appellants owned no land in his area of jurisdiction. Like the learned trial Magistrate I am satisfied that the respondents proved their case on a balance of probabilities. The respondents had reason to file the suit in the lower court to protect their interest in their land through the legal process. There was a cause of action in trespass. Although trespass is a continuing tort, the injured person can sue at any point when the cause of action arises.

According to learned counsel for appellants there was no evidence of possession, actual or constructive apart from the respondents claiming that they purchased the land in 2004. That there is no evidence that the respondents took possession of the land upon purchase to found a trespass cause of action. That constructive possession would connote for instance fencing the land in issue by the respondents or having crops thereon while actual possession would mean physical occupation thereof exemplified with structures thereon. That damage to the respondents' possessions would be useful in determining actual possession.

I do not agree with learned counsel for the appellants that these are the only instances upon which possession would be proved. From the point of the agreed facts during scheduling where it was agreed that the suit land belonged to the respondents and they had surveyed it, possession of the suit land was sufficiently proved. It was held in ***Wuta Ofei v. Danquash (1961) 3 ALL.E.R. 596, 600*** by the privy council inter alia, that:

> "***Their Lordships do not consider that, in order to establish possession, it is necessary for the claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient."***

I will find that the respondents had the capacity to sue in trespass since they showed they owned the land.

Like the learned trial Magistrate I have believed the evidence of PW.1 which was corroborated by PW.3 who went to the suit land and found the land being fenced in the presence of DW.1. DW.2 started tilling the land soon after DW.1 claimed the land. DW.2 was lying when he claimed not to know the proper names of her employer, his home or proper identity.

DW.3 the LC.I of the area was also telling lies when he disowned the respondents and claimed not to know them and claimed he did not hear of any dispute over plot

35-37 Bugwere road where police were involved and fencing was being done yet he lives 300 metres from the land.

I have not found any serious contradictions to warrant faulting the trial magistrate's findings.

Consequently, I will uphold the decision of the learned trial Magistrate and the attendant orders as pronounced in the decree.

This appeal stands dismissed with costs.

Stephen Musota

JUDGE

23.2.2012

23.2.2012

Appellants absent.

1st Respondent in court. 2nd Sick.

Isodo for Respondents absent.

Kanagwa Interpreter.

1st Respondent: I am ready to receive judgment although my lawyer is away.

Court: Judgment delivered.

Stephen Musota

JUDGE

23.2.2012