IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 001 of 2016

In the matter between

OCAN PATRICK **APPELLANT**

And

ADOCH JOLLY **RESPONDENT**

Heard: 22 July 2019

Delivered: 29 August 2019

Civil Procedure*-----Framing of grounds of appeal----Ground of appeal will be struck out for being too general -----Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Costs- Principles applicable to the award of costs-* a defendant who does not set out counterclaim, is not entitled to any affirmative remedies in the same suit since there is only one suit and no cross-action.

Land law---*Locus in quo- Visiting the locus in quo is intended to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately half an acre of land situate at Custom Corner, Kirombe, Layibi Division, Gulu District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs. Her case was that on 24th May, 2005 she purchased the land in dispute from a one Oketch Christopher at a price of shs. 700,000/= (exhibit P. Ex.1). At the time she purchased the land, she was cohabiting with the appellant who took advantage of that relationship to procure registration of the plot in his own name and later mortgage it to a bank. The appellant has since then denied her access to the plot.

[2] In his written statement of defence, the appellant claimed to have purchased plot 15 Ocan Ben Road, Customs Corner Kirombe, Layibi Division, Gulu District measuring approximately 21 x 18 meters on 24th May, 2005 from the same Oketch Christopher, at a price of shs. 930,000/= After he had developed the land, the respondent connived with the said Oketch Christopher and forged an agreement purporting that the latter had sold the same plot of land to the former at on the same date.

The respondent's evidence in the court below:

[3] The respondent, P.W.1 Adoch Dolly, testified that while cohabiting with the appellant, she purchased the plot in dispute from P.W.2 Oketch Christopher, for which she paid the purchase price in three instalments. She paid the first instalment on 24th May, 2005. She had difficulty raising money for the last

instalment upon which she received a notice from the seller to the effect that he would re-sell the land to another person if she continued to default. She eventually paid the last instalment on 21st November, 2006. Before that payment, the appellant had asked her for the handwritten agreement of sale contending that the seller was taking advantage of her being a woman to inflate the purchase price due to the late payment. He promised to handle the seller on her behalf. She later began constructing a building on the land. The appellant offered assistance in supervising its construction. When differences developed between her and the appellant, she separated from him during the year 2007 but inadvertently left behind the original purchase agreement for that plot. She later learnt that the appellant intended to sell the plot and it is upon intervening that she discovered the appellant had forged a typed sale agreement dated 4th February, 2006 in his favour in respect of the same plot.

[4] P.W.2 Oketch Christopher testified that through her friend Adoch Alice, the respondent had expressed interest is purchasing the plot now in dispute from him. A purchase price of shs. 700,000/= was eventually agreed upon which the respondent paid in three instalments. A handwritten sale agreement to that effect was signed on 24th May, 2005. Months later the appellant presented to him for his signature, a typed document explaining that it was required by the Municipal Authorities as a pre-requisite for permission for the respondent to commence construction of a building on the plot. It later transpired that the document was a sale agreement for the same plot but in favour of the appellant, yet he had never sold the plot to him. During the construction of the building, the appellant would deliver the construction material while the respondent would prepare meals for the construction workers.

[5] P.W.3 Ajok Christine testified that she is a neighbour to the land in dispute and she witnessed the agreement of sale between the respondent and P.W.2 Oketch Christopher signed on 24th May, 2005. Later the respondent constructed a

building on the land up to roofing level. The appellant took it up from there, roofed it and let it out to tenants.

The appellant's evidence in the court below:

[6] In his defence, the appellant D.W.1 Ocan Patrick, testified that he purchased the plot in dispute from P.W.2 Oketch Christopher on 24th May, 2005. He paid the purchase price of shs. 750,000/= in two instalments; the first one on the day of signing the agreement and the second on 4th February, 2006. During the year 2007, the respondent separated from him, broke into the house in his absence and took the original agreement with her. By that time he had taken out a loan and had begun construction of a house on the land. The respondent did not make any financial contribution to the construction other than cooking food for the construction workers. It is him who paid the Municipal dues for the necessary permits for that construction, and the ground rent. Receipts for both payments were issued in his names. He completed the construction during the year 2009 and has since let it out to tenants.

[7] D.W.2 Ocen James testified that he was present when the appellant paid the last instalment of the purchase price, shs. 180,000/= to P.W.2 Oketch Christopher on 4th February, 2006. The respondent was only a witness to the transaction. The appellant later began construction of a building on the land. The building is now occupied by tenants.

[8] D.W.3 Mwaka Stephen testified that the appellant bought the plot in dispute and he was one of the witnesses when the appellant was paying the last instalment. The respondent was a witness to the transaction.

Proceedings at the *locus in quo*:

[9] The court then visited the *locus in quo* on 2nd July, 2014 where it recorded evidence from three other witnesses; (i) Layado Cirina, (ii) Okot Francis and Oyet Sam alias Ismael Abdu. In his judgment, the trial Magistrate found that each of the parties accuses the other of forgery. P.W.2 Oketch Christopher acknowledged the transaction with the respondent but denied the one claimed by the appellant. In execution of the agreement presented by the appellant, the appellant persuaded the respondent claiming that she was too weak to defend herself against constant demands by P.W.2 for additional payments, while to P.W.2 Oketch Christopher he presented it as one of the requirements by the Municipal authorities for permission to begin development of the land. The appellant's claimed to have purchased the land on 24th May, 2005 by payment of shs. 750,000/= is not evidenced in writing yet when he paid the balance of shs. 180,000/= on 4th February, 2006 he ensured it was evidenced in writing. That he avoided the costs of witnesses at payment of the first instalment is unbelievable. That agreement of 4th February, 2006 was prepared by a law firm which on 24th January, 2006 had written a warning letter to P.W.2 Oketch Christopher on behalf of the respondent as purchaser of that plot, restraining him from selling the land to a third party. The appellant did not sign the agreement but simply wrote his name, the L.C1 Chairman is purported to have thumb marked it and was never called to testify in court, the agreement bears an L.C. stamp yet D.W.2 Ocen James the then General Secretary L.C.1 testified that they had no stamp at the time and were awaiting its replacement, the stamp is not dated. The agreement between the appellant and P.W.2 Oketch Christopher is a forgery.

[10] The appellant's subsequent payment of ground rent and obtaining a permit authorising construction on the plot did not confer title to the land upon him. Although the appellant had incurred expenditure by completing the buildings from wall plate level to the point where they became habitable and are now rented by tenants, he did not claim that cost in his pleadings. The court considered that the

appellant had recouped his expenses from rent collected from the premises since the year 2009. The court therefore found in favour of the respondent, declared her owner of the plot, issued a permanent injunction against the appellant but declined to award general damages.

Judgment of the court below:

[11] In his judgment, the trial magistrate found that the two disputants are closely related by intermarriage between their respective families. Having considered the witnesses of both parties and those at *locus in quo*, he found that the appellant's father in law and the respondent's father each owned land at Baraming village. The evidence of D.W.2 was taken with caution because of the sibling rivalry between him and the respondent. The evidence of the independent witnesses was most instructive, most particularly that of Okwera Augustino. He therefore found that the land belonged to Faustino Okok who gave it to Onasimo Banya, the respondent's father. The respondent being the son of the late, Onasimo Banya, he was declared the rightful owner of the land in dispute. The appellant was thus a trespasser on the land. The court issued an order of vacant possession and a permanent injunction. It did not award general damages since the respondent was in occupation, but awarded the costs of the suit to the respondent.

The grounds of appeal:

[12] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he held that the respondent was owner of the suit property.
2. The trial Magistrate erred in law and fact when he refused to award the appellant general damages and costs.

3. The trial Magistrate failed to properly evaluate evidence before him thereby coming to a wrong decision leading to a miscarriage of justice.

Arguments of Counsel for the appellant:

[13] In his submissions, counsel for the appellant, argued that the sale agreement relied upon by the respondent did not indicate the dimensions of the land that she purchased. She admitted having signed the agreement dated 4th February, 2006 as a witness. By signing that agreement, the respondent confirmed its content. The agreement corroborates the appellant's testimony that the respondent broke into his house and took the original agreement away. The appellant should accordingly be declared owner of the land in dispute.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent argued that the respondent's signature on the agreement of 4th February, 2006 was procured by fraud or misrepresentation. The appellant made her believe that the purpose of her signature was to protect her from exploitation by the seller, P.W.2 Oketch Christopher, who was escalating the purchase price due to late payment of the last instalment. The appellant thereafter used similar trickery to procure the signature of P.W.2 Oketch Christopher claiming the document was required for purposes of processing a permit for construction of a building on the land. On 24th January, 2006 the appellant had cause his law firm to write to P.W.2 Oketch Christopher on behalf of the respondent cautioning him against his intention to re-sell the land to another person. It is the same firm which surprisingly on 4th February, 2006 prepared a sale agreement naming the appellant as purchaser of the same land. This is evidence of the appellant's fraudulent manipulation of the documentation relating to the plot with an intention of depriving the respondent of her land. The previous owner of the land, P.W.2 Oketch Christopher, denied

having sold it to the appellant but confirmed he had sold it instead to the respondent. The trial court therefore properly evaluated the evidence and came to the correct decision. The appeal should be dismissed.

Duties of a first appellate court:

[15] This being a first appeal, it is the duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see Father Nanensio Begumisa and *three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236).* In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions *(see Lovinsa Nankya v. Nsibambi [1980] HCB 81).*

[16] As an appellate court, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The 3rd ground of appeal is struck out for being too general:

[17] I have considered the third ground of appeal and found it to be too general. It offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection

to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). This ground is accordingly struck out.

Proceedings at the *locus in quo*:

[18] At the *locus in quo* the trial Magistrate recorded evidence from three additional witnesses who had not testified in court. Visiting the locus in quo is intended to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them, lest Court may run the risk of turning itself a witness in the case *(see Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and Nsibambi v. Nankya [1980] HCB 81)*. Recording and relying on the evidence of; (i) Layado Cirina, (ii) Okot Francis and Oyet Sam alias Ismael Abdu was therefore a misdirection.

[19] That notwithstanding, according to *section 166 of The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the "independent witness," since I

am of the opinion that there was sufficient evidence on basis of which a proper decision could be reached, independently of the evidence of those that witness.

[20] Furthermore, according to *section 70 of The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting the merits of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice.

[21] A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the three additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those witnesses.

Ground 1

[22] As regards the first ground of appeal, the appellant contends that the trial court failed in its duty of properly evaluating the evidence. Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence,

or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed *(See Peters v. Sunday Post Ltd [1958] E.A. 429).*

[23] I have considered the reasoning behind the decision of the trial court. The court was presented with two different agreements relating to the same piece of land. The respondent's agreement contained a full account of all instalments paid from the date of the agreement, 24th May, 2005 until the last instalment making a total of shs. 750,000/= Although the appellant claimed to have bought the land at the same price on the same date, he claimed that no agreement was executed on that day but that it was only made on 4th February, 2006. That agreement only referenced an earlier instalment allegedly paid on 24th May, 2005 in the sum of shs. 750,000/= Although the appellant claimed that to have been the agreed purchase price, the agreement of 4th February, 2006 contains an additional sum of shs. 180,000/= making a total of shs. 930,000/= which is inconsistent with his testimony. The presence of the respondent's signature on that agreement is satisfactorily explained. The purpose of the document was misrepresented to her by the appellant. Lastly, the appellant's claim is inconsistent with the notice of intention to sue dated 24th January, 2006 written by the same law firm which drafted the agreement of 4th February, 2006, in which letter they categorically named the respondent as purchaser of the land. I find that the decision of the trial court is backed with acceptable reasoning based on a proper evaluation of evidence, which evidence was considered in its proper perspective. This ground of appeal accordingly fails.

Ground 2

[24] In the second ground, the trial court is faulted for its failure to award general damages and costs. According to Order 8 rule 2 of *The Civil Procedure Rules*, a defendant who has any right or claim, whether it sounds in damages or not, ought to set it up by way of counterclaim against the claims of the plaintiff, so as

to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. Under that rule, a counterclaim has the same effect as a cross-action. It follows that a defendant who does not set out counterclaim, is not entitled to any affirmative remedies in the same suit since there is only one suit and no cross-action. Although the appellant presented a counterclaim, it was not supported by evidence and the trila court came to the right conclusion when it did not ward him general damages.

Award of costs

[25] Concerning the award of costs, the principles applicable to the award of the costs of litigation can be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs, and if so, what order, is a matter entrusted to the discretion of the trial court; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the court may make different orders for costs in relation to discrete issues, and in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the court may deprive a party of costs on an issue on which he or she has been successful if satisfied that the party has acted unreasonably in relation to that issue; (vi) an appellate court should not interfere with the trial court's exercise of discretion merely because it takes the view that it would have exercised that discretion differently. In the instant case the appellant was the unsuccessful party and was not entitled to any costs. This ground too fails.

Order :

[26] In the final result, the appeal has no merit. It is dismissed and the costs of the appeal as well as those of the court below are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ocorobiya and Co. Advocates.

For the respondent : M/s Oyet and Co. Advocates