THE REPUBLIC OF UGANDA.

HIGH COURT OF UGANDA HOLDEN AT JINJA.

CIVIL APPEAL NO.059 OF 2013

(Arising from Iganga Civil Suit No.113 of 2009)

ALIYENKA DAWSON::APPELLANT

VERSUS

KINAWA AIDAH ::RESPONDENT

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Introduction.

The appellant represented by Mr. Osillo Jacob, filed this appeal against the judgment and decision of Her Worship Cissy Mudhasi delivered on 03/7/2013. The respondent opposed the appeal through Mr. Ngobi Balidawa.

The facts admitted by the lower court are that the appellant purchased land in Nabitovu Village, Mvira Parish, Nambale Sub County, Iganga District (hereinafter the suit land) from one Siringi Bigingo on 25/1/1981 upon a sale agreement exhibited in Court. That the respondent trespassed on and took over the land by herself and her agent, one Joseph Kiguli. The respondent as defendant contested those facts stating that she owns the suit land having obtained it from her father the late Sajjabi/Sadaibi Mukama. That at some point, the suit land was handed over to one Yokosani Isabirye as caretaker, the latter who subsequently handed it over to the respondent in 1994.

In her decision, the trial magistrate on the whole did not believe the evidence of the appellant and his witnesses, whom she considered generally evasive and deliberate liars. She then found that the appellant failed to prove his case and entered judgment for the respondent. She declared the respondent owner of the suit land, issued a

permanent injunction against the appellant and awarded general damages to the respondent. The appellant disagreed with that decision and accordingly filed this appeal on the following grounds:

1. **The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thus arrived at a wrong decision.**
2. **The learned trial magistrate erred in law and fact when she ruled that the suit land belongs to the respondent without credible and supporting evidence hence resulting in a miscarriage of justice.**
3. **The learned trial magistrate erred in law and fact when she failed and omitted to pronounce herself on whether the respondent is a trespasser on the suit land in light of evidence adduced thus leading to an unjust decision.**

Duty of the Court

Under Section 80 CPA, As an appellate court, I have the powers to determine a case finally. Also as a first appellant Court, I am mandated to subject the evidence of the lower court to fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions from it. In doing so, I will apply the law strictly and consider only the evidence adduced for the appellant in the lower Court. Even so, I do bear in mind that I did not see or hear the witnesses and will therefore, make due allowance in that respect. See for example, **Pandya v. R [1967] EA, 336** and **Narsensio Begumisa & 3 Ors Vrs Eric Kibebaga SCCA No. 17/2002.**

Ground one:

Appellant's counsel argued grounds one and two together. It is provided in Order 43 rr 1 (2) that:

"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative ……."

I consider the first ground to be too general and ambiguous. In that ground, the appellant did not concisely indicate the point of objection against the judgment and decree of the lower court. He also did not show which part of the evidence was wrongly evaluated or how the Magistrate arrived at a wrong decision. In my view, that ground offends the above law and cannot stand.

The first ground of the appeal is accordingly dismissed

Ground 2

Either party presented four witnesses to prove and defend the claim. The bone of contention is that the trial Magistrate erred when she ruled that the respondent owns the suit land without credible and supporting evidence. I respectfully disagree. The Trial Magistrate did evaluate the evidence presented for each party. She generally found the appellant's witnesses evasive, arrogant and unbelievable. On the other hand, she considered that the respondentlaid down the history of her claim and was well supported by her witnesses and the evidence on ground. In my view, her decision was grounded on evidence that she found impressive and credible. After studying the record carefully, I would have no reason to depart from her findings. None the less, my brief observations and re-evaluation are as follows.

The undisputed fact is that the suit land stretched all the way from the Iganga-Kaliro main tarmac road and stretched to the old Iganga-Kaliro road that cut through the boundaries of the Naibiri and Nabitovu villages. The appellant claimed to have purchased the suit land from the late Siringi Bigingo in writing on 25/11981 and immediately took possession by cultivation of food crops and trees. That he first learnt about the respondent's trespass on 12/10/08, when PW3 his brother Basalirwa, informed him that one Joseph Kiguli the respondent's agent, had entered on the suit land and cut down several trees, burnt charcoal and uprooted some crops. He claimed

not to know the respondent's ancestors and saw the appellant on the village for the first time in September 2008.

Beyond knowing that Bigingo owned land in the area, PW2 Bawudhula did not know much about the suit land and the dispute between the parties. PW3 Basalirwa supported the evidence that the appellant bought the suit land from Bigingo who used to cultivate it. That he witnessed Kiguli's trespass and reported it to the appellant, the LC Committee and police. He denied knowing Magola or Sajjabi/ Sadiabi or their connection to the respondent, but admitted that Saidabi ever owned land across the road. In cross examination he back-tracked to admit that Sajjabi was the respondent's father and that his land was separated from that of the appellant by the new road. Both Basalirwa and Robinah Aliyenka, the appellant's wife, admitted not to have witnessed signing of the purchase agreement and PW4 Robinah Aliyenka, specifically dispelled the appellant's evidence that she ever planted *Musizi* trees on the suit land. PW4 further admitted that she knew Sadiabi and the fact that he had land in Nabitovu village. She conceded that Yokosani Isabirye had used the suit land for long, even after the appellant had purchased it. She was to change in cross examination to state that Isabirye used what used to be Magoola's land across the road and not the suit land.

On the other hand, the respondent explained that she received the land from her grandfather Magola and his son Sadiabi, her father who died in 1973 and 1972 respectively. That before his death, Magola appointed and handed over the suit land to Yekosani Isabirye as caretaker and the latter used the land until he handed it over to her in 1994, as the rightful owner. That she took possession in the same year and although she knew Siringi Bigingo as one who ever owned land adjacent to hers, she disputed the appellant's testimony that he had ever occupied or used the suit land. She admitted that Kiguli was her tenant and explained that she sold to and then authorized him to cut some trees on it. The respondent and her witnesses gave a detailed and coordinated description of the suit land, explaining that it extended to the old Iganga

Kaliro road, which acted as a boundary between the two villages. They insisted that no one villagemate owned land that overlapped that boundary, only that the new Iganga-Kaliro tarmac road had cut through the suit land, and as a result, divided it into two.

Exhibit P1 was admitted as the sale agreement by which the appellant purported to have purchased the suit land. Citing reasons, the appellant admitted that he did not sign it. Neither the vendor, its witnesses nor its author were present to support the agreement which would leave the evidence of the appellant and his witnesses as the only account to support it. As noted by the Magistrate, the testimony that he took possession of the suit land in 1981 was doubtful. His wife who claimed to have tilled the land admitted that Yokosani and his family had used the same land for long. Even then, she did not attempt to inquire of her husband of Yokosani's status and the appellant himself did not dispute that occupation. The Magistrate's decision that both the appellant and his wife must have known that Yokasani's occupation was legitimate, would be a reasonable conclusion. Yokosani was the same personthe respondent stated had occupied and used the land for long until it was turned over to her in 1994. The Magistrate further noted that the appellant and his witnesses were intent on denying the fact that the appellant was related and successor in title of Magolaand Sajjabi the original owners of the suit land, but when pressed, admitted that fact.

The trial Magistrate found, and I do agree, that the respondent's narrative of the history of the suit land was more credible. Together with her witnesses she testified that Siringi Bigingo, the appellant's predecessor had ever owned land in Nabitovu village but not adjacent to the suit land. That the suit land was originally one tract of land but subsequently sliced into two by the Iganga-Kamuli tarmac road. That the respondent begun using the land for cultivation in 1994, but that before she allowed Kiguli to use it, it was idle and only reserved as grazing land. All her witnesses supported the fact that she had inherited the land from Magola and Sajjabi. In

particular, DW2 Mpamboro an elder stated to have been present when she received it from Yekosani Isabirye at a ceremony attended by elders and other villagers. It was unanimously stated that the appellant was not known to have ever owned or used the suit land. Indeed, the appellant's wife stated that they both resided elsewhere and only visited the suit land periodically to work on it. She was unable to explain how they were able to so, when Yekosani Isabirye was using it at the same time.

PW4 Jamada Ngobi's evidence was even more persuasive. He testified that his father Wandera Ndaye once owned land in Naibiri Village whose boundaries stopped at the old road opposite the disputed land. That it was part of that land that Ndaye sold to the appellant and they remained neighbors. He emphasized that Bigingo ever owned land adjacent to the suit land but separated by the murrum road and that he too had never seen the appellant and his people use the disputed land. He was aware that Magoola continued to use the suit land until his death in 1973 and that the respondent begun to use it around 2007 when she left her marriage. During the *locus* visit, the appellant admitted buying land from Ndaye Yosamu, which would largely validate Ngobi's testimony.

The observations of the trial Magistrate at the *locus* visit are also important. She noted that the disputed land is a tiny strip adjacent to the tarmac road and positioned directly opposite of what was identified as land originally owned by Magola and Sajjabi. She noted further that the strip which was triangular in shape, was too small to accommodate a home and was clearly created as a result of the demarcations brought about by the new road. She continued that at the *locus,* the bearings of Bigingo's land were given, and the appellant's land which was located behind the disputed land, showed no connection to what was Siringi's land. She concluded then that there would be no logic that Siringi

ever owned the disputed land and as a result, could not have sold that portion to the appellant. These were conclusions made by the Court which made a physical inspection of the suit land and the immediate properties. I would have no basis to disbelieve the Magistrate on such a well illustrated account.

Stemming from the above I am persuaded that the appellant failed to discharge the burden of proving that he owned the suit land. The decision of the trial Magistrate on this point would thus be correct and I would have no reason to change it. The second ground of appeal accordingly fails.

Ground three

I do agree with appellant's counsel that trespass by the respondent was raised as an issue for determination. Indeed the trial Magistrate ought to have pronounced herself on that issue. However, failing to do so, did not affect the outcome of her decision and certainly caused no material injustice to the appellant. I note that the Magistrate appeared to have decided the first two issues together and upon finding that the appellant had failed to prove ownership of the suit land, she concluded summarily that he had at the same time failed to prove that the respondent was a mere trespasser. It was a matter of semantics that the Magistrate did not specifically address the issue whether the respondent was in trespass. In my view, it was taken care of when she generally decided that the respondent did not own the suit property.

The above notwithstanding, basing on powers of an appellate court under Section 80 (1)(a) and (2) CPA, it would be fair for the appellant's counsel to move this court to pronounce herself on the issue of trespass which I do.

The Supreme Court in her decision of **Justine E.M.N Lutaaya Vs Stirling Civil Engineering Company Civil Appeal NO.11 OF 2002** define Trespass to land to be:

"Trespass to land occurs when a person makes an authorised entry upon land and there by 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''

In this case, I am persuaded that the appellant neither owned the suit land nor was in possession of it. He even had no adverse claim to it. He could not without any legal right to the land, maintain a cause of action in trespass against anyone, in particular the respondent who I am now persuaded was its lawful owner. That being so, I would find and hold that Kinawa Aidahthe respondent did not commit any trespass on the suit land.

With respect therefore, the third ground also fails.

In summary, I find no merit in the appeal and it is thus dismissed. The respondent shall have the costs of the appeal and of the Court below.

I so order.

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Eva K. Luswata

JUDGE

10/12/2020