THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 61 OF 2023

(Formerly MSD Civil Appeal No. 022 of 2017)
(Arising from Hoima Chief Magistrate's Court, C.S No. 7 Of 2014)

SENTAYI JOSEPH :: APPELLANT

VERSUS

IGA DAVID :: RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the judgment and decree of **H/W Sayekwo Emmy Geoffrey,** the Chief Magistrate, Hoima Chief Magistrate's court at Hoima delivered on the 8th day of December 2016.

Background to the appeal

[2] In 2005, the Claimant/Plaintiff/Respondent instituted a suit against the Defendant/Appellant before the Kibaale District Land Tribunal for inter alia, trespass, a permanent injunction and a declaration that the suit land situate at **Mizinda in Kiboijana L.C1, Kibaale (Kakumiro) District.**

[3] It was the Plaintiff/Respondent's case that sometime in 1999, he purchased the suit land from a one **Senjovu Antonio** at a consideration of **Ugx 120,000/=.** That upon purchase of the land, he immediately took over the land, thereby exercising his rights of ownership.

[4] In 2004, the Defendant/Appellant, without any colour of right of ownership over the suit land and consent of the Plaintiff/Respondent encroached on the land by grazing cattle thereon. The

Defendant/Appellant subsequently fenced off the land claiming that the land belonged to him.

[5] The Defendant/Appellant on the other hand put up an evasive denial of the claimant's allegations, that he had never known the Claimant to live or own land in the area.

[6] The suit was heard as a result of a retrial ordered by the High court on the ground that the trial Magistrate had omitted to visit locus. A retrial was done but no such locus visit was done as directed by the High court.

[7] The trial Magistrate found that the land in dispute was first sold to the Plaintiff/Respondent and at a certain stage, the Defendant/Appellant unsuccessfully expressed interest to buy it from the Plaintiff. That as a result, it was clear that the land in dispute belonged to the Plaintiff and there was therefore no need to go for a second inspection by way of a locus visit. Judgment was given in favour of the Plaintiff/Respondent as the rightful owner of the suit land and the Defendant/Appellant as a trespasser.

[8] The Defendant/Appellant was dissatisfied with the decision of trial Magistrate and lodged the present appeal on 3 grounds of appeal as stated in the memorandum of appeal.

1. *The learned trial Magistrate erred in law and fact when he failed to conduct locus in quo hence a mistrial.*
2. *The trial Magistrate erred in law and fact when failed to evaluate the evidence on record.*
3. *The learned trial Magistrate erred in law and fact when he awarded general damages on monthly basis.*

[9] As rightly put by counsel for the Respondent, **Mr. Kasangaki Simon,** the law governing first appeals like the instant one is well settled. The duty of the first appellate court is to review the record of evidence for itself in order to determine whether the decision of the trial court should stand. In so doing, court must bear in mind that the appellate court should not

interfere with the discretion of a trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result, there has been a miscarriage of Justice; **Stewards of Gospel Talents Ltd Vs Nelson Onyango, HCCA No.14/2008** and **NIC Vs Mugenyi [1987] HCB 28.**

Consideration of the grounds of the Appeal

Ground 1: The learned trial Magistrate erred in law when he failed to conduct locus in quo hence a mistrial.

[10] Counsel for the Appellant **Mr. Paul Baingana** prolixly groused about the trial Magistrate's failure to carry out the directives of the High court to visit the locus in quo. He prayed that this court sets aside the judgment of the lower court and order that the trial Magistrate complies with the High court directions to visit locus in quo.

[11] In consideration of the above contention by counsel for the Appellant, vide **HCCA No.021/2017,** this court observed that the High court direction to visit locus in quo was not in vain. For purposes of ensuring that there is no further delay in the determination of the matter, considering the fact that this appeal arose out of a suit that was instituted in the Land Tribunal way back in 2005, directed the Registrar of this court to visit locus in quo of the subject matter.

[12] The Registrar of this court visited the locus in quo of the suit land in the presence of the parties and their respective counsel and made his observations in form of a report. He also accordingly drew the sketch plan/map of the suit land.

[13] According to the Registrar's locus report, the boundaries of the suit land were found largely not disputed. The suit land borders that of the

Appellant on the Southern side and a one **Hirariyo** on the Eastern side i.e, the Hill top side as per the sketch plan/map of the locus in quo.

[14] As a result of the foregoing, queries by counsel for the Appellant regarding failure to visit locus, were accordingly answered since the Registrar's visit for locus as directed by the judge cured the defect complained of in the proceedings.

Ground 2: The trial Magistrate erred in law and fact when he failed to re-evaluate the evidence on record.

[15] Though this court as a first appellate court is required to re-evaluate all the evidence on record, I find this ground of appeal too general and offending the provisions of **O.43 rr.1& 2 CPR** which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, i.e, specify the points which are alleged to have been wrongly decided 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 on numerous times, **Katumba Byaruhanga Vs E.K. Musoke, EACA No.2/2998 [1999] KALR 621.** See also **A.G Vs F. Baliraine, CACA No.79/2003.**

[16] The present ground of appeal which does not point out errors observed in the course of the trial by concisely specifying points of objection but merely gloss over failure of evaluation of evidence generally has been found offensive to the provisions of **O.43 rr.1&2 CPR** and is liable to be struck out.

[17] 2ndly, the Appellant in his defence evasively denied the Respondent's allegations and thereby offended **O.6 r.10 CPR.** It provides thus;

"When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance. Thus, if it is alleged that he or she received a certain sum of money, it shall not be sufficient to deny that he or she received that particular amount, but he or she must deny that he or she received that sum or any part of it, or else set out how much he or she has received."

[18] In the present case, the Defendant/Appellant in his WSD merely stated that:

"3. paragraph 3 is wholly denied.

4. paragraph 3 under particulars of fraud is totally denied since the defendant has never owned land he alleges to be his.

5. paragraph 5 is denied since the defendant has never known the claimant to live or own land there."

[19] The above defence is a mere flat denial without answering the plaintiff's points of substance regarding the ownership of the suit land. As a result, I find that the Appellant's defence did not disclose a reasonable answer to the plaint and is defective for offending **O.6 r.10 CPR.** The trial Magistrate erred in law to proceed on such a defective WSD.

[20] Against this format of the WSD by the Appellant, during the trial, he stated that in 1997, he bought half an acre of a kibanja from **Antonio Senjovu** (deceased) and in 1998, fenced it off and put his cattle thereon. This kind of evidence offended **O.6 r.7 CPR** for it amounted to departure from the previous pleadings since the Appellant's WSD did not plead such facts but was a mere evasive denial. It is trite law that parties are bound by their pleadings; **Struggle Ltd Vs Pan African Insurance Co. Ltd 1990 ALR 46,47** and **Semalulu Vs Nakitto HCCA No.4/2008.** A party cannot be allowed to succeed on case not set up by him and be allowed at the trial to change his case or set up case inconsistent with what he alleged in his pleadings, except by way of amendment of the pleadings, **Interfreight Forwarders (U) Ltd Vs E. African Development Bank, CACA No.33/1992.**

[21] In the premises, the Appellant's evidence would be found inadmissible as it would be considered as a mere afterthought. In any case, the evidence was not supported by any evidence as the Appellant could not produce the agreement upon which he claimed to had purchased the portion of land in question. The excuse that he lost the agreement is unbelievable for he neither presented any report regarding loss of such an important document that he made to police nor were circumstances under which the document got lost availed to court.

[22] The above Appellant's questionable pieces of evidence were against the Respondent's cogent evidence which was to the effect that he purchased the suit land from the late **Antonio Senjovu** on 20/11/2009 at a consideration of **Ugx 120,000/=** as per the purchase agreement admitted in evidence as **P.Exh.1.** His evidence was corroborated by that of **Tushabe Florence** (PW2) and **Rwebembera Emmanuel** (PW3) who witnessed the agreement.

[23] The trial Magistrate, among other pieces of evidence, considered the evidence of **Tushabe Florence**(PW2) which is to the effect that her late husband **Antonio Senjovu,** sold the 2 parties land and she knew the boundaries of the 2 pieces of land for each of the parties but because the Appellant had not concluded payment, his boundaries were not showed to him. When this evidence is considered with the findings at locus which is to the effect that the boundaries of the suit land vis a vis of the neighbour, the Appellant, are largely not disputed, it becomes apparent that since the portion of land which was sold to the Appellant was never ascertained or appropriated by way of demarcation because consideration had not been paid in full, in such circumstances, it cannot be said that any interest in the land ever passed to the Appellant. This also possibly explains why the Appellant's defence was in that evasive form that did not answer the substance of the Respondent's claim. It is from the foregoing that the trial Magistrate summarily found in favour of the Plaintiff/Respondent. I do not find any valid reason to fault him. As things stand, the Appellant may have to revert to the vendor, the estate of **Antonio Senjovu** and or its administrator, if any, for a possible remedy.

Ground 3: The learned trial Magistrate erred in law when he awarded general damages on monthly basis.

[24] In this case, the trial Magistrate made the following orders;

> *"...general damages and profits of shs.300,000/= (three hundred thousand shillings) per annum from the time of encroachment till final payment."*

[25] As can be seen from the above, the trial Magistrate bundled together "damages" and "profits" and gave an omnibus order for the award of shs.300,000/= payable per annum to the Respondent. In his pleadings, the Respondent did neither pray for profits nor adduced evidence in court in support of such profits. It is now well established that a party cannot be granted a relief which it has not claimed in the pleadings; **Semalulu Vs Nakitto, HCCA No.4/2008.**

[26] However, as regards general damages, this being a case of trespass to land, it is actionable per se. According to **Assist (U) Ltd Vs Italian Asphalt Haulage Ltd HCCS No.219/1999,** general damages are a direct consequence of the act complained of, such consequence may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

[27] In the instant case, though the Respondent never pleaded a prayer for general damages, during trial, he adduced evidence regarding how he had been highly traumatised by the Appellant's act of trespass and prayed for general damages. This is permissible under the authority of **Odd Jobbs Mubia [1970] EA 476,** court can decree an unpleaded matter if the parties have led evidence and addressed court on the matter. This is for purposes of ensuring that court "arrives at a correct decision in the case."

[28] In this case, the Respondent was inconvenienced by the encroachment of the Appellant who crossed his boundaries and fenced off the Respondent's land and as a result, since 2004, the Respondent has suffered loss of use of his land. The Appellant's act bordered arrogance and impunity.

[29] In the premises, from the foregoing, I set aside the omnibus order of the trial Magistrate's award of **Shs.300,000/=** for "damages" and "profits" payable annually to the Respondent and substitute it with an order for general damages of **Ugx 20,000,000/=** in favour of the Respondent.

[30] All in all, the Appellant's appeal is found to be devoid of any merit. The trial Magistrate's judgment and orders are upheld save for the orders of payment of **Shs.300,000/=** per annum as "damages" and "profits" which is substituted with an order for payment of **Ugx 20,000,000/=** as general damages to the Respondent. The Appellant shall meet the costs of this appeal.

Dated at Hoima this **3rd** day of **November, 2023.**

Byaruhanga Jesse Rugyema
JUDGE.