

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. 0055 OF 2022
(Arising out of Masindi Chief Magistrate's Court Civil Suit No. 0033 of 2018)

TINKAMANYIRE HOSEA APPELLANT

VERSUS

1.MUSINGUZI WILSON

2.BUSOBOZI PATRICK RESPONDENTS

BEFORE: Hon Justice Isah Serunkuma

JUDGEMENT

Introduction

In the year 2018, the Appellant filed Civil Suit No. 0033 of 2018 against Gladys Bagada Kyomya, Musinguzi Wilson (1st Appellant), Busobozi Patrick (2nd Appellant), Kusemererwa Wilson and Tinkasimire Frida seeking *inter alia* an order that the Defendants jointly and severally trespassed on his land located at Kitamaba Village, Kitamba Parish, Bwijanga Sub County in Masindi District measuring approximately 1 acre. The Appellant further sued for recovery of the above land, general damages and costs of the suit.

It was the appellant's case that in the year 1998, he purchased land approximated to be 6.5 acres from a one Reuben Kyomya. The appellant also contended that in the year 2018, Gladys Bagada Kyomya and the respondents herein illegally sold part of the appellant's land measuring 1 acre to Kusemererwa Wilson and Tinkamanyire Frida.

At the Trial, the appellant produced 5 witnesses to prove his case and the Defence presented 5 witnesses as well.

In her judgement, the trial Magistrate ruled that the appellant's evidence in relation to the respondents herein was not credible and therefore dismissed the suit as against the respondents with costs. The trial magistrate, however, ruled in favour of the appellant as against Gladys Bagada, Kusemererwa Wilson and Tinkamanyire Frida.

Being dissatisfied with the decision to dismiss the case against the respondents herein, the appellant filed this instant appeal on grounds that;

1. *That the learned Trial Magistrate erred in law and fact when she failed to find that the Appellant had a cause of action against the Respondents, severally and jointly with the other three Defendants in the above suit thereby dismissing the suit against the Respondents with costs thereby occasioning a miscarriage of justice to the appellant.*

2. *That the learned Trial Magistrate erred in law and fact when she failed to find that the Respondents' connivance or participation in the sale of the suit land was crucial, material and sufficient to constitute a cause of action against the Respondents severally and or jointly with the other Defendants therefore, reaching a finding which occasioned a miscarriage of justice against the appellant.*

3. *That the Learned Trial Magistrate erred in law and fact when she in dismissing the suit against the Respondents, she condemned the Appellant to pay costs on a dismissal primarily or reliantly founded or basing on an impropriety drafted plaint whose drafting was beyond control of the lay innocent Appellant but errors or mistakes of his former advocates instructed to file the said suit, hence such condemnation occasioned a miscarriage of justice to the appellant.*

4. *That the learned Trial Magistrate erred in law and fact when she dismissed the Appellant's suit for want of cause of action reliantly, on reasons that the Appellant did not specifically plead fraud against the Respondents in his plaint to support the claim that the Respondents sold the suit land therefore, reaching a finding that the said plaint does not disclose a cause of action, thus, dismissing the suit against the respondents and condemning an innocent appellant to costs on drafting error, mistake and or omission of his former advocates, which finding occasioned a miscarriage of justice on the appellant.*

The Appellant in the written Submissions argued Ground 1 & 2 together and 3 & 4 together.

Representation

The appellant was represented by counsel Atyang Christine of M/S Atyang Christine & Co. Advocates and the respondents were represented by Simon Kasangaki of M/S Kasangaki and Co. Advocates. Both parties were directed to file Written Submissions.

5 Whereas the Appellant complied with the said directive, the Respondents did not comply with the directive and opted not to file written submissions.

Appellant's Submissions

Ground 1 & 2

10 **ISSUE 1 - Whether the Plaintiff (now the Appellant) has a cause of action against the Defendants (now Respondents), severally and or jointly**

The appellant in his submissions cited **O.7 r 11 (a)** of the **Civil Procedure Rules S.I 71-1 (as amended)** and the Supreme Court decision of **Tororo Cement Co. Ltd V Frokina International Co. Ltd; SCCA No. 002/2001** which defined a cause of action as every fact which is material to be proved to enable the Plaintiff to succeed or every fact which
15 if defined the Plaintiff must prove in order to obtain judgement.

The Appellant further cited the *locus classicus* case of **Auto Garage & Ors Versus Motokov Civil Suit No. 3 of 1971 EA** which indeed laid down three elements for a cause of action to exist. They are:

- (i) **Whether the Appellant enjoyed a right**
- 20 (ii) **Whether the right was violated**
- (iii) **Whether the defendant is liable for the violation**

it was stated by the appellant that he acquired land measuring 6.5 acres from the 1st defendant in the lower court (Gladys Bagada) and that this right was violated when the said defendant and respondents herein without any colour of right and his consent
25 caused a sale of 1 acre to the 4th and 5th defendants in the lower court. The appellant submitted that the said actions of the 1st defendant were in collusion or connivance with the Respondents herein; which fact was admitted by the 2nd respondent in paragraph 9 of his Witness Statement.

It was the appellant's submission that the respondents had a strong connection,
30 participated in and connived with the 1st defendant and that the appellant had a cause of action against the respondents jointly with the other defendants.

Furthermore, the appellant submitted that in finding no cause of action against the respondents, the learned trial magistrate primarily or heavily relied on the error, mistake or failure of the appellant to plead fraud, connivance or collusion in the plaint; which according to the appellant should not have been the case.

5 **Ground 3 & 4**

It was squarely the appellant's submission that the lower Court erred when it condemned the appellant to pay costs which was primarily based on the fact that the appellant had an improperly drafted plaint on record. According to the appellant, the plaint having poorly been drafted by his former advocates, it was his submission that
10 the errors/ mistakes of his former counsel should not be visited on him.

Analysis of Court

It is now trite law that it is the duty of the first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account that the appellant court did not have the opportunity to hear and see the witnesses
15 testify (*Kifamutnte Henry V Uganda SCCA No.1 of 1997*).

I have extensively reviewed the entire record of the lower court; the Memorandum of Appeal and the appellant's written submissions and the following are my findings;

Ground 1 & 2

It was the appellant's submission that he had a cause of action against all the defendants severally and or jointly. According to the appellant in his submissions, he stated that
20 Gladys Bagada (1st defendant in the main suit) together with the respondents herein, without any colour of right and or consent from the appellant, caused the sale of 1 acre of the suit land to Wilson and Frida (4th and 5th defendants in the main suit), hence trespassed on his land.

25 I entirely agree with the appellant that a cause of action is trespass.

Whereas the appellant submits that the above sale was made by the 1st defendant to the 4th and 5th defendants in collusion and connivance with the respondents herein, the same was a departure from his pleadings wherein the cause of action is entirely premised on trespass to land and not fraud. The case of *Semalulu V Nakitto (Civil Appeal No.*
30 *004 of 2008)* extensively tackled the issue of departure from pleadings when it held that no pleading shall, not being a petition or application, except by way of amendment,

raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.

The position in the above provision was re-affirmed in the cases of *Jani Properties Ltd. vs. Dar es Salaam City Council* [1966] EA 281; and *Struggle Ltd vs. Pan African Insurance Co. Ltd* (1990) ALR 46 – 47, that the parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

10 From the lower courts record no evidence was led to prove that the respondents trespassed on the suit land.

O.6 r 7 CPR provides;

15 *‘That no pleadings shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.’*

From the lower court’s record, it is visible that the Appellant had introduced a new cause of action (fraud) as against the respondents without amending his pleadings.

It is therefore my finding that the trial magistrate rightly held that *“bringing buyers perse does not constitute a cause of action because not every wrong is a legal wrong that should give rise to a suit and there should have been the allegation of fraud/connivance/collusion in the plaint”*.

I also note that whether or not the Respondents connived with the 1st defendant to sell the appellant’s land, the said act did not in any way amount to trespass. For clarity, trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land (see *Justine E.M.N. Lutaaya vs Sterling Civil Engineering Co. SCCA No. 11 of 2002*).

I, therefore, find no merit in Grounds 1 & 2 of the Appeal and the same hereby fails.

Ground 3 & 4

The Appellant submitted that the lower courts decision to condemn the appellant to pay costs was primarily based on the fact that the appellant had an improperly drafted
5 plaint on record. It was the appellant's submission that the complaint was poorly drafted
by his former advocates and that the errors/ mistakes of his former counsel should not
be visited on him.

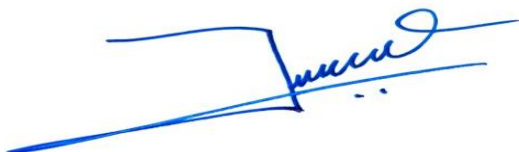
According to the Appellant, the failure to specifically plead fraud in his complaint was caused
by error/mistake of counsel who left the same out while drafting the pleadings and that
the decision to sue the respondents was one taken by former advocates and not the
10 appellant. I do not agree with the appellant's submissions on this issue considering that
actions and omissions of counsel may bind the client. (*See: Hadon Daniel V Yolamu
Egondi; Civil Appeal No. 0067 of 2003 C.A unreported*).

Negligently drafting the complaint or in doing the same is not an excuse for a client to
escape being bound by his counsels' action as it was held in the case of *Capt. Philip
15 Ongom V Catherine Nyero; Civil Appeal No. 0014 of 2001 S.C (unreported)*. In case
counsel has acted negligently/incompetently the appellant has the option to sue for
professional negligence.

In the final analysis, I find that there is no merit in the appeal and I hereby dismiss the
same with no orders as to costs since the respondents did not file the written submissions
20 as directed by court. The appellant however shall meet the respondents' costs awarded
by the lower court.

I so order.

Dated and delivered on this 22nd Day of December 2023.



25 Isah Serunkuma

JUDGE