THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CV-CA-0063-2020

(ARISING FROM CIVIL SUIT NO. 63 OF 2018)

LUKAKAMWA JOHN::APPELLANT

VERSUS

KAGOYA SARAH:::RESPONDENTS

Land Appeal

Held: *Appeal Dismissed on Preliminary Points of Law for Offending on Order 43 r.1 (1) and (2) of the CPR*

BEFORE: HON. JUSTICE DR. WINIFRED N. NABISINDE

JUDGEMENT

The Appellant being aggrieved by and dissatisfied with the Judgement of the learned Chief Magistrate Her Worship Agwero Catherine delivered on the 3rd of December 2020 appealed to this Honorable Court against the Judgement on grounds that :-

1. The learned Trial Chief Magistrate erred in law when, she insisted on further hearing of the case ex-parte, by conducting Locus in Quo on 26th/11/2020 after receiving an urgent letter from counsel for the Applicants dated 25th/11/2020, annex hereto as "A", explaining valid reasons for absence of the Appellant and his counsel, at the previous hearing, when, exparte hearing was ordered, and asking for adjournment of the case, to enable interparty, hearing of the case, more so as disputed involving land such as this are sensitive matters and thus should be handled justly and with care.
2. The learned Trial Chief Magistrate acted with inconsistency and or with material injustice , bias and or material irregularity , when, she delivered Judgement on 3/12/2020, instead of 10/12/2020, as ordered by her Locus in quo, proceedings conducted on 26/11/2020, in the absence of the Appellant, thus denying the Appellant to file an Application before 10/12/2020 for re-opening of the Respondents closed case, so as to enable the case proceed interparty in the interests of justice and fairness.

3. The learned Trial Magistrate failed to assess , weigh and or to evaluate the Respondents evidence on court records, in a balanced ,fair and judicious manner otherwise , if she had done, so she would have come up with an irresistible conclusion that the Respondent having quietly looked on for several years, while the Applicant conducted substantial developments on the suit land , is equitably estopped to deny that she had earlier donated the same property to the Appellant, and for those reasons , her case should have been dismissed for failure to prove the same under formal proof following which the Appellant was entitled to Judgment in his favour, under the counter claim.
4. The Appellant reserves his rights to amend this Memorandum of Appeal, after being served with typed proceedings and judgment.

The Appellant prayed that;

1. The appeal be allowed.
2. The Judgment/Decree of the learned trial Chief Magistrate be set aside.
3. That the suit be re-tried by another independent minded Chief Magistrate, or by the High Court of Uganda itself.
4. Costs of this Appeal, and of the lower court be awarded to the Appellant.

THE LAW

It is now settled law that it is the duty of the Plaintiff to prove his or her case on the balance of probabilities. In relation to the onus of proof in civil matters, the burden of proof lies on he who alleges a fact and the standard is on the balance of probabilities, and not beyond reasonable doubt as in criminal case. It is provided for in **Sections 101, 102, and 104 Evidence Act** and is discharged on the balance of probabilities. The standard of proof is made if the preposition is more likely to be true than not true.

The standard of proof is satisfied if there is greater than 50% that the preposition is true and not 100%. As per Lord Denning in ***Miller v Minister of Pension [1947] ALLER 373****;* he simply described it as 'more probable than not." This means that errors, omission and irregularities that do not occasion a miscarriage of justice are too minor to prompt the appellate court to overturn a lower court decision. ***See Festo Androa & Anor vs Uganda SCCA 1/1998.***

It is also the position of the law that in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per

Section 58 Evidence Act and Section 33 Evidence Act. A fact under evidence Act means and includes: -

(i) Anything, state of thing, or relation of thing capable of being perceived by senses as per **Section 2 1(e) (i) Evidence Act.**

On the duty of the first appellant court, the first appellate Court is mandated to subject the proceedings and Judgment of the lower Court to fresh scrutiny and if necessary make its own findings. ***Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996***, where Supreme Court held that "The appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanor and manner of witnesses, the first appellate Court must be guided by the trial Judge's impression."

This being the first appellant court, it is duty bound to evaluate evidence and arrive on its own conclusion, bearing in mind that it did not have benefit of the observing the demeanor of the witnesses. The duty of the first appellate court is to re-evaluate, assess and scrutinize the evidence on the record. This duty was well stated in ***Selle vs. Associated Motor Boat Co. [1968] E.A 123 and followed in Sanyu Lwanga Musoke vs. Galiwango, S.C Civ. Appeal No.48 of 1995; Banco Arabe Espanol vs. Bank of Uganda S.C.C. Appeal No.8 of 1998.***

A failure to re-evaluate the evidence of the lower court record is an error in law. The appellate court has a duty to re-evaluate the evidence as a whole and subject to a fresh scrutiny and reach its own conclusion. ***See Muwonge Peter vs Musonge Moses Musa CACA 77; Charles Bitwire vs Uganda SCCA 23/95; Kifamunte Henry vs Uganda SCCA No. 10/1997.***

It is also trite law that the appellate court can only interfere and alter the findings of the trial court in instances where misdirection to law or fact or an error by the lower court goes to the root of the matter and occasioned a miscarriage of justice. ***See Kifamunte Henry vs Uganda SCCA No. 10/1997.***

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to a first appellate court, I will now turn to the substantive matters as raised in the Memorandum of Appeal and proceed to re-evaluate the evidence on record.

RESOLUTION OF THE GROUNDS OF APPEAL

PRELIMINARY POINT OF LAW

In their Written Submission, learned counsel for the Respondent raised a Preliminary Point of Law as to the framing of the 1st and 2nd grounds of Appeal. As is the procedure in our courts, I will first address the above Preliminary Point of Law.

Learned Counsel for the Respondent relied on **Order 43 r.1 (1) and (2) of the CPR** that requires a Memorandum of Appeal to set forth concisely the grounds of objection of the decision appealed against. *"Every memorandum is required to set forth, concisely and under distinct heads, the ground of objection to the decree appealed against without any argument or narrative".*

They submitted that upon perusal of the Memorandum of Appeal, it can easily be noticed that grounds 1, 2, 3 are very general and narrative in nature contrary to the requirement of the law .The grounds as framed with an intention to send this court into a fishing expedition to aid the Appellant in making a case for himself in this appeal.

Further that in ground 1, the Appellant is putting forward arguments to justify his failure and his counsel to enter physical appearance when required by court. The Appellant even went ahead to attach an annexture to the Memorandum of Appeal. The same is exhibited in ground 2 and 3 of the Memorandum of Appeal. That the grounds are very narrative and argumentative in nature. They relied on the case ***Migadde Richard Lubinga & 2 others v Nakibuule Sandra, C.A No.53 of 2019 cited National Insurance Corporation v Pelican Air Services, CA No.15 of 2003*** in which court of Appeal held that a ground which offended the rules of court in as far as how grounds of Appeal shall be framed should be struck off.

They concluded that it was therefore their submission that grounds 1, 2 and 3 of the memorandum of Appeal be struck off with costs to the Respondent for offending the rules of procedure ass by law established.

In Reply to the Preliminary Objection, it was submitted by learned counsel for the Appellant that the grounds of Appeal are not argumentative or narrative in nature as they were designed for clarity purposes, in order to avoid highly generalized grounds of Appeal.

That the grounds of Appeal that are too general, are bad in law and courts have often struck the same from court records. Counsel for the Appellant directed the

court to refer to the *case* ***C.A No.107/2018, Oduch Geoffrey v Odong Karamela & 2 Others*** which he annexed as **Annexture 'A'.**

Further, that alternatively, given the sensitivity of the suit as it involves land and substantial amounts of money spent by the Appellant on reconstructions and renovations regarding the suit property, that the Honourable Court, in the interests of justice, proceed to hear the Appeal on merits and thus over rule the Preliminary objection . That in doing so, court may invoke its powers under **Section 33 of the Judicature Act and or Section 98 of the CPA**.

They prayed that the preliminary objection be dismissed and the Appeal be heard on merits.

I have carefully analyzed both counsel's arguments on the Preliminary Point of Law I have found that indeed the appellants' grounds of Appeal were not in tandem with the provisions of **Order 43 Rule 2** of the **Civil Procedure Rules** that provides for the form of Appeal

Oder 43 Rule 1 (2) of the Civil Procedure Amendment Rules 2019 provides that;

"*That every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose. The memorandum shall forth concisely and under district heads, the ground of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively".*

In the case of ***National Insurance Corporation vs. Pelican Air services, Civil Appeal No. 15 of 2003*** the Court of Appeal held that a ground which offended the rules of court in as far as how grounds of appeal shall be framed should be struck off. Also in the case of ***Kizito Mpumpi vs Seruga Frank Civil Appeal No. 68 of 2010*** where Justice Tuhaise held that, the words *"Yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction"* are clearly argumentative offending the above cited rule.

Again, **Black's Law Dictionary, 8th Edition at Page 1191** defines an argumentative pleading as;-

"*A pleading that states allegations rather than facts and thus forces the court to infer or hunt for supporting facts."*

I have analyzed the grounds of appeal alluded to and indeed, I have found them to be certainly argumentative or narrative. In respect of ground one the words *"...by conducting Locus in Quo on 26th/11/2020 after receiving an urgent letter from counsel for the Applicants dated 25th/11/2020, annex hereto as "A", explaining valid reasons for absence of the Appellant and his counsel , at the previous hearing , when , exparte hearing was ordered , and asking for adjournment of the case , to enable interparty, hearing of the case , more so as disputed involving land such as this are sensitive matters and thus should be handled justly and with care"* are argumentative and provide a narration which are prohibited by **Order 43 rule 1 (2)** of the **Civil Procedure Rules** and this ground is struck off the record for offending the **Civil Procedure Rules.**

The second ground of appeal the words *"...when, she delivered Judgement on 3/12/2020, instead of 10/12/2020, as ordered by her Locus in quo, proceedings conducted on 26/11/2020, in the absence of the Appellant, thus denying the Appellant to file an Application before 10/12/2020 for re-opening of the Respondents closed case, so as to enable the case proceed interparty in the interests of justice and fairness"* These words form an argument and are narrative in nature. These are words which should have been used in the submissions and not the grounds of appeal. Ground two is equally struck out.

Ground three the words *"...if she had done, so she would have come up with an irresistible conclusion that the Respondent having quietly looked on for several years, while the Applicant conducted substantial developments on the suit land, is equitably estopped to deny that she had earlier donated the same property to the Appellant, and for those reasons, her case should have been dismissed for failure to prove the same under formal proof. Following which the Appellant was entitled to Judgment in his favour, under the counter claim".* These words form an argument and are narrative in nature. These are words which should have been used in the submissions and not the grounds of appeal. Ground three is equally struck out.

I have found that no single ground of appeal in this case passes the test of law, and I therefore agree with learned counsel for the Respondent and the law cited above and find that in this particular Appeal, the Appellant repetitively chose to offend the law in respect of all the three grounds relied upon. It is appreciated that he drew these grounds without assistance of counsel and even put a disclaimer at the end that he reserves the right to amend them, however, even when he engaged counsel, they chose to retain the same offensive grounds of Appeal.

As such, I do not find this as just a genuine mistake **as all of them do not** pass the test and are to be bound to be struck off the record. While I'm alive to the fact that **Order 43 Rule 1(2) of the CPR** guides on the procedure and is not a substantive section in the parent Act, in this particular case, I have not found any ground to anchor on that would persuade me to exercise my discretion and invoke **Article 126 (2) (e) of the Constitution of the Republic of Uganda (as amended)** or **Section 33 of the Judicature Act cap 13** and handle this appeal on merit.

Following up on that, it is my finding and decision that in this particular Appeal, I cannot bend the rules of natural justice and equity to give an opportunity to have their appeal heard on merit. The position of the law is clear that parties must succeed on their own pleadings and court is not obliged to create a case for any side.

For all the reasons given above, I see no cure to such to such repetitive flaunting of the law order as follows:-

1. That **Civil Appeal No. 063 of 2020 is** dismissed for repetitively offending the provisions of **Order 43 Rule 1 (2) of the Civil Procedure Rules** with such impunity.
2. The Judgment and Orders of the trial Chief Magistrate in **Civil Suit No. 63 of 2018** remains valid.
3. The costs of this Appeal are awarded to the Respondent.

I SO ORDER

_____

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
08/12/2023

This Judgement shall be delivered by the Magistrate Grade 1 attached to the Chambers of the Resident Judge of the High Court Jinja who shall also explain the right to seek leave of appeal against this Judgement to the Court of Appeal of Uganda.

_____

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
08/12/2023