THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0066-2020

(Arising from ISG-00-CV-CS-004-2014)

PIO MWESIGWA :: APPELLANT

VERSUS

TANANSI BISHANGA :::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] The appeal arises from the judgment and orders of the learned trial Magistrate Grade One sitting at the Chief Magistrate's Court of Isingiro at Isingiro delivered on 18th August 2020 in ISG-00-CV-CS-004-2014.

Background.

[2] The Respondent sued the Appellant for a declaration of right, an order that the Appellant is a trespasser, temporary injunction against the Appellant, his agents and his servants from committing future acts of trespass, general damages, mesne profits, eviction and costs of the suit.

The case of the Respondent was that he had bought a piece of land in 1997 which the Appellant trespassed upon in 2015 by cultivating it. That it was because of the Appellant's actions, that the Respondent was aggrieved hence the suit.

The Appellant denied the Respondent's allegations and averred that he was the owner of the suit land having bought it too.

[3] After full trial, the learned trial Magistrate found in favour of the Respondent declaring him the rightful owner of the suit land. The Appellant was declared a trespasser thereon, a permanent injunction issued against him and costs awarded against him.

The Appellant feeling dissatisfied with the learned trial Magistrate's orders preferred the instant appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he failed to consider the fact that the Appellant purchased his portion in 1995 and that the Respondent bought his portion across the cattle path on the lower side in 1997 and the cattle path was the distinct boundary, thereby leading to a wrong conclusion.
3. The trial Magistrate erred in law and fact when he failed to consider the fact that the parties purchased separate pieces of land from the same seller but the Respondent claimed interest in the Appellant's portion 20 years after the latter had utilized his thereby leading to a wrong conclusion.
4. The learned trial Magistrate erred in law and fact when he failed to critically analyse the reason why the sale between the Respondent took place in a different village without the

neighbours' consent instead of Kasaana village where the suit land is situate thereby leading to a wrong conclusion.

5. The learned trial Magistrate erred in law and fact when he failed to critically analyse the contradictions stated by the Respondent in respect of the district boundary marks to wit: a cattle track on the suit land and how and when it was acquired by the Appellant thereby leading to a wrong conclusion.

6. The learned trial Magistrate erred in law and fact when he held that the Appellant trespassed on the suit land in complete disregard of the fact that the Appellant bought two years before the Respondent bought the portion across the cattle track.

It was prayed by the Appellant that this court allows the appeal with costs and sets aside the judgment and orders of the lower court and the Respondent be ordered to pay the costs in the lower court.

Representation.

[4] The Appellant was represented by Ruyondo & Co. Advocates while the Respondent was represented by M/s Mugarura, Mwijusya & Co. Advocates. Both Counsel filed submissions in the matter which I have considered.

Preliminary point of law.

[5] Counsel for the Respondent raised a point of law regarding the grounds of appeal as raised by the Appellant in the instant appeal. Counsel submitted that grounds 2,3,4,5 and 6 were offensive to **Order 43 rule 1(2)** of the Civil Procedure Rules and the said grounds should be

struck out. According to counsel, these grounds were argumentative and a narrative.

There was no rejoinder from the Appellant.

[6] **Order 43 rule 1(2)** of the Civil Procedure Rules provides that the memorandum of appeal shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative.

The **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 court to infer or hunt supporting facts.

In **M/S Tatu Naiga & Co Emprorium vs Verjee Brothers Ltd (Civil Appeal 8 of 2000)**, the Supreme Court held that:

> *"…counsel who frame memoranda of appeals and other legal documents which are ultimately presented to court should comply with the requirements of the rules and forms for framing memoranda and such other legal documents."*

In **Kitgum District Local Government & Anor vs Ayella (Civil Appeal 8 of 2015)** this court while relying on **M/s Tatu Naiga (supra)** observed that:

> *"Grounds ought to be; (a) as clear as possible, (b) as brief as possible, and (c) as persuasive as possible, without descending into narrative and argument. A ground of appeal must only state the objection to the decree without any argument or narrative.*

*Although there is no maximum requirement as to the length or the fullness of detail of a ground of appeal, the argumentation which is necessary for the objection to the decree should be reserved for the written or oral submissions. To include justifications, elaboration or illustrations of the objection in the ground itself risks introducing argument or narrative into the ground." [**Emphasis mine**]*

[7] I have examined the grounds of appeal complained of by the Respondent as stated herein above and it is the finding of this court that grounds 2,3,4,5 and 6 of this appeal are offensive to **Order 43 rule 1(2)** of the Civil Procedure Rules, a provision that is couched in mandatory terms.

The grounds are not concise and precise as they are argumentative in nature and provide a long narration of the evidence which would ordinarily be a part of counsel's written and or oral submissions. (**On this, (See Katumba Byaruhanga vs Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 62T, Attorney General vs Florence Baliraine, CA. Civil Appeal No. 79 of 2003 and Nyero vs Olweny and Ors (Civil Appeal 50 of 2018))**.

Subsequently the preliminary point of law is upheld and grounds 2,3,4,5 and 6 of this appeal are struck out.

I will consider this appeal on the remaining ground.

The duty of this court.

[8] This being a first appellate court, it is duty bound 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 vs 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 vs Nsibambi [1980] HCB 81**).

In its appellate jurisdiction, 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. (**See Nyero vs Olweny and Ors (Civil Appeal 50 of 2018) and Kaggwa vs Ampire (Civil Appeal 126 of 2019) per Mubiru J.**)

I shall determine this appeal with the above principles in mind.

Ground 1: The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion.

[9] On this ground, it was submitted by counsel for the Appellant that the trial Magistrate ignored the Appellant's evidence on record and instead decided the case on the evidence given by the Respondent. That the Appellant in his testimony was clear when she stated that she bought the suit land in 1995 from John Rutanana and she confirmed that John Rutanana and John Patrick Mugisha was one person but using the two names interchangeably. That in such circumstances where there is conflicting evidence before the trial court on whether John Rutanana and John Mugisha was one person, court ought to have properly evaluated the evidence presented by both sides and establish the truth. That instead, the court chose to rely on the evidence of the respondent to come to its decision.

Counsel prayed that this court exercises its power to scrutinize and re-appraise the evidence presented at trial to come to a just conclusion.

On the part of the Respondent, it was submitted by counsel that the trial Magistrate properly evaluated the evidence thereby arriving at the right conclusion. That the Appellant clearly stated in his evidence that he bought the land in dispute from Rutanana John who was totally a different person from the person that sold the land to the Respondent.

[10] It is trite that in court disputes, whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

In civil proceedings as the instant one, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him or her. He or she bears the burden of proof. (**See S. 100 to 105 of**

the Evidence Act and Besigye Kiiza vs Museveni Yoweri Kaguta and Another (Election Petition No.1 of 2001) [2001] UGSC 3).

Guided by the above legal position, I evaluate the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to my own conclusion on whether the Plaintiff, now Respondent proved on a balance of probabilities all allegations in his plaint.

The Plaintiff's/Respondent's evidence at trial.

[11] The Respondent produced four witnesses in the trial court.

PW1, Atanasni Bishanga testified in chief that the Appellant encroached on his land situate at Kasana II Cell, Kasana Parish in Birere sub county in Isingiro District in 2015. That he bought the said land on 27th May 1997 and an agreement of sale was executed in that regard. That this agreement was witnessed to by two witnesses; Amosi Sabiti and Mukiga George an LCIII Chairperson.

That the area LC1 Chairperson did not witness the purchase agreement because he paid for the land in Kaberebere and had already inspected it before purchase. That the boundaries of the land were that; to the right it was boardered by Rwezahura, on its left was Nkuba and on its lower part was Tukasimire and on top was a hill and cattle pass.

The purchase agreement was tendered into court and exhibited as **PEX1** and its translation **PEX II**. He testified further that he purchased the land from a one John Patrick Mugisha. That the Appellant claimed to have

bought part of the land from John Rutanana, a person he never knew yet for him he bought from John Patrick Mugisha and he had bought the whole land.
In **cross-examination** he testified that ever since he bought the suit land, the Defendant was using the neighbouring land.

PW2 was Mukiga George who testified in chief that it was the Plaintiff/Respondent that owned the suit land having bought it from Patrick Mugisha on **28th May 1997**. That he witnessed and made the sale agreement and signed on it. He corroborated the boundaries of land as stated by **PW1**. That before he made the agreement, he had a chance to visit the suit land and observed its neighbours and boundaries.
In **cross-examination** he testified that he visited the suit land as an intending buyer and it was the same John Patrick Mugisha that was selling the suit land. That John Patrick Mugisha executed the sale agreement from outside the area where the land was located because his father would restrain the sale yet the land was his.
The area local authorities only came to know about the sale after it had been concluded. That the neighbours to the land were never involved too because John Patrick Mugisha feared his family. That he did not know whether John Patrick Mugisha had sold the land to another person before. That he did not know that the Defendant was a neighbour to the disputed land.

PW3 was Buzaale Julius. He testified that he was the chairperson of Kasana II Cell, Birere Sub- County in Isingiro. That the Plaintiff bought

the suit land from John Patrick Byamugisha. That he was not present when the purchase took place.

PW4 was Namberito Ruteraho a young brother of John Patrick Mugisha who testified that his brother sold his land to the Plaintiff. He further corroborated the boundaries to the land as laid out by PW1. In **cross-examination** he testified that the sale took place at the sub-county headquarters in his presence but he never witnessed on the said agreement. He further testified that his brother was known as John Patrick Mugisha and had never used their father's name.

The Defendant's/Appellant's evidence at trial.

[12] At trial, the Defendant led his evidence through four witnesses.

DW1, Mwesigwa Pio testified in chief that he had not trespassed on the Plaintiff's land. That he bought the suit land from John Rutanana on 15th January 1995 at UGX 200,000/=. Executed an agreement. The sale agreement was tendered into court and exhibited as **DEX1.** That the Plaintiff began challenging his use on 14th October 2015. That the Plaintiff was his neighbour and the two shared a common boundary since 1997.

In **cross-examination,** he testified that John Rutanana and John Patrick Mugisha constituted one and the same person and this was the name that appeared on his grave.

DW2, Kishaija Richard testified in chief and corroborated the Defendant's evidence. He further testified that he was witness number

one on the Defendant's land sale agreement. That the land owned by the Plaintiff was adjacent to that of the Defendant whose boundary was comprised of sisal plants and cactus trees.

During **cross-examination,** he testified that he has never heard of a person called John Patrick Mugisha.

DW3, Mugisha Emmanuel testified that he was a witness to the Defendant's purchase agreement. That the two parties to the suit were neighbours. That the Defendant owned the suit land which he bought from John Rutanana. That the suit land was separated from that of the Plaintiff by sisal and Ruyenje trees.

In **cross-examination,** he testified that the father of John Rutanana had children namely; John Rutanana, Alberito Rutanana, and John Patrick Mugisha.

DW4, Rutandama Joseph testified in chief that both parties to the suit were his village mates. That by the time the Defendant bought his part of the land, the Plaintiff was not his neighbour because the land was plain.

The proceeding at locus in quo.

[13] The trial Magistrate visited the locus in quo on **25th November 2019**. At locus I note that the court took on evidence from a new witness by the names of **Furidah Kasande**. The trial Magistrate's notes at locus are also scattered and this court cannot make out whether there was a formal proceeding or not.

Analysis and decision.

[14] From the evidence on the court record, it is not in dispute that the Appellant and Respondent were neighbours. What is in dispute according to this court is who own the portion of land that the Appellant was using.

It was claimed by the Appellant that he purchased his land including that portion from a one John Rutanana in **1995**. On the other hand, the Respondent claimed that he purchased he owned the same portion having purchased it from John Paul Mugisha in **1997**.

The Appellant and his advocate argued both in the trial court and this court that John Rutanana and John Patrick Mugisha were one and the same person and it would therefore follow that the Appellant purchased the suit land earlier than the Respondent.

On the other hand, counsel for the Respondent argued that the learned trial Magistrate properly evaluated the evidence on the court record and found that the two; John Patrick Mugisha and John Rutanana were different.

[15] The findings of the learned trial Magistrate were as follows at page 3 of his judgment;

> *"In the present case the two parties claim equitable interests in the suit land from in my opinion different people as stated by PW4 the brother to John Patrick Mugisha who stated that John Patrick*

Mugisha never used the name Rutanana but the said name belonged to their father. I accordingly find that the Plaintiff owns the suit land, his interest having purchased it from John Patrick Mugisha."

It was the Respondent's unchallenged evidence through PW4, the biological brother of John Patrick Mugisha that his brother was using his names and not those of his father; that is, "Rutanana". He maintained this throughout his cross-examination.

The Appellant's witness DW3, Mugisha Emmanuel testified that the late Alphonse Rutanana, the father of the seller had children named **John Rutanana, Alberito Rutanana** and **John Patrick Mugisha**. (**See page 18 of the record**). This evidence of DW3 suggests that there existed a John Patrick Mugisha (the one that sold land to the Respondent) and a John Rutanana (the one that sold land to the Appellant).

[16] Be that as it may, if I were to consider the arguments of counsel for the Appellant that John Rutanana and John Patrick Mugisha were one and the same, the only legal way that a person can use two name interchangeably within this jurisdiction is after swearing a name declaration affidavit commonly known as a deed poll in that regard.

In order to establish before court that the person known as John Rutanana and John Patrick Mugisha were one and the same person, such a deed poll ought to have been the best evidence of such facts. However, this is not the only evidence that could be relied upon. In the instant case, since the alleged seller had passed on, the evidence of

relatives and friends who knew his names would have been key to this case.

The Appellant's evidence that the two were one and the same person was made less probable by the evidence of the biological brother of the alleged John Rutanana; **PW4** who testified that his brother was using his names and not those of his father.

Worse still, by the evidence of his own witness **DW3** who testified that there existed two different people by the names of John Rutanana and John Patrick Mugisha, it made his evidence less probative.

[17] On a balance of probabilities, I agree with the conclusion of the learned trial Magistrate that the Respondent owned the suit land having proved that he purchased it from John Patrick Mugisha and accordingly, the Appellant was a trespasser thereon.

In the premises, ground 1 of the appeal fails. This appeal is therefore without merit. The Judgment and orders of the learned trial Magistrate are upheld.

The Appellant shall bear the costs of this appeal.

I so order.

Dated, delivered and signed at Mbarara this 31st August 2023.

Joyce Kavuma
Judge