THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CIVIL APPEL NO.72 OF 2022

FORMERLY CIVIL APPEAL NO.99 OF 2021 AT MBALE

1. ANGWELLA KENNETH
2. LYDIA ACHOLA
(Administrators of the estate of
The late Ochwo Obonyo) :: APPELLANTS

VERSUS

1. AKWAROI YEREMIYA
(Administrator of the estate of
The late Onyango Erifazi)
2. OWORI LAWRENCE
3. OTHIENO SIDORO
4. SANDAY SIDORO
5. LUKE SIDORO
6. OCHIENG DAVID :: RESPONDENTS

JUDGMENT

BEFORE HON. DR. JUSTICE HENRY I. KAWESA

This appeal arises from the judgment of Her Worship Mulondo Mastula, a Chief Magistrate at the Chief Magistrate's Court of Tororo at Tororo. The judgment was delivered on the 20th day of April 2021.

The judgment appeal against was rendered vide Civil Suit No.34 of 2012. The suit was originally filed by the late Ochwo Obonyo against the late Onyango Erifazi and the respondents herein. the plaintiff sought for a declaration that he is the proprietor of part of land comprised in Plot 38 of LRV 51594 Vol. 2102 Folio 19 Plots 38 and 39; an order of eviction; a permanent injunction; mesne profits; damages for trespass and interest thereon, in addition to costs of the suit.

At the trial, each of the parties called 6 witnesses. The record shows that the plaintiff's/appellants' principal witness is PW2, Ochieng Omusolo. This is because his case was that the suit land belonged to PW2, and that it neighboured his undisputed land. That he (Ochwo Obonyo, under whom they claim) took over the suit land after compensating PW2 and shifted him therefrom to another portion of land on Plot 39.

PW2 testified that he acquired the suit land from his father, the late Omusolo Erukana; and the evidence shows that his father indeed acquired land as a gift from Donozio Padde, a neighbour and relative to the respondents. However, it is disputed that that land is the suit land. According to PW2, that the suit land is the land he acquired from his father. He described its boarders as starting from Mudondo stream, and that its upper part neighboured the late Ochwo Obwonyo's undisputed land.

This court looked at a copy of a deed print attached to a certificate of title exhibited by the plaintiff as P.I and a sketch plan drawn by the trial court while at the locus in quo. It appraised itself with the boarders and neighbourhood of the suit land. These show that the suit land and the late Ochwo Obonyo's undisputed land is divided by a road coming from Mudondo to Putiri; and that the suit land is on the lower side of the said road. Further, the north east to north east-east of the suit land is divided into two portions by river Kaliwani (which river crosses from the appellants' undisputed land to Mudondo Puturi Road) which then extends to meet river Mudodo in the south. From that point, where river Kaliwani and Mudondo meet, to the west, is another boundary line of the suit land. Below that boundary line and river Kaliwani is land which undisputedly belongs to the respondents.

According to the plaintiff/appellants, the suit land is part of their undisputed land. This assertion is countered by the respondents who assert that they never had a common boundary with the appellants; that their land (suit land) and PW2's land

(which Ochwo Obonyo acquired from him) was separated by the road from Mudodo to Puturi. Their assertion implies that the appellants' land did not cross the road from Mudodo to Puturi.

The issues raised by the parties, in their joint scheduling conference notes, were:

1. *Whether the suit discloses a cause of action against the 4th, 5th, and 6th defendants?*
2. *Who is the rightful owner of the suit property?*
3. *Whether the defendants are bonafide occupants?*
4. *Whether the suit property was wrongfully included in the plaintiff's certificate of title and if so if the plaintiff is guilty of fraud?*
5. *Whether or not the defendants are trespassing on the suit property?*
6. *Whether the suit is barred in law?*
7. *Remedies available to the parties*?

After evaluation of the evidence, the learned trial Magistrate did not believe the late Ochwo Obonyo/appellants' assertion. Consequently, she dismissed the suit with costs. In addition to that, she also made findings on all the issue raised, most of which were not in the appellants' favour. This led to this appeal.

Grounds of the Appeal

These are that:

1. *The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole, thereby occasioning a miscarriage of justice that the suit was time barred.*
2. *The learned trial Magistrate erred in law and fact when she held that the respondents are not trespassers without considering the evidence of the boundary demarcation thereby occasioning a miscarriage of justice.*

3. *The learned trial Magistrate misdirected herself on the law when she held that Ochwo Obonyo's registration on Plot 38 was fraudulent without a counterclaim.*
4. *That the learned trial Magistrate erred in law and fact when she misdirected herself on the law relating to bonafide occupants and customary owners when she held that the respondents owned equitable interest on Plot 38 both as bonafide and customary owners thereby occasioning a miscarriage of justice.*
5. *The judgment and orders of the trial Magistrate are unenforceable for ambiguity when she held that the respondents have an equitable interest in part of Plot 38 without pronouncing the size of the land thereby occasioning a miscarriage of justice*

The appellants are represented by **MS ASIRE & CO. ADVOCATES**, and the respondents are represented by **AKETCH & CO. ADVOCATES**.

Counsel for the parties filed written submissions as directed by court. this court shall consider them in the determination of the above grounds of the appeal.

DUTY OF FIRST APPELLATE COURT

This court bears the duty to re-examine the evidence taken at trial and come up with its own conclusion, bearing in mind the fact that it neither heard nor saw the witnesses (**Father Namensio Begumisa & Others vs. Eric Tiberaga SCCA No.017 of 2000**). This court shall endevour to uphold the said duty in resolving the grounds of appeal.

Consideration of the Grounds

Ground One:

The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole, thereby occasioning a miscarriage of justice that the suit was time barred.

Counsel for the appellants argued that it was erroneous for the learned trial Magistrate to rely on evidence of the parties to determine the issue of whether the suit was time barred. Counsel submitted that the learned trial Magistrate ought to have restricted herself to the pleadings only in determining the issue. This submission is resisted by that of Counsel for the respondents, who argues that the learned trial Magistrate could nevertheless dig into the evidence of the parties and determine the said issue; though none of the parties' Counsel cited any authority to support their submissions.

Additionally, Counsel for the appellants also submitted that the suit was not time barred since it was founded on a tort of trespass to land, which is a continuous tort. In support of this submission, Counsel cited the case of **Odyek Alex & Anor vs. Gena Yokonani & Others HCCA No.0009 of 2017**.

Counsel for the respondents did not reply to the latter submission by the appellants' Counsel.

With regard to the first arguments by Counsel; it was established by the Court of Appeal in deciding the case of **Madvani International S.A vs. Attorney General CACA No. 48 of 2004,** that in considering whether a suit is barred by any law court looks at the pleadings only, and no evidence is required. This decision was upheld on appeal by the Supreme Court in **Madvani International S.A vs. Attorney General SCCA No.23 of 2010.** Further reference is made with regards to the same

to the decisions in **Sunday Edward Mukooli vs. Nabbale Teopista & Others HCCS 282 of 2013** and **Polyfibre (U) Ltd vs. Matovu Paul & 3 Ors HCCS No.412 of 2010** which followed the holding **in Madvani International S.A vs. Attorney General (supra).**

However, in **Polyfibre (U) Ltd vs. Matovu Paul & 3 Ors HCCS No.412 of 2010,** while following Odoki J., **(as he then was) in Sayikwo Murome vs. Yovani [1985] HCB 68**, the court held that where a plaintiff pleads facts from which a reasonable inference can be made that the suit is not time barred, then the issue of limitation is a triable issue which can only be determined after hearing the evidence on the matter. This court agrees with and acknowledges that holding as an exception to the decision in **Madvani International S.A vs. Attorney General (supra).**

The court has looked at the appellants' plaint in this case. A reasonable inference made from it is that the suit was not time barred. It is probably for this reason that the parties' Counsel chose to raise an issue of limitation and left it for determination after the trial. Thus, there is no merit in faulting the learned trial Magistrate for the determination she made on the basis of the evidence put before her. This court disagrees with the submission of appellants' Counsel that the learned trial Magistrate ought to have considered only the pleadings in resolving the issue.

Furthermore, upon looking at the plaint, the court considers that the plaintiff/appellants' suit was premised on recovery of land, not trespass to land. The plaint, and the remedies sought, clearly show that plaintiff sought to enforce a right to title or ownership of the suit land as opposed to merely possessory rights. The court appreciated the decision in the case of **Odyek Alex & Anor vs. Gena Yokonani & Others HCCA No.0009 of 2017**, about the difference between a tort of trespass to land and recovery of land, and it is on the basis of that decision that it

rested its view. Accordingly, the court finds no merit in the argument of the appellant's Counsel that the suit was premised on a tort of trespass to land.

Consequently, this court finds the first ground in the negative.

Ground Two:

The learned trial Magistrate erred in law and fact when she held that the respondents are not trespassers without considering the evidence of the boundary demarcation thereby occasioning a miscarriage of justice.

Counsel for the appellants submitted that PW1 testified that the key feature separating the suit land and the respondents is a stream called mudodo (or river mudodo). That the trial court ignored the testimony of existence of a natural boundary and instead found that the respondents are not trespassers. Counsel cited the case of **Nekomia Obina & Others vs. Okumu Vincent & Others HCCA No.0042 of 2018** and stated that the court, while upholding the appeal, considered the importance of natural boundaries, such as the stream called mudodo mentioned by PW1.

On the other hand, the respondents' Counsel supported the trial court's findings and argued that the learned trial Magistrate paid keen attention to the boundaries described by the parties as seen at page 4 and 5 of the judgment. Counsel added that what is clear from PW1's testimony is that he not only surveyed and obtained a certificate of title over land claimed by the respondent but also surveyed land of PW2 and compensated him upon intervention of Justice Centers in 2011. That the respondents also clearly described their respective boundaries in their witness statements, which evidence was not challenged in cross examination. Ultimately, Counsel submitted that the criticism lodged against the learned trial Magistrate by the appellants' Counsel is unsubstantiated and that the appeal should be dismissed.

The parties' evidence about the boundaries of the suit land and the appellant's undisputed land is contradictory, as revealed in the introductory part of this judgment.

That said, this court noted that the appellants' case hinged mostly on PW2. However, while at the locus in quo, PW2 failed to show that the land he exchanged with Ochwo Obonyo (under whom the appellants' claim) indeed extended up to the suit land. In other words, PW2's testimony about the suit land did not correlate with what he showed court to be the land he acquired from his father, and which he gave the late Ochwo Obonyo in exchange for his current land. The learned trial Magistrate noticed PW2's failure hence noting that:

> *....the plaintiff led evidence of PW2 Omusolo who testified that he agreed with the plaintiff to exchange for him another piece of land for his own (7) seven acres, and that he was given (3) acres on plot 39, he said that this agreement had been entered (10) years ago and that therefore he had no issues with the survey of the land. It was his evidence that his land stretched up to Kaliwan stream. However, during the locus visit on 04/03/2021 when this witness was requested by court to show the portion he had exchanged with the plaintiff the same was far away from the alleged stream.*

This court looked at the sketch plan taken by the learned trial Magistrate while at the locus in quo. It confirmed that the land PW2 showed as his original land did not correlate with his evidence given at trial, and that the land he showed court does not

cover the entire suit land. This is unlike the respondents, whose evidence correlated with what they showed court at the locus in quo.

Furthermore, the learned trial Magistrate made another proper observation immediately after above quoted statements. This is to the effect that:

> *Last but not least the 1st defendant led evidence that he owned land which he inherited from his late father and that D2 and D3 are his neighbours in the east and the late Erukana in the north. This court is alive to the fact that PW2 Omusolo derives his claim and title from the family of the late Erukana. Since there is evidence indicating that the 1st defendant had an unresolved dispute with the plaintiff by the time the plaintiff acquired title over the land comprised in plot 38 and D1, D2, and D3 were neighbours on the same land, it's this court's finding that all the defendants have an unregistered interest in the suit land...*

It is trite law that the burden of proof lies on the plaintiff, and that this must be discharged on a balance of probabilities (**Section 102 of the Evidence Act Cap.6; and Dr. Vicent Karuhanga t/a Friends Polyclinic vs. NIC & URA [2008] HCB 151**.

Mindful of the parties' evidence, and the above quoted statements and observation, the court is not convinced about the appellants' evidence. It is its finding that the appellants did not discharge the burden of proof to the required standard. Consequently, it finds no fault in the findings of the learned trial Magistrate with respect to the second ground. The ground fails therefore.

Ground 3:

The learned trial Magistrate misdirected herself on the law when she held that Ochwo Obonyo's registration on Plot 38 was fraudulent without a counterclaim.

In his submissions, the appellants' Counsel faults the learned trial Magistrate for making findings on the respondents' allegations of fraud, yet the respondents had no counterclaim.

On the contrary, Counsel for the respondents admitted that the respondents did not raise a counterclaim. Nevertheless, Counsel argued that the respondents pleaded fraud under paragraph (four) 4 of their written statement of defence and that that was sufficient. In support of that argument, Counsel cited the case of **Rwenzori Cotton Ginners Co. Ltd vs. Kampala District Land Board & Others HCCS No.624 of 2016** where Zeija J., stated as follows:

> *…the 2nd defendant pleaded fraud in its written statement of defence. Counsel for the plaintiff submitted that the 2nd defendant's allegations of fraud are incompletely before this court as they contravened O.8. r.7 and 8 CPR as they were raised in their defence and not on a counterclaim….*
>
> *It is not provided anywhere in law that it is mandatory to file a counterclaim when pleading fraud in defence. That is false. The pleading of fraud does not automatically lead to a counterclaim. A counterclaim is a separate action and fraud can be raised either in the defence itself or pleaded in cross action i.e a counterclaim.*

Accordingly, the respondents' Counsel stated that since fraud was raised in the written statement of defence, and an issue relating to it raised for determination, the learned trial Magistrate did not misdirect herself on the law, but properly found that the plaintiff's registration on plot 38 was fraudulent.

It is true that the respondents pleaded fraud and its particulars in the written statements of defence only. Further, the parties' Counsel also raised an issue on fraud

for determination by the trial court; and also went ahead to submit on it in their submissions.

Pursuant to all that, the learned trial Magistrate proceeded and made a finding on the allegation of fraud. In view of the revealed facts, this court finds nothing wrong with the finding. The submission that the respondents needed to have filed a counterclaim is rejected. As the respondents' Counsel argued, premising on the decision in **Rwenzori Cotton Ginners Co. Ltd vs. Kampala District Land Board & Others (supra),** it was enough that the allegation had been raised in the written statement of defence, an issue about it raised and submitted upon by all the parties.

Consequently, the 3rd ground fails as well.

Ground 4:

That the learned trial Magistrate erred in law and fact when she misdirected herself on the law relating to bonafide occupants and customary owners when she held that the respondents owned equitable interest on Plot 38 both as bonafide and customary owners thereby occasioning a miscarriage of justice.

The court shall not deliberate much on this ground; and decides as follows.

The court did not come across any finding in the judgment of the lower court to the effect that the respondents were customary owners of the suit land. The allegation in relation to that fact is accordingly rejected.

With regard to the point of bonafide occupancy, there is evidence on record suggesting that the respondent, or persons under whom they claim, probably occupied the suit land for 12 years before the coming into force of the Constitution of the Republic of Uganda. This qualifies them as bonafide occupants under **Section**

29(2)(a) of the Land Act Cap.277 as it was rightly observed by the learned trial Magistrate.

Accordingly, there is no merit in ground 4. The same fails as well.

Ground 5:

The judgment and orders of the trial Magistrate are unenforceable for ambiguity when she held that the respondents have an equitable interest in part of Plot 38 without pronouncing the size of the land thereby occasioning a miscarriage of justice.

The court finds as follows with respect to this ground.

From page 7 to page 8 of her judgment, the learned trial Magistrate found that the respondents have an equitable interest in the suit land "*measuring from River Kaliwani to the old road from Mudodo to Putiri then to Mudodo River*". The sketch plan she drew shows that the suit land is on the lower side of the road from Mudodo to Putiri. Thus, this implies that whatever is on the lower side of the said road does not belong to the appellant.

In view of the above statements, this court's considered view is that it was not necessary for the learned trial Magistrate pronounce herself on the size of the land on the lower side of the road, especially since the materials before her were not enough to make such a pronouncement. The descriptions she made in the judgment and which have been referred to were sufficient.

Consequently, this ground fails as well.

Result of the appeal

This appeal fails and is dismissed with costs to the respondents.

The judgment of the lower court dismissing the appellants' suit with costs is hereby upheld.

It is so ordered.

Delivered at Tororo this ....13th..... Day of .....October..... 2023

JUSTICE DR HIKAWESA

In the presence of:

1....3rd Appellant - Achola Lydia

2....1st 2nd 4th, 5th & 6th - Respondents

3. Akecho Rebinah - counsel for the Respondents

4.....

13/October 2023

13th October 2023