THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA

CIVIL APPEAL NO: 47 OF 2020

(Arising from Masaka Civil Suit No: 192 of 2017)

SSENYONDO JOSEPHAT ……..…….….. APPELLANT

VERSUS

HAJJI LYAZI ISMAIL …….……..……..RESPONDENT

JUDGMENT

(Appeal against the Judgment & Orders of His Worship Yeteise Charles, then Chief Magistrate of the Chief Magistrates Court of Masaka at Masaka)

BACKGROUND

The Appellant instituted Civil Suit No. 192 of 2017 in the Chief Magistrates court of Masaka at Masaka against the Respondent. The Appellant alleged that the Respondent had in 2017 trespassed on FRV MSK 252 Folio 19, Plot 92 land at Bigasa which is registered in the names of the Appellant.

The Appellant sought general damages for trespass, an eviction order against the Respondent, a permanent injunction restraining the Respondent from further trespassing on the suit land and costs of the suit.

The Respondent/Defendant's case was that the entry, business and machines on the suit land that was brought on the suit land belonged to his brother Semanda Dauda. He further pleaded that the Appellant and Semanda Dauda had earlier on executed a leasehold agreement over the suit land in 2011 for 30 years. That this leasehold agreement permitted Semanda Dauda to occupy and use the land.

The Respondent also pleaded that he had only assisted Semanda Dauda with financial support and thus occasionally visited to see how the business was doing.

The Respondent pleaded that the Appellant's suit was misconceived and prayed that the same be dismissed with costs to him.

Indeed, at the trial, Semanda Dauda, testified as Dw2 and stated that the business that is currently running on the suit land belongs to him. The Appellant admits to having executed a leasehold agreement dated 10th May 2011 for a term of 30 years over the suit land with Semanda Dauda. The Appellant's contention, as seen in one of his grounds of appeal, is that the said leasehold agreement is illegal.

The Learned Trial Chief Magistrate found for the Respondent. The Appellant was dissatisfied with the decision and thus the instant appeal.

Representation

The Appellant was represented by **M/s Ssekyewa Matovu & Co. Advocates.**

The Respondent was represented by **M/s Mbeeta Kamya & Co. Advocates**

The Appellant raised three grounds of appeal in his memorandum of appeal to wit;

1. ***The learned Trial Magistrate erred in law and fact when he totally failed to consider and evaluate all the evidence on record before reaching his decision.***
2. ***The learned Chief Magistrate erred in law and fact when he failed to find that the lease agreement between the Appellant and Ssemanda Dauda (Dw2) was illegal and unenforceable.***
3. ***The learned Chief Magistrate erred in law and fact when he failed to find that the admissions and contradictiuons in the defence evidence proved that the defendant and Dw2 were trespassers on the suit land.***

APPELLANT'S SUBMISSIONS

The Appellant argued both grounds 1 and 3 jointly.

The Appellant submitted that the Respondent trespassed on the suit land by starting up trade activities of coffee and maize milling under a trade licence of Bemba Coffee that he obtained from Bukomansimbi District Local Government. The Appellant submits that when he protested the Respondent's occupation of the suit land, the Respondent took him, along with his Advocates to

his Lawyers of M/s Bashasha & Co. Advocates to execute a leasehold agreement. He maintains that he rejected the said lease agreement. A copy of the agreement that was never signed by any of the parties was exhibited in evidence.

The Appellant further argues that the learned Trial Chief Magistrate erred when he found that he could not maintain a cause of action founded in trespass because he had no possession of the suit land. The Appellant buttressed his argument by relying on the authority of ***Moya Drift Farm Ltd v Theuri (1973) E.A. 114 in which the court of Appeal for East Africa in which the trial court had dismissed the suit by the registered proprietor of land, on the ground that at the time of the unlawful entry complained of, the proprietor was not in possession. The final decision on appeal was that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass.***

The Appellant further submitted that the name Bemba factory belongs to the Respondent and not to Semanda Dauda to whom he leased the suit land. He submitted that the Respondent runs a similar factory under the same names as per his trade licence issued by Lukaya Town Council.

The Appellant also submitted that the Respondent's evidence was tainted with contradictions because, having pleaded that Semanda Dauda was his brother, he later stated in his evidence that they do not belong to the same clan.

The Appellant also stated that Semanda Dauda's business is not Bemba factory but rather, Dauda Ssemanda & Sons dealers in produce: Maize, Beans, Maize flour, Bran etc of address – Bulenga, 7 miles Mityana Road, P.O Box 37614, Kampala.

Ground two: ***The learned Chief Magistrate erred in law and fact when he failed to find that the lease agreement between the Appellant and Ssemanda Dauda (Dw2) was illegal and unenforceable.***

The Appellant argued that since the suit land was held by him under customary tenure on public land, he was not the owner of the land, empowered to enter into any leasehold agreement. He argued that this was the position because he had no certificate of customary ownership as required by S.4 of the land Act, Cap. 227, as amended by Section 5 of the land Amend Act 2004.

In conclusion, he submitted that the purported lease that he entered into with the a one Semanda Dauda was illegal and unenforceable by this Honourable Court.

The Appellant supported his argument with the locus classicus case of ***Makula International Ltd vs. His Eminence Emmanuel Cardinal Nsubuga and Anor [CACA No. 4 of 1981] in which the court of Appeal held that;***

"A court of law cannot sanction what is illegal, an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality."

RESPONDENT'S SUBMISSIONS

Ground one and **three.**

The Respondent submitted that the Appellants grounds of appeal have no merit at all. The Respondent argued that the Appellant had to prove that it was the Respondent in current possession of the suit land and that he had failed.

The Respondent submitted that he had proved his pleading that he was not in possession of the suit land but that the same was in the current occupation of a one Semanda Dauda with whom, the Appellant executed a leasehold agreement.

The Respondent further submitted that he categorically informed court that his factory is located at Lukaya but not in Bukomansimbi. That this evidence was corroborated by Dw2, Semanda Dauda, who testified that the factory at Bigasa, Bukomansimbi is his business.

Ground two:

The Respondent submitted that this ground was a waste of court's time because the leasehold contract was between the Appellant and a one Semanda Dauda who is not a party to the instant suit.

In conclusion, the Respondent prayed that this court be pleased to dismiss the instant appeal with costs.

DETERMINATION OF COURT.

The duty of this Court as a first Appellate

The duty of a first Appellate Court is to re-appraise or re-evaluate evidences as a whole and come to its own conclusion bearing in mind that it has neither seen nor heard the witness and should make due allowance in that regard.

The Supreme Court has re-echoed the above principles in a number of cases like ***Uganda Revenue Authority versus Rwakasanje Azariu & 2 Ors; CACA No. 8/2007; Fr. Narsensio Begumisa and 3 Ors versus Eric Kibebaga; SCCA No. 17 of 2002*** *and* ***Banco Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1998.***

I therefore have the duty to re-appraise the evidence and reach my own conclusions thereon subject to the caution that I did not see, hear, or observe the witness.

Decided cases have also established that ***"where the trial court has erred, the Appellate Court will only interfere where the error has occasioned a miscarriage of justice. The Appellate Court has a duty to reevaluate the evidence of the trial court while considering facts, evidence and the law. The court can interfere with the findings of the trial court, if the court misapplied or failed to apply the principles applicable to the offence charged"*** in this civil case, the issues that were raised before court for determination.

I have carefully examined the parties' submissions and the trial court's record, and below are my findings on the grounds of appeal.

Grounds 1 and 3;

The Appellant, PW1 Ssenyondo Josephat, testified and confirmed the existence of a lease agreement between himself and one Semanda Dauda, DW2. He further stated that his problem is that DW2, the lessee, brought the wrong person onto the land, that person being the Respondent, who is presumably running a factory trading as "Bemba Factory," a business the Appellant claims belongs to the Respondent.

In his evidence, Respondent DW1 averred that he operates the said factory on behalf of his brother, the lessee, Semanda Dauda. This was further confirmed by DW2 Semanda Dauda, the lessee who

stated in evidence that he has a factory on the Appellant's land trading as Bemba and Dauda Semanda, a company that was registered by the Respondent. The lease agreement Dexh1 was admitted in evidence to prove the lease between the Appellant and DW2.

The Appellant's cause of action of trespass arises from the Respondent's presence on his land without permission. The Respondent did not deny being on the Appellant's land but rather that he entered on the land on behalf of one Semanda Dauda, who has permission to be on the land under the lease agreement that is not in dispute. The contention in the instant case is further based on the factory, which the Appellant alleges belongs to the Respondent, although the Respondent claims the factory belongs to one Semanda, a claim which was confirmed by Semanda DW2 in his evidence.

In his judgment, the trial Magistrate found that the Appellant may not maintain an action of trespass because he was not in possession of the suit land. I am in agreement with the Appellant's submissions that the learned trial Magistrate arrived at this conclusion wrongly as the law on trespass is clear that trespass is not committed against the land but the person who is in actual or constructive possession of the land ***(See Justine E.M.N Lutaya v Stirling Civil Engineering Copnay LTd Civ. Appeal No. 11 of 2002).*** In the instant case, the Appellant was in constructive possession of the land through the lessee and has the locus to institute an action for trespass.

Trespass to land occurs when a person makes an unauthorized entry upon another's land, thereby interfering with another person's lawful possession of the land ***(See Justine E.M.N Lutaaya versus Stirling Civil Eng. Civ. Appeal No. 11 of 2022).***

In the instant case, the issue in contention relates to a dispute over the ownership of a factory on the Appellant's land. The Respondent claims to have entered the land on behalf of one Semanda who has authorized entry on the Appellant's land. The Appellant adduced evidence of a trading license registered to "Bemba Factory." The Respondent argues that Bemba is a family name used by DW2, the lessee on the land. In his evidence, DW2 stated that the factory is his and that it is in the names of Bemba and Dauda Semanda. DW2 further stated that he pays the licenses, although the company was registered by the Respondent.

The standard of proof in civil cases is on the balance of probabilities, and the evidential burden of proof lies on the person who wishes the court to believe the existence of a fact (Section 103

Evidence Act Cap 6). In the instant case, the Appellant argues that the Respondent is the owner and is running an unauthorized factory on his land. The Appellant adduced evidence of a trading license granted to "Bemba Factory," which he claims is owned by the Respondent, although he did not prove such ownership. The Appellant had the burden of proving that the Respondent and not DW2 owns the said factory. On the other hand, the Respondent claims to run the factory on behalf of DW2, a claim that DW2 confirmed in his evidence.

The Appellant confirmed the existence of a lease agreement that allows DW2 entry into the land. This fact is not disputed by the Appellant. DW2 confirmed granting the Respondent access to the land. The Appellant has not argued that contrary to the provisions of the leasehold agreement, Semanda Dauda has sublet the premises to a 3rd party. Moreover, the lease agreement on the trial court's record dated 10th May 2011 did not bar subletting.

The facts on the record support the Respondent's claim that he entered the Appellant's land with the permission of DW2, who has authorized entry. The Appellant did not adduce sufficient evidence to prove that the Respondent owns the Bemba factory, failing to discharge his evidential burden of proof. I find that the evidence on record supports the inference that the Respondent's entry on the land on behalf of DW2, who is the lessee on the same, and since the lease had no conditions barring entry by third parties, discharges the claim of trespass.

The Appellant further sought to prove the Respondent's unlawful entry based on a draft lease agreement adduced as Exh. P3, which he alleges was drafted by the Respondent's lawyers when the Respondent's entry on the land was challenged. It is questionable that the impugned draft lease agreement possesses the same date of 10.05.2011 as the undisputed lease agreement between the Appellant and DW2, yet the Appellant, in his evidence, alleges that the Respondent entered the land sometime in 2017. I note that there is a letter on record admitted as Dex. 2 dated 13.05.2016 from the Bigasa Sub-county addressed to the Appellant demanding an explanation for his refusal to receive the rental payment from DW2. The Appellant did not dispute this document, further confirming the lease and authorized entry to the Respondent from the lessee. Without evidence disproving DW2's authorization of the Respondent to enter the land, the claim for trespass cannot stand.

The Appellant also submitted that the Respondent's evidence was tainted with contradictions because having pleaded that Semanda Dauda was his brother, he later stated in his evidence that they do not belong to the same clan.

It is settled law that, unless satisfactorily explained, grave inconsistencies and contradictions will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistences or contradictions, unless they point to deliberate untruthfulness, will be ignored ***(see Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989).***

The Appellant has also argued that the Respondent sought to mislead the court that Bemba is a family business name when he pleaded that Semanda Dauda is his brother but later testified in cross-examination that he only shares a mother with him and that the two do not belong to the same clan. I find this to be a minor contradiction that does not point to deliberate untruthfulness.

The facts of the Moya Drift Farm case, cited by the Appellant, are also distinguishable from those of the instant case because, in Moya Drift, the registered proprietor had not let out the suit property to a 3rd party, as it is in the instant case. Also, the person who was sued in the Moya Drift farm case did not claim to be the lessee's agent.

Accordingly, grounds 1 and 3 hereby fail. They are answered in the negative.

Ground 2: The learned Chief Magistrate erred in law and fact when he failed to find that the lease agreement between the Appellant and Ssemanda Dauda (Dw2) was illegal and unenforceable.

Article 28(1) of the Constitution of Uganda of 1995 as amended enjoins all public officers presiding over courts and tribunals to ensure that persons against whom civil or criminal claims are brought are afforded a fair and speedy hearing.

The rules of natural justice also encourage courts and tribunals to hear both parties and not condemn anyone unheard. The Appellant is now inviting this Honorable Court to make a pronouncement in respect to a leasehold against that he entered into freely with one Semanda Dauda without his attendance.

There is a degree of likelihood that by making a decision with respect to Semanda Dauda's leasehold tenancy with the Appellant, the former may be adversely affected.

Counsel for the Appellant submitted that the Appellant could not have entered into a lease agreement with DW2 when he himself did not have a certificate of customary ownership under Section 4 of the Land Act Cap 227 as amended. Counsel invites this court to find that the purported lease agreement was illegal and unenforceable.

The Respondent seeks to rely on the privity of the contract, and since the Respondent was not a party to the agreement, considering the same in this matter would be a waste of the court's time.

I am in agreement with the Respondent that the cause of action in the instant case was trespass to land, and it would be improper to determine the same when one of the parties is not party to this suit.

Regardless, the Appellant's claim that the lease was illegal and unenforceable raises questions as to whether the Appellant hopes to be discharged from his obligations, considering that there is already evidence on the record that he refused to accept payment from the lessee. This issue raises questions about the capacity to contract and the effect of void or illegal contracts, which are not the subject of this matter and affect a party that is not party to this suit. To consider this question would be to condemn Semanda Dauda, unheard contrary to the law and the rules of natural Justice.

On the premises, I am inclined to agree with the Respondent that this ground was a waste of this court's time because Semanda Dauda was neither a party to the trial suit nor a party to the instant appeal.

In conclusion, this ground also fails. It is answered in the negative.

The Appeal is hereby rejected and is dismissed as prayed by the Respondent with Costs.

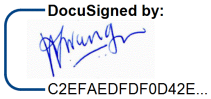
I so order.

Dated this 11th day of January, 2024.

Orders:

1. The Judgment and orders of the learned Trial Chief Magistrate are hereby upheld.
2. The Appeal is rejected and is hereby dismissed.

3. The Appellant shall pay the Respondent's Costs of the appeal.



VICTORIA NAKINTU NKWANGA KATAMBA