THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0071-2013
(From Original Kapchorwa Civil Suit No. 11 of 2010)

BOARD OF GOVERNORS TOSWO S.S.S ……APPELLANT

VERSUS

KOKOP JANET MANGUSHO…….……..…..RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal arising from the Judgment and decree of her **Worship Nabukeera Aisha**, Magistrate Grade I, in the Chief Magistrates Court of Kapchorwa.

The memorandum of appeal listed six (6) grounds of appeal, as here below:

1. That the learned Trial Magistrate erred in law and in fact when she held that the suit land belonged to the plaintiff and that the plaintiff had proved her case on the balance of probabilities.
2. That the learned Trial Magistrate erred in law and in fact when she did not consider that the suit land was within Kween District Local Government and not Kapchorwa and as a result reached a wrong decision.

3. That the learned Trial Magistrate erred in law and in fact when she held that Kapchorwa District Local Government had no authority to allocate land to the Defendant.

4. That the learned Trial Magistrate erred in law and in fact when she awarded special and general damages of 13.9 million shillings which is a manifestly excessive amount and that she followed the wrong principles.

5. That the learned Trial Magistrate erred in law and in fact when she failed to evaluate the evidence before her and as a result reached a wrong decision.

6. That the decision of the learned Trial Magistrate is tainted with fundamental misdirection and non-direction in law and in fact and as a result has led to a miscarriage of justice.

The appellant prayed for orders that the appeal be allowed, the Judgment and orders of the lower court be set aside.

The appellants were represented by Kob Advocates, who chose to argue the appeal in the following order:

(a) Grounds 6 and 4 separately.
(b) Grounds 1 and 5 concurrently.
(c) Grounds 2 and 3 together.

Respondents were represented by M/s Anukur and Company Advocates and they argued the appeal in response to the appellants' submissions in the order he chose to argue the grounds.

Both counsel filed written submissions.

The duty of the first appellate court is to re-evaluate the evidence on record and to arrive at its own conclusion and not to be bound by the findings of fact of the lower court (see cases of **Uganda Breweries Ltd v. Uganda Railways Corporation, SCCA No. 6 of 2001 (2002) E.A**.

Badiru Kabalega v. Sepiriano Mugangu CS 7/87 (High Court, KLA 8/5/91.

It is the duty of this court therefore to subject the evidence before me to a fresh scrutiny and reach my own conclusions on the same. I will be guided in this exercise by the submissions by both counsel as the grounds were argued.

The first ground to be presented in arguments of the appellant was ground 6. The issue is <u>That the decision of the Learned Trial Magistrate is tainted with fundamental mis-directions and non-direction in law and in fat and as a result led to a mis-carriage of justice.</u>

In his submission, counsel for the appellant states that the fundamental mis-directions and non directions in law were:

1) Failure to hold that the appellant was wrongly sued and that the presence of Kween District Local Government was necessary for the proper determination of the suit.

2) Holding that the plaintiff is the sole owner of the suit land and yet she allegedly sued as an administrator of the estate and as a co-owner of the suit land.

In his submission, counsel for appellant argues that the plaintiff/Respondent, sued a wrong party (BOG; TOSWO S.S.S) instead of suing Kapchorwa District Local Government. He faults the trial Magistrate for refusing to invoke court's power under Order 1 rule 10 Civil Procedure Rules to add Kween District Local Government as another defendant since the suit land was situate in Kween District. He further argued that the consent document dated 19th December 2011 stating that Kapchorwa District Local Government be dropped out of the list of defendants, did not give reasons as to why it should be struck off and that the issue of consent was not resolved by consent.

In conclusion it was his case that the question of ownership could not be ably determined without the presence of either Kapchorwa District or Kween District (the successor district) since all the evidence of the BOG, TOSWO S.S.S. Pointed to Kween District Local Government.

Anxillary to the above, counsel further argued that the learned trial Magistrate ought to have found that, if the plaintiff was suing as an administrator of the estate of the late then she was not a "co-owner", because an administrator only manages property on behalf of the beneficiaries. He pointed out that an administrator only owns property after distribution. It was his submission that the plaintiff testified that the estate had not been distributed. The conclusion by the trial Magistrate therefore that the plaintiff was the owner of the suit land was therefore erroneous and shouldn't be allowed to stand. He prayed that this ground should for the above reasons succeed.

In rebuttal, counsel for respondents adopted the lower court submissions but also made further responses as hereunder.

Firstly that Kapchorwa District Local Government was a defendant at first, but upon looking at the documents that the Board of Governors of Toswo S.S.S presented at the scheduling it became clear that there was no need maintaining them as defendants. Consent was reached and they were struck off with each party bearing their own costs.

Furthermore he referred to Article 246; 241 (1) of the Constitution and Section 59 of the Land Act to the effect that it is the district land boards who are mandated to hold and allocate the interested parties. He further pointed out that the above provisions of the law, ruled out any use to retain either Kapchorwa or Kween Districts as defendants since they do not have the mandate to own or allocate land.

The Respondent's counsel pointed out that appellants had no proof of allocation, by the land board nor did they have a lease or freehold title to confirm their claim/allocation by the District Land Board of Kapchorwa District Local Government or District Land Board of Kween District Local Government.

Respondent's counsel pointed out that it was upon the defendants/appellants to call the District in evidence, and there was no need to give reasons for the consent.

He argued that the respondent/plaintiff did not sue as administrator, but as "co-owner" and that the Letters of Administration were put on record on consent of the parties as one of the agreed documents.

He referred to evidence on record and concluded that the court should uphold the lower court findings; that the land is for the respondent.

Given the above submissions, the lower court record shows that on 19th February 2012, when the case was before the trial Court, **counsel Anukuru** for plaintiff/Respondents prayed to court that the Defendant Kapchorwa District be struck off, since they had consented that they be struck off. Court noted this consent, and each party was to bear its own costs.

The record further indicates that counsel Kob for defendants/appellants prayed to court to have Kapchorwa Local Government remain as defendants, but plaintiffs insisted that if the defendants want to involve KLDA, they could call them as witnesses.

In her Judgment, the learned trial Magistrate considered the above contentions under the broad issue of "who owns the land, and whether defendants/appellants trespassed on plaintiff's/respondent's land.

Evidence called by the plaintiff on the above point as per the lower court record indicates that, **PW.1 Kokop Janet Mangusho** (Plaintiff)- told court on oath that she was a widow of the **late Mangusho Chekweko**. She was 68 years, married **Chekweko** in 1964, and found when he was residing on the suit land. She gave details of how her

husband settled various people on the suit land, and testified that her husband gave land to the Agriculture department of the sub-county. That her husband also donated land for a dispensary. That her husband died in 1997. In 1998 Defendants came on the land, destroyed the home of **Chekwoti Backson**, and began constructing a school. She told court that defendants informed her that the local authorities had given them that land; and brought a letter from **Sangaya Wilson** evicting them. The letter was exhibited and received as Exhibit 1. The destruction of property and homes was again repeated on 9th April 2011. The sample photos of the destruction were exhibited and identified by court, as plaintiff identification Document 1.

During cross-examination, this witness insisted that her husband had donated land to government though she was not around, could not tell the exact size of the donation, but had seen the "donation of land" agreement which was done by her husband.

PW.2 Asuman Mwanje (87), stated that he attended the burial of the late **Chekweko**; who had been his neighbor. He knew that plaintiff was married to the late **Arap** in 1964 on the suit land, and that their children were born thereon. He stated that the late **Arap** gave land to the government departments. He also stated that the school came on the land after the death of the late **Arap** - on the space where a kraal of the son of the late **Arap** was. The school is 5 years old on the land; forcefully; and they destroyed crops and houses of the plaintiff.

PW.3 Kerenget Dominic (46) confirmed to court that he was among the people who asked for land from **Mangusho**; due to insecurity of Karimojong raids. That the plaintiff's husband was a friend of the witness's grandfather.

PW.4 Chesaki Rashid (61) who stated that plaintiff is a wife to the uncle of his father. That the late **Mangusho** left the land (suit) to the plaintiff. He told court that the school was built at the spot where the house belonging to **Chekwot**, the son to the plaintiff. That the house was demolished by the relatives of **Chekwot**'s wife because they suspected the death of their daughter (**Chekwot**'s 2nd wife) was because of the first wife of **Chekwot** who died in 1998. He stated that a one **Mr. Mawa,** produced a letter from the CAO Kapchorwa claiming that the CAO had allocated them land to construct a school. The document was identified by the witness. The document was tendered as PE.3.

In defence, the defendants' evidence was as below.

DW.1 Mawa Aldrine stated that the plaintiff is a wife of his late uncle. He stated that the land on which the school is situated belonged to the local government and at that time it was Kapchorwa Local Government in 2000. That it gave the land to Kaptoi Parish now a sub-county to develop and establish a secondary school which at that time it was proposed to become Kaptoi Girls' S.S.

He stated that a meeting was held in which neighbours, LCs, members of Kapchorwa Local government and there were minutes. The Secretary was **Moses Lowoh.** The minutes were tendered in for identified and marked (ID.1). He also tendered in a letter of permission dated 29th February 2000 and signed by acting CAO **Mr. Chelimo**, which was exhibited as D.2. The defendant tendered in several other letters detailing the school's occupation of the land, and conflicts they have had on the suit land with plaintiffs. (Exhibits D.2-D.8).

DW.2 Chembaya Christopher (77), told court that the land belongs to government; then to Sebei district, to Kapchorwa District Local Government. It now belongs to Kween District Local Government. He claimed that plaintiff, was telling lies because her husband was staying in the house of the hospital dispensary in 1962. He claimed that the land was given to them by the local government to the community of Kaptoyoyi sub-county in 2000. He stated that the community had requested for the land by resolution.

DW.3:Isaac Chebet (48); stated that the land belongs to Toswo S.S.S. He stated that the school got the land from Kapchorwa District Local Government. He said that prior to the school's occupation, some people from Karamoja occupied the land.

DW.4 Sanayay Wilson (78) gave evidence to show that the school owns this land since 2000, having got it from Kapchorwa local government.

DW.5 Bushendich Stephen (52) stated that the suit land belongs to the local government. He said that the late **Mangusho** came onto the land with his father in 1979. He stated that the school came onto the land after the community requested Kapchorwa Local Government to give them land so that they put up a school; which Kapchorwa local government allowed.

DW.6 Anna Ceswake, only stated that she didn't know plaintiff, but the land is for government. However court noted that the demenour of this witness was wanting and counsel prayed to declare her a liar, which court noted.

The above is the totality of the evidence called in proof of the case, alongside the exhibited documents. Court moved to the locus, and took note of the plaintiff's and defence versions of the suit land location.

The above evidence was reviewed by the trial court, and in its wisdom concluded that Kapchorwa Local Government had been struck off by consent of the parties, and so the case proceeded with only defendant No.2 as defendant.

It's the submission of appellants that this was wrong because Kapchorwa District Local Government would have been the right party to sue. In his submission counsel alleges that this was raised in the lower court and allowed by the trial Magistrate (page 2 line 25-27 of judgment).

The provision of the law regarding parties to suits is stated in order 1 r.3 which makes it the duty of the plaintiff to decide the parties to join to his pleadings as defendants; either jointly or severally.

The record shows that originally the plaintiffs had sued Kapchorwa Local Government and Board of Governors Toswo S.S. However, during scheduling, it was agreed by consent that Kapchorwa be struck out. This is reflected even on page 2 of the typed judgment.

The attempt to have the Kapchorwa District to be re-admitted as defendant was according to the record made by the 2nd defendant's counsel when the matter came to

court again. However the Magistrate made no decision on it as the record is silent on the decision thereon. It's the contention of counsel that the trial court should have invoked O.1 r.10 to add Kween District as Defendant No.2.

It is the view of this court, that the court only intervenes under O.1 r.10, where the court realizes that a party who ought to have been joined as plaintiff or defendant was improperly joined or omitted.

Before court invokes its discretion, it must inform itself of an improper (misjoinder) or nonjoinder of parties; necessitating its intervention. In this case the 1st defendant Kapchorwa District who had been sued were struck off by court upon application by plaintiffs. Court could not therefore add Kween District, a new party who was not mentioned at all by the parties and appeared as a stranger to the pleadings.

On this point, am aware of the provisions of O.1 r.9, that no suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may deal with every matter in controversy so far as it regards the rights and interests of the parties actually before it.

The Respondent's counsel made arguments to the effect that in the evidence there was no evidence at all to warrant the joining of the Kapchorwa District or Kween District as defendants. I agree. In any case the fact that defendant No.2 claimed that his title to the land was obtained from Kapchorwa District, is not government by O.1 CPR. This is a matter for defendant to prove what he alleged by calling the said District's officials as his witnesses. The decision of the trial Magistrate on this matter, not to include the

Kapchorwa Local Government or Kween Local Government as defendants was not erroneous.

Regarding the fact that the alleged misdirection/non-direction that plaintiff is sole owner of the suit land yet she sued as an administrator of the estate and a co-owner of the suit land.

The evidence on record as reviewed shows that in her evidence, plaintiff stated that she is a widow of the late Mangusho Chekwoko. According to the lower court record on 01.08.2011 when court convened, counsel for defendant/Respondent **counsel Namangala** raised an objection that the plaintiff should have obtained Letters of Administration, and in the discourse which followed it is shown that plaintiff had obtained Letters of Administration after filing the plaint. Court considered these issues and ruled that the plaint be amended now that the plaintiff secured Letters of Administration.

The law is that whoever wishes to deal with properties of a deceased person must hold Letters of Administration. This issue was raised in the lower court and was determined upon by court. As to whether the plaintiff sued as an "Administrator" or a "co-owner" is borne out by the pleadings. It is shown from the plaint and the testimonies of plaintiff and her witnesses that she brought the case in defence of "family land"- land she claims she utilized with her husband, and which devolved to her upon his death. She sued as a co-owner of the land, a fact clearly seen from the pleadings before amendment of the plaint. It is the appellant's counsel who raised the need to have the Letters of Administration which prompted the trial court to order the amendment owing to the

technicality that if property of a deceased comes into issue, Letters of Administration are necessary to give you audience in a court of law.

I will refer to Article 126 (e) of the Constitution and hold that substantive justice ought to override technicalities. The fact that plaintiff is a co-owner of property (land) does not disentitle her to administer other properties left by the deceased as an administrator. I find the arguments by respondents on this issue the proper position of the facts and the law, and I find no misdirection or non-direction by the trial court either.

In the result therefore, ground 6 of this appeal must fail.

Ground 4:

That the learned Trial Magistrate erred in law and in fact when she awarded damages and mesne profits of Uganda shillings 13.9 million which is manifestly excessive amount and that she followed the wrong principles.

I take note of the arguments on this ground by both appellant and respondent's counsel. I have also gone through the judgment of the lower court on this matter.

The appellant's counsel's complaint is that:

(a) The Respondent (the plaintiff) did not produce any evidence, whether documentary or otherwise to court to warrant the award of damages and or mesne profits.

(b) The Learned trial Magistrate erroneously based her decision on her imagination and theories which were not backed up by any evidence or at all.

Having all the above in mind, the lower court Judgment on page 8 indicates that the trial Magistrate noted that "the plaintiff prayed for general damages for trespass." The Magistrate then proceeded to discuss the law of general damages for trespass, which she applied to the facts and made conclusions amounting to the awards she gave.

According to Glanville Williams, in his book "Foundations of the Law of Tort" (Second Edn) at page 67;

> " *General damage is damage not accurately quantifiable in money terms for which damages can be awarded even in the absence of any specific monetary claim in the plaintiff's statement of claim. All that the plaintiff has to do is claim "damages" at large and then the court will make some rough assessment ….no precise figure need be claimed on the pleadings*."

This position of the law is also found on page 170 of **Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice (22nd Edn**). He states that;

> " *General damages such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law, and need not therefore be proved by evidence, and may be averred generally*. "

(see ***Perestrelloe Componilia Limitada v. United Paint Co. Ltd (1969) 1 WLR. 570; Damsalla v. Barr (1969) 1 WLR 630***.

The above position of the law has not changed. I have not seen any new authority requiring the court to assess general damages upon proof as argued by appellants. The case of ***Obongo and another v. Municipal Council of Kenya (1971) EA***, dealt with exemplary damages not general damages and is therefore distinguishable from the current case. I did not find the other cases quoted by appellant relevant to the issue at hand.

The trial Magistrate went through the record, considered the evidence, took guidance from the submissions and finally granted the respondents general damages. I find no merit in the assertions by appellant on this grant.

As regards mesne profits- appellants argue that this is based on rent which could accrue from the suit land.

Osborn's Concise Law Dictionary (7th Edn) defines;

> *"Mesne Profits" as the profits lost to the owner of land by reason of his having been wrongfully disposed of his land. A claim for mesne profits is usually joined with the action for recovery of possession of the land. The Civil Procedure Act, Cap.71, Section 2(thereof) to which the trial Magistrate relied to define Mesne profits, spells out that all those profits which the person in wrongful possession of the property actually received or might have received……*" amount to mesne profits.

The fact that the trial Magistrate considered the items as part of the general claim for general damages and in view of the Holding by courts that appellate courts will not interfered with an award of damages by a trial court unless that court acted on a wrong principle of law, or the amount is too high or too low, to constitute an erroneous estimate of the damages. (***CROWN BEVERAGES LTD VS. SENDU EDWARD CIVIL APPEAL 01 OF 2005***, I find no reason to fault the computation above. Evidence is available on record showing that the minimum was actually excavated. The reliance on this evidence by the court, including submissions by counsel and the proceedings at locus in my view enabled the trial court to assess in its own discretion how much to award as general damages in the matter. This ground is not proved, and must also fail.

Ground 1 and 5:

Ground 1: Whether the Learned Trial Magistrate erred in law and fact when she held that the suit land belonged to the plaintiff and that the plaintiff had proved her case on the balance of probabilities.

Ground 5: That the Learned Trial Magistrate erred in law and fact when she failed to evaluate the evidence before her and as a result reached a wrong decision.

Both grounds above raise issues related to evaluation of evidence and proof of the plaintiff/respondent's case.

While discussing ground 6, on the question of parties, I evaluated the evidence that was before the trial Court. The submissions by both counsel refer to the evidence had by

either party in proof of their cases. While rejecting the evidence of the appellants/defendants the learned trial Magistrate evaluated the evidence, and made conclusions. She referred to the law giving each party rights and observed on page 4 "I am inclined to believe the plaintiff more than the defendant as her evidence is more credible on ownership than that of the defendant."

I have reviewed the evidence, and make the following findings.

The plaintiff and her witnesses all consistently informed court that the plaintiff and her husband **Mangusho Chekweko** were the owners of the suit. It came out through plaintiff the deceased **Mangusho** got the land in the late 1930s from his father. The plaintiff got married to him in 1964 and he died in 1997. In 1998 the defendants destroyed property from the land and began their school. This was collaborated by PW**.2- Asuman Mwanje, PW.3 Kerenget Dominic, PW.4 Rashid Chesakit**.

The defence case was that defendant was given the suit land by Kapchorwa Local Government in 2000 to establish a school (Kaptoi Girls S.S.). Evidence was led through **DW.1 Mawa, D.2 Chembaya, DW.3 Isaac Chebet, D.4 Sampy Wilson** and **D.5 Bushindich Wilson**. It was stated that by a letter authored by the acting CAO of Kapchorwa Local Government.

Mr. Chelimo, to the sub-county chief of Kaptoi. That a resolution was passed by the community to give the land to defendants. The defence witnesses acknowledge that plaintiff was in occupation of the land by the time they took possession in 2000.

The trial court examined all that evidence and looked at the exhibited letters, and made observation at page 5 of the judgment regarding ExD.2 which is the purported letter of offer of land by the district to defendant: “I am wondering whether **Chelimo A.P.** acted in his personal capacity or on behalf of Kapchorwa Local Government”.

This is the omission on part of the defence evidence that completely tilted the balance of probability in favour of plaintiff/respondent. A number of legal and factual problems are noticeable in the defence case.

Firstly, the above ExD.2 as a document needed to be further proved in court in accordance with section 36 of the Evidence Act. **Mr. Chelimo** – its author, or an official from the district ought to have come to court to confirm that its contents were genuine.

Secondly in law, the Local Government is by law an owner of property. The District owns and manages its land through a Land Board. The procedure for allocation of such land ought to have been followed and proved in court and the mere calling of witnesses who were not District Land Board members, was fatal to the defence case.

Thirdly the defence case that the district gave them land in 2000, as per their evidence, on land which plaintiff occupied since 1964 with her husband (over 30 years) is in violation of plaintiff’s rights as a bonafide occupant of land. (See section 29 of the Land Act).

Fourthly even if the defendants' occupancy was to be legalized by virtue of being given as alleged in evidence, no evidence was on record to show that plaintiff as an occupant had been compensated as per the requirements of the law.

The facts show that defendant dealt with individuals from the district to try and acquire land already occupied. Plaintiff was able to show that she had lived on that land, her husband was buried there, her properties were destroyed from there. Both defendants' witnesses and those of plaintiff agreed that her late husband lived there as far back as 1974. With no other strong evidence of either a Title, Lease offer, minutes of the Board how can defendant a stranger claim a better title to this land than the respondent? Why didn't the appellant call Kapchorwa District Local Government as witnesses to prove better title than the plaintiffs/Respondents?

I find that on both grounds, the trial Magistrate properly evaluated the evidence and reached the right conclusions. Ground 1 and ground 5, have not been proved and accordingly fail.

The findings above, operate to dispose off grounds 2 and ground 3 of this appeal.

I have already found that Exhibit D.2 needed further corroboration of the authors thereof to inform court of the procedures and legalities of the transaction as per section 37 of the Evidence Act.

There is no evidence to satisfy court that Kacphorwa District Local Government had authority to allocate the suit land. There was no evidence before court to prove that **Chelimo** the Ag. CAO was authorized to allocate the land, and if he did so where he obtained the authority. There was no evidence to connect the new Kween District Local Government to the plaintiff's dispute with defendants.

All arguments raised in support of these grounds by appellants are in my view erroneous. ACAO of a district has no authority in the law to allocate District Land, this is the mandate of the District Land Board by virtue of section 59 of the Land Act.

The argument that the school was not required by law to inquire into the internal management affairs of the District, is to me untenable. The maxim equity helps the vigilant is of assistance here. Every purchaser or allocate of land since the enactment of the Land Act (Cap.227) was put on notice that land owners and "occupiers" thereon have a legal responsibility to each other to make good each other's stay thereon; comfortable. The letters given to defendants were requiring an eviction of plaintiffs, whom he knows were liable to be compensated by law. Was that no enough warning to defendants that their acquisition was tainted? The case of ***Royal British Bank v. Turquard (1856) E & B 327*** quoted is therefore of no relevancy here because it dealt with company matters.

The case of ***Okello v. UNEB 12 (1987)*** on the point of fraud, was noted, but even if fraud was not pleaded, in my view there was no sufficient evidence on record to prove that defendants/appellants were the owners of the suit land.

Grounds 2 and 3 above have also not been proved.

In conclusion, this appeal has failed on all grounds raised. I find no merit in the arguments presented and it is accordingly dismissed. I order that the lower court findings, the Judgment and orders of the trial Magistrate are hereby upheld. Costs of this appeal, are granted to respondents.

I so order.

Henry I. Kawesa

JUDGE

12.11.2013