THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT ARUA

CIVIL APPEAL NO. 0037 OF 2008

ALBERT MADRAWI ___________ APPELLANT

=VERSUS=

WEST NILE DISTILLERS LTD ____________ RESPONDENT

JUDGMENT
BEFORE HON. JUSTICE NYANZI YASIN

BACKGROUND TO THE APPEAL

1. The respondent company was the plaintiff in the court below. It commenced an action in trespass to land against the current appellant. In its pleadings and evidence the respondent claimed that it had acquired a piece of land measuring about 1.5 hec in Moyo Town Council vide an allocation, made by the council on the 28/5/1997.
2. That after the allocation the plaintiff paid for the land by deposing premium and ground rent to the council and thereafter occupied the land by preparing a site for construction of an industry. It stationed one of its staffs to be on the ground. The plaintiff claimed that it

experienced no challenge to its occupancy of the land until the 22nd/04/2007.

3. It is said that on the 22/04/2007 the defendant entered upon the plaintiff's land and constructed huts thereon. Destroyed growing teak trees and excavated a pit latrine. The plaintiff attempted to stop him but failed. Hence this suit seeking recovery of land, injunction and damages.

4. The defendant (now appellant) filed a written statement of defence and denied all the above. He pleaded that the house he constructed were on land customarily held by the estate of Mario Draga without proof or details he referred to the land being registered.

5. It was also the appellant's pleading that when he started constructing the land on or around January 2007 the disputed land was in possession of the defendants as administrator of the estate of Mario Draga who entered into a divesture agreement with Adjumani Town Council in order for the town council to own and allocate the suit land.

6. At the start of this case Mr. Okello Oyarmoi represented the plaintiff and Mr. Basingo acted for the defendants. At some stage however before scheduling the advocates changed to Mr. Bantu for the plaintiff and Mr. Twontoo Oba for the defendant.

7. At the time when this can was scheduled it was only Mr. Bantu in court representing the plaintiff. Even earlier the record shows that on 20th Feb 2008 the trial Magistrate allowed the plaintiff to proceed under 0.9 r 11 (2) upon an application made by the plaintiff's advocate. That meant that apart from filing a Written Statement of defence the defendant did not take part in the rest of the trial.

8. On the 4th July 2008 H/W JAMES EREEMYE delivered a judgment in favour of the plaintiff/respondent declaring the defendant a trespasser and ordering his eviction. The defendant/appellant was aggrieved by two events in particular. The first was the trial court's exclusion of the defendant from the trial when he filed a WSD with consent of the advocates present and secondly the result of the trial in the judgment of the trial court. Hence this appeal.

9. On 17/10/2008 the appellant filed in this court a memorandum of appeal containing 5 (five) grounds. I must on the onset say that the grounds were badly drafted and amounted to an abuse of court process in violation of 0.43 r (2) which requires that the grounds be concisely stated without narrations.

   In the present case the contrary was done by the learned advocate who filed the memorandum. Save that substantive justice is a must, they would have been rejected. I will however try to para-phrase them according to the way they were argued and this court understood them.

10. GROUNDS OF APPEAL

i). **GROUND ONE**

Is a complaint that the trial court erred in law and procedure when it upheld the objection to the written statement of defence's belated filing when the same was consented to. That it was equally an error to allow the suit for proceed under 0.9 r 11 (2) CPR.

ii). **GROUND TWO**

In my view is similar to ground one.

iii). Ground 3

Is a complaint that the trial court wrongly evaluated the evidence before it and relied on unsubstantiated pieces of evidence without documentary evidence to support such evidence.

iv). **GROUND FOUR**

Is an complaint that the trial court erred in law and fact when it considered the respondent's evidence only despite the fact that the appellant had filed a written statement of defence (this ground is not clear) there is no way the appellant's evidence would have been considered in exparte proceedings.

v). **GROUND FIVE**

Is a compliant that the trial Magistrate was biased in the whole trial and acted largely outside the law which occasioned a miscarriage of justice to the appellant.

11. In presentation Mr. Twontoo appeared to have argued grounds 1, 2 and 5 together by commenting that 5 was similar to 1 and 2 and made no submission on it. He also argued ground 3 and 4 together. Mr. Ondoma for the respondent answered ground 1 and 2 together and then 3 and 4 and made no comments on ground 5. Perhaps because even Mr. Twontoo for the appellants did not make any comments on it

12. GROUND 1 and 2

In respect of the two grounds Mr. Twontoo argued that the court below erred when it ignored earlier proceedings showing that Mr. Okello Oyarmoi was acting for the plaintiff agreed that a Written Statement of Defence be filed out of time. That error resulted into

proceedings being exparte. That is to say the court allowed Mr. Baringo's application to proceed under 0.9 r 11 (2).

13. 0.9 r 11 (2) is the rule applicable to a party which has not filed a WSD within the time allowed to do so. Court allows the plaintiff to set down this suit for hearing exparte.

14. The answer to his complaint can only be traced from the record and not any amount of arguments by either side. The relevant court minute is the proceedings of **31/09/2007**. On that day Mr. Okello Oyarmoi appeared in court for the plaintiff, his learned friend Mr. BARINGO for the defendant did not.

15. For purposes of clarity I will reproduce the events that took place in court on that day.

31/sept/2007

Mr. Oyarmoi for plaintiff

Counsel: (Meaning Oyarmoi)

Mr, Baringo my learned friend is supposed to appear for the defendants but he is stranded in Yumbe on his way to Adjumani. I learnt about him being stranded in Yumbe this morning when I rang him. The defendant is absent though according to his lawyer he should be here. I therefore pray that the case be adjourned to a convenient date in October 2007 **to enable the counsel of the defendant to put in a written statement of defence which is not yet on record.** I pray for the costs of the day to be granted to the plaintiff in any event.

Court: The matter is adjourned to 16/10/2007 for scheduling conference and **also to allow the defence file a written**

statement of defence in the afternoon to commence with the hearing. (Added emphasis)

16. The record shows that on 5th/Oct/2007 a written statement of defence was filed 11 days before 16/10/2007. The words Mr. Okello Oyarmoi used on the 31/09/2007 were clear and unambiguous. To any ordinary mind it meant that he had agreed that a written statement of defence be filed out of the normal time.

17. 0.51 r 7 provides for enlargement of time by consent. For purpose of emphasis the order and rule provide

    "The time for delivering, amending or filing any pleading, answer or other documents may be enlarged by consent in writing of the parties or with their advocates without application to the court".

18. In the present case Mr. Okello did not write but he made his will clear to court and court allowed his application. The adjournment to 16/10/2007 was purposely to allow the defendant file a Written Statement of Defence belatedly.

19. Much as the parties are expected to confirm to the rules when the rules impose a procedure on them, equally the rest of the court users should honour rules which allow a party to do a particular thing by consent.

20. I therefore agree that before the trial Court allowed Mr,. Bantu to proceed under 0.9 r 11 (2) exparte it would have revisted the record. If it had done so it would have discovered that the WSD was filed late but with consent. Failure to do that extent amounted to miscarriage of justice and ground (1) and (2) succeeds.

21. In ordinary way my answer to ground one and two above would result into a re-trial. However in the present case I must first answer ground 3 which relates to the evidence before court in order to decide whether such a re-trial may or may not be ordered.

22. Ground 3 was summarized to be a complaint that the evidence before court was wrongly evaluated. Unsubstantiated pieces of evidence were relied on without documentary proof which was an error in law and in fact by the trial court.

23. While submitting Mr. Twontoo identified areas where breach in evaluation of evidence occurred. In summary they can be itemized as below;-

    a) That the allocation in Exh. P2 a letter of the Town clerk dated 28/05/1997 was not proved to have been made by the District Land Board of Adjumani but it was made by the Town Council. This argument could mean that the Town council did not have the power to do so.

    b) That the payment for the land were irregularly made. That concerned the payment made to one ONEK JACKSON.

    c) There was no lease offer made in favour of the respondent.

24. On the concern about irregular payments I agree with Mr. Ondoma's reply that it is only Moyo Town Council that can comply about this matter. A third party like the appellant is not privy to the arrangement and therefore lacks the locus to complain.

25. The absence of a lease offer is very much related to the concern that the allocation was done by the town council instead of the Adjumani District Land Board. I say so because even if the offer were to be made by Moyo Town Council still the same complaint would arise

that it would have made by the District Land Board. I will join it with the first concern.

26. In reply Mr. Ondoma decided to be more technical than argumentative. He only reasoned that since the proceedings in the court below were exparte the respondent's evidence was unchallenged and therefore had to be believed. With respect I do not agree that Mr. Ondoma could reason like that at the hearing of an appeal. In an appeal of first instance this court has the duty to re-evaluate all the evidence and arrive at its own conclusion. See **F.J.K ZAABWE =VS= ORIENT BANK & ORS SCCA NO. 04/2006** Katurebe JSC and particularly the EACA decision in **SELLE and ANOTHER –VS- ASSOCIATED MOTOR BOAT CO. LTD [1968] EA123.** Consequently if an advocate is to be helpful at appellate hearing, it becomes immaterial that the proceedings in the court below were **exparte**. He or she remains with the duty to make an analysis of evidence to help the court in its obligation to re-evaluate all the evidence.

27. Evidence in the court below showed that PW1 Dr. Adriko told court he applied for the disputed land from Moyo Town Council as the controlling authority. The respondent company got the land allocated to it on 28/5/1997 the company then paid for the land.

28. From that date to January – April 2007 they filed no challenge except the alleged trespass by the appellant.

29. PW3 the Town Clerk of Moyo Town Council confirmed to court that the council allocated the land to the respondent company on 28/05/1997 as an Industrial plot. He tendered in court Exh. P2 which is the contested letter of allocation. To Exh. P.2 there is annexed a

sketch plan with a plot of land measuring 90.8m x 110m and 90.16m x 96.63m with the name Adriko inserted in the square.

30. PW2 told court that he was employed by the company in 2003. His duties included checking on company properties. It was in 2007 that he saw the defendant now appellant constructing huts on the company land.

31. The appellant's physical presence on the disputed land to have occurred in 2007 appears not to be in dispute since it pleaded that way. Paragraph 5 (b) of the WSD states;

> "*That when the construction of houses started in around January 2007 the suit land was in the possession…………of the defendant as administrator of the estate of Mario Draga*"

32. I have critically looked at Exh. P1 and P2. I have also related the evidence of PW1 and PW3 to those two documents. Starting with Exh. P2 it did not state clearly that the applicant company had been allocated land and described what piece of land was allocated. To quote the Ton clerk he wrote;

> "***I am glad to inform you that the Council is ready to offer you land and they well come you as their prominent customer in Adjumani Town Council***"

33. Those words never named any particular piece of land to have been allocated to the respondent company. The letter did not even refer to the sketch plan yet that was attached to it.

34. It is also normal for letters of allocations from controlling authority to quote a minute number of the Body sitting to allocate the land. In the minute number the land is described and terms upon which it is allocated are given. All those details were absent in Exh. P2.

35. While Exh. P2 advised the respondent company to get in touch with the Land Office to follow the normal procedure no evidence was adduced to prove that and the land was eventually be acquired. Though the respondent had been in occupation for 10 years at the time of the dispute, it had not even acquired a lease offer over the land. PW1 Dr. Adriko told court when he testified 10 years since allocation that he was in the process of getting a lease for the company.

36. That is the available evidence on the allocation. I have laboured to analyze the evidence on allocation for the sole reason that if it is found that the Moyo Town Council had the power to allocate land and indeed it allocated the land then the orders for a re-trial would be a waste of time and if the otherwise is true then such order would be justifiable.

37. I now turn to complaint that Moyo Town Council could not allocate the land.

    Exh. P2 shows that the Town Council wrote in May 1992 by that time the law in force applicable to land allocations was the Public lands Act 1969 and the Land Reform Decree of 1975 that is so because the Land Act 1998 which repeated the Public Lands Act 1969 and the land reform decree 1975 came into force on 2/07/1998.

38. Under the Public Land Act Moyo Town Council was a controlling authority as defined under S.54 and had the power to allocate land under S.23 being an owner of a Statutory lease. The Supreme Court decision in **KAMPALA DISTRICT LAND BOARD =VS= BABWEYAKA VANASIO & ORS SC CA NO. 002 OF 2007** clearly shows that before the enactment of the land Act in 1998 the

applicable law to land transitions were the Public Land Act 1969 and the land reform decree 1975.

39. I therefore with respect do not agree with Mr. Twontoo that Moyo Town Council had no power to allocate land.

40. What is disturbing in the present case is evidence of allocation. I have already aired my criticism on annexture Exh. P2. My conclusion was that it never pronounced itself clearly what had been allocated to the respondent company. In absence of such clear evidence of allocation it remains true that Moyo Town Council had the power to allocate land but there is no clear evidence that it did so in respect of the respondent company.

That would in itself leave the issue open to be determined by the lower court upon taking evidence from both sides. If otherwise I had evidence before this court that the land was properly allocated, I would have considered a re-trial to be a waste of time. Ground 3 of this appeal therefore succeeds.

41. In the result this appeal is allowed and the following orders are made;-

1). The trial of the court below is set aside with the judgment and orders resulting there from.

2). It is ordered that the suit between the appellant and the respondent be heard denovo (afresh).

3). While that hearing shall not change the physical status of the land by any development.

4). The respondent shall pay the costs of this appeal to the appellant

NYANZI YASIN
JUDGE
3/04/2013

3/04/2013

Samuel Ondoma for the respondent

Mr. Ariko John from Twontoo and Co. Advocates.

Parties are present Mr. Adriko Eric for respondent

Appellant present.

Joyce clerk

Mr. Ondoma Samuel

The appeal is for judgment and we are ready to proceed/receive it.

Court:Judgment read in the presence of the above.

NYANZI YASIN

03/04/2013