THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0065-2011

(From CS-068-2001)

MURANGIRA OBED :: APPELLANT

VERSUS

KIKUMBWE YOWASI :: RESPONDENT

BEFORE: HON. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

MURANGIRA OBED *(hereinafter referred to as the "Appellant")* filed this appeal seeking orders of this court, *inter alia,* overturning the judgement of the His Worship Charles Kisakye Chief Magistrate – Bushenyi *(hereinafter referred to as the "trial court")* delivered on the 29/9/2011 in favour of ***KIKUMBWE YOWASI*** *(hereinafter referred to as the "Respondent").*

The Appellant's case is that he acquired the suit land from his mother and father, while that of the Respondent is the suit land was the same which was disputed between him, Kaguruka his brother on the one hand, and the late Edinansi Bugunwire his sister and mother to the Appellant, which was subsequently returned formally to him by the said Edinansi Bugunwire. The trial court decided in favour of the Respondent. Dissatisfied with the decision, the Appellant filed this appeal and advanced eleven grounds as follows:-

1. ***The trial Magistrate erred in law and fact by failing to properly evaluate the evidence on record and further by basing his judgement and orders upon the Respondent's and his witnesses testimonies which were contradictory in nature and manifestly unreliable and this occasioned a miscarriage of justice.***

2. ***The trial Magistrate erred in law and fact when he relied on the evidence of the Defendant's father who had personal vendetta with the appellant.***

3 ***The trial Magistrate erred in law and fact when he failed to distinguish ownership of two pieces of land by Suman Kagaruka and the Respondent.***

4 ***The trial Magistrate misdirected himself when on the doctrine of burden of proof in civil cases.***

5 ***The trial Magistrate misdirected himself when he ignored the evidence of the 3rd Appellant's witness who had witnessed the execution of a document by the appellant's mother giving land to the appellant.***

6 ***The trial Magistrate erred in law and fact by failing to appreciate the fact that the appellant had stayed and used the disputed since 1995.***

7 ***The trial Magistrate erred in law and fact when he relied on documents pertaining to High Court Civil Misc. Application No.10/95 which were suspect had no effect on the Appellant's continued ownership and possession of the disputed land.***

8 ***The trial Magistrate erred in law and fact when he passed his judgment without visiting the locus in quo contrary to the Chief Justice's Directive and in total disregard of the appellant's Counsel's request.***

9 ***The trial Magistrate erred in law and fact when he exercised his discretion to award general damages un-judiciously by basing himself on mere conjecture and surmise which have been affected by the irritation.***

10 ***The trial Magistrate erred in law and fact when he ignored the appellant's evidence and the available documentary evidence that sufficiently supported the appellant's case.***

11 ***The trial Magistrate's judgment and orders were against the weight of evidence on record.***

The Appellant was represented by Mr. Mbangire Patrick, while the Respondent was represented by Mr. Tumwesigye Charlie. Both Counsel filed written submissions which I have considered in arriving at a decision in this judgment.

It needs pointing out at the outset that the entire appeal principally hinges on the issue of ownership of the land in dispute as between the Appellant and Respondent. The resolution of this particular issue one way or the other would effectively determine the whole appeal and dispose of all the other grounds. Accordingly, the grounds of appeal will not be resolved separately in the manner and order they were framed since they may overlap or be concurrently resolved; depending on the substance of issues therein.

It is the duty of this court, as a first appellate court, to re-appraise the evidence and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen no heard the witnesses and should, therefore, make due allowance in that respect. See ***Selle v. Associated Motor Boat Co. [1968] E.A 123; Sanyu Lwanga Musoke v. Galiwango, S.C Civ. Appeal No.48 of 1995; Banco Arabe Espanol v. Bank of Uganda, S.C.Civ.Appeal No.8/1998.*** With this duty in mind, I will consider the grounds of appeal; not in the order they were raised but as they relate to the issue of ownership of the disputed land.

Ground 1:

Counsel for the Appellant in a rather long winded submission faulted the trial court for having relied on the evidence of Edinansi Bugunwire who never physically testified in court; and for admitting in evidence documents pertaining to *High Court Civil Misc. Appl. No.10 of 1995* without confirming whether they were executed by the said Edinansi Bugunwire. Counsel argued that they could have been forged or manipulated by the Respondent. That DW7, His Worship Gordon Muhimbise, testified that the Appellant's mother was brought to him by the clerk to Mr.Tumwesigye Charlie, who was and still is acting as a lawyer to the Respondent. That the trial court should have cast suspicion on the said documents, and that failure to do so was misdirection.

Counsel also faulted the trial court for what he perceived to be failure to appreciate the distinction as to the land the Appellant had taken over in 1994 that had been occupied by DW4,

Kagaruka Suman, which is different from what the Respondent Kikumbwe Yowasi is occupying. That DW4 left the land and the Appellant took it over in 1994, and that the Respondent Kikumbwe Yowasi and his brother (DW4) Kagaruka Suman stayed with the Appellant's father for two years, having come following the Appellant's mother, Edinansi Bugunwire, who was their sister.

Furthermore, that Kikumbwe and Kagaruka only came to be on the land when they were given its temporary use, and that in 1994 when Kagaruka attempted to sell his portion, he was blocked by the Appellant's mother. Kagaruka then left and the Appellant took over the land, and it is this land that the Respondent started encroaching and trespassing on. That had the trial court visited the *locus in quo* as had been requested by the Appellant, it would have properly identified the land in dispute. It did not and therefore misdirect itself.

Mr. Mbangire also faulted the trial court for having wrongly believed and relied on the biased evidence of the Appellant's father, DW3, Ntegyerize Kezironi, who testified that the Appellant used to be his son but ceased to be when he refused to build a house for him. Counsel opined that this evidence should not have been relied upon, but that the trial court did so and hence misdirected itself.

Also, that DW3 stated in his testimony that the Respondent and his brother Kagaruka Suman stayed with him for two years; a claim that was refuted by DW1, the Respondent's own son, the Respondent himself, and DW4, Kagaruka Asuman, and that this meant that they were covering up something. That the Respondent testified that Bagunwire Edinansi withdrew a case against him, but that the DW3, Ntegyereize Kezironi, clearly stated that the dispute was between the Appellant and his mother, who surrendered the land in dispute to the Respondent. Further, that the Respondent, his son (DW1) and his brother (DW4) claimed that they acquired the land in 1956, yet they had no proof to that effect. That had the trial court considered all the above cited sharp inconsistencies and contradictions in the Respondent's case it would have ruled in favour of the Appellant.

In response Counsel for the Respondent submitted that the trial court properly evaluated the evidence on record and reached the correct conclusion. That the evidence of DW4, the Respondent, and DW2 (the former Chairman LC.III Bugongi sub-county, clearly shows that the

suit land belongs to the Respondent. Further, that the fact of ownership by the Respondent is supported by the evidence of DW3 (father to the Appellant) that he gave the Appellant his own portion of land, which is not part of the land in dispute, and that the disputed land belongs to the Respondent.

Furthermore, that even the affidavit evidence of the Appellant's mother sworn before DW7, and the reconciliation document annexed thereto lead to only one possible conclusion that the disputed land belongs to the Respondent, and that the Appellant's assertion of ownership of the suit land is baseless.

Also, that the trial court which had the opportunity of observing the witnesses as they testified believed the Respondent's version against that of Appellant, and that the reason was categorically clear as the same people from whom the Appellant claimed that he acquired the land totally denied the same.

Counsel for the Respondent maintained that there were no inconsistencies and or contradictions, and that even if they were, they are not serious as to be fatal to the case, and that the trial court reached correct conclusions based on what it observed and found out of the witnesses.

In consideration of the issues raised in the above submissions, it would appear that the main contention is basically that the trial court should not have relied on documents which could have been forged or manipulated by the Respondent; given that the clerk to Mr. Tumwesigye Charlie, Counsel for the Respondent, is the one who presented the Appellant's mother to DW7, His Worship Gordon Muhimbise, to swear an affidavit which the trial court relied upon.

On reappraisal of the evidence, it is clear that DW7, His Worship Gordon Muhimbise, commissioned the affidavit sworn before him on the 16/12/2002 by a one Edinansi Bugunwire - the Appellant's mother - who was speaking Runyankole dialect, which DW7 first read to her. DW7 testified that the deponent was an old lady of about 70-80 years, who was brought by the clerk to Mr Tumwesigye Charlie, and that she did not have any other person apart from the said clerk. DW7 pointed out that he was not aware of any dispute between the parties, and did not know any of the people mentioned in the affidavit, or their relationship with Bugunwire. That when the deponent confirmed the contents of the affidavit to be true, DW7 commissioned it.

Based on the above testimony, there is no reason whatsoever for raising suspicion that the affidavit in issue was forged or manipulated. DW7 read the English version over back to the deponent in Runyankore language, which she understood and confirmed the content to be true before it could be commissioned. There is absolutely no basis for the Appellant to allege forgery or manipulation of the documents by the Respondent when there was no evidence of the same before the trial court.

The cardinal principle under ***Section 103 of the Evidence Act (Cap 6)*** is that he who alleges has the burden to prove. The Appellant who, in this case, desires court to believe that the affidavit of Bagunwire Edinansi could have been forged or manipulated by the Respondent ought to have furnished the particulars of the alleged fraud or manipulations; which he did not. Further, it is a mandatory requirement under ***O 6. r. 3 CPR*** that where fraud is alleged the particulars thereof have to be given in the pleadings. See also ***Kampala Bottlers v. Damanico (U) Ltd, S.C.Civ. Appeal No. 22 of 1992.*** Again the Appellant was lacking in this duty. From the foregone deliberations the Appellant failed to establish his allegations, and the trial court never misdirected itself on the affidavit evidence of Edinansi Bagunwire.

The Appellant also faulted the trial court for allegedly failing to appreciate that he had taken over a piece of land in 1994; which had been occupied by DW4, Kagaruka Suman, which is different from the land that the Respondent Kikumbwe is occupying. Further, that the Respondent, Kikunbwe Yowasi, and his brother (DW4) Kagaruka Suman stayed with the Appellant's father for two years, when they came following their sister, who is the Appellant's mother, Edinansi Bugunwire. The Appellant based on this fact to argue that Kikumbwe and Kaguruka were only given temporary use of the land, and they did not own it.

After re-evaluating the evidence on this point, it is clear that the argument is not conversed by the evidence on the record. In fact there is no evidence of who was the previous owner of the land from whom the Respondent and his brother Kagaruka acquired user rights. If anything, the Respondent and Kagaruka traced their rights as far back as 1956 when they acquired that piece of land which they later shared between themselves. The alleged attempt by DW4 to sell his portion which was swatted by the Appellant's mother does not in itself indicate that the Appellant's mother owned the land either.

With regard to the issue of alleged bias in testimony of DW3 against the Respondent; this court could not discern any. It is true that the two were no longer on good terms as son and father should have been, but that alone could not be sufficient reason for the trial court not to rely on the evidence of DW3. There is no law which precludes court from relying on such evidence. It was wholly within the trial court's discretion whether to believe such evidence or not.

It is trite law that an appellate court should not interfere with exercise of discretion of the trial court, unless it is satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise if its discretion and that as a result there has been injustice. See ***Mbogo & Anor v. Shah [1968] E.A 93.*** This is not the position in the instant case. I find that the trial court properly evaluated the evidence before it and no miscarriage of justice was occasioned. This ground of appeal totally fails.

Ground Two.

The main contention in this ground is that the trial court relied on evidence of the Respondent who had personal vendetta. It is however, noted that this issue has only come up now on appeal, and was neither raised nor canvassed in evidence of witnesses at the trial. It would therefore be unjustified to criticise the trial court for not considering the matter that was never raised before it. Nonetheless if by "personal vendetta" is meant the evidence of DW3, Kezironi against his son the Appellant, then the issue has already been settled and it is not necessary to repeat it. The trial court was well within its right to believe or not to believe the witness.

Similarly, I find it as sheer speculation to suggest that just because DW3 was eighty years of age, he could have been senile and influenced by the Respondent. For as long as the witness was mentally well oriented in time and space and without a blurred memory his evidence was as good as that of a robust youth. There is nothing on the record pointing to the fact that DW3 never knew what he was talking about. That he had disowned his son (the Appellant) would not be the basis to disregard his testimony, which could at the very least be treated with caution, but still be safely relied upon in light of other evidence corroborating it.

DW3 in his testimony stated that he earlier on gave the Appellant his own piece of land (kibanja) but that the Appellant went ahead to grab land belonging to the Respondent. DW4, Kagaruka Suman also testified that they had planted a eucalyptus forest on the land, but that the Appellant grabbed all the land and is using it. Given this evidence, it is rather unwarranted for this court to interfere with the discretion of the trial court in believing the testimony of DW3, unless it could be shown that it did so injudiciously causing a miscarriage of justice; which in my view is not the case. For the foregone reasons this ground fails.

Ground 3 & 8

The main issues in both grounds are that at the trial court failed to distinguish ownership of two pieces of land by DW4, Suman Kagaruka and the Respondent, and erred when it passed judgment without visiting the *locus in quo* contrary to the Chief Justice's Directive and in total disregard of the Appellant's Counsel's request.

Counsel for the Appellant submitted that the evidence adduced by both sides is that (DW4) Kagaruka Suman and (DW5) Kikumbwe Yowasi had different portions of land, and that according to the Appellant, he occupied the land Kagaruka Suman had left in 1994 or 1995, and that the Respondent never complained, but started encroaching and claiming the whole of it; which prompted the Appellant to filed a suit. Counsel criticised the trial court for failing to draw this distinction, and going ahead to decree all the land to the Respondent.

Counsel also submitted that the trial court ought to have visited the *locus in quo* to appreciate the property in dispute, but did not in total disregard of the Chief Justice's ***Directive No.01of 2007*** requiring that trial courts should conduct *locus in quo* visits before taking decisions effecting parties in land disputes, and that the omission was a total misdirection.

Counsel for the Respondent, on their part, submitted that the land in dispute was clear as the one on which the Appellant erected a building and settled his family in 2002, and that this land belonged to the Respondent, Yowasi Kikumbwe. In effect, Counsel meant that it was not necessary to conduct a *locus in quo* visit the since the land in dispute was clear and evidence had established the true owner.

On record of the trial court, during examination in chief, DW3 testified on the issue of ownership as follows;

> ***"The issue in dispute is over a kibanja/land. I know the disputed land. It is found in Kyabuyongo.***
>
> ***I also have my land in Kyabuyongo but it does not boarder the land in dispute. The plaintiff has the land which I gave him.... After having married the second wife then he grabbed the land in dispute and gave it to her. He has constructed a house for the 2nd wife. Before he grabbed the same, it was Kikumbwe who used to use the said properties. I and my wife could not give the plaintiff the land which is not mine."***

At page 6 of the trial court's proceedings, when DW3 was cross-examined by Counsel for the Appellant now, he testified that;

> ***"…. Kaguruka moved away and left the land with Kikumbwe. After coming back from where he (Kaguruka) had gone he came back with a wife and Kikumbwe gave him part of the land but he later went back and the land remained with Kikumbwe.***
>
> ***After Kaguruka had gone my wife said she is going to take the land and Kikumbwe refused so the dispute arose from there …… I later explained to my wife that the land does not belong to their father. My wife later agreed and they reconciled. She wanted to take the land of Kaguruka. They reconciled before the LC.III Court. She also came this way and gave evidence that they had reconciled with her brother. Kaguruka did not give that land to my wife."***

It is also on the trial court's record, that on 13/05/ 2003, the Bushenyi District Land Tribunal received a claim against the Respondent by the Appellant. I reproduce its content below for ease of following.

> ***"The whole purpose of this claim is that Kikumbwe is threatening to chase me from my father's land. The land was being used by Kaguruka before 1994 when he migrated and left the land behind. Mr.Kaguruka had wanted to sell this land but my father could not allow this. When Kaguruka left, I took over my father's land and started using it. In the year 2002, I erected a building and put my family on this land. Kikubwe my maternal uncle started threatening me ….***
>
> ***Of recent, Mr Kikubwe has started going to advocates who write letters threatening me and even connecting my land to the case, which is in the High Court. The case in the***

High Court is "Bugunwire versus Kikumbwe" and the disputed land is not this one I have lived on since Kaguruka left in 1994."

Rwamugundu Molly, the only witness produced by the Appellant at trial testified thus;

*"**What I know is that the old mother of Murangira Obed in 2005 on a date I can't remember sent the son to me. The son told me that the mother wanted me. I followed him later. When I reached there I found her at her son's home. She told me that she had her things she wanted me to write for her. I asked her 'are you going to die.' She told me she wanted to give out her 2 pieces of land to the son and brother.***

She got me a pen and a piece of paper and she told me what to write. I cannot remember the exact words but briefly they were concerning these 2 pieces of land. There were boundary marks in those pieces of land. I after read back what I had written to her and she accepted that what she told me is what I had written. She also confirmed it with her son. That is what I did. I gave her the document and I left."

Upon being cross-examined by Counsel for the Respondent, the said Rwamugundu Molly stated that;

"I wrote the document in 2005. I don't know whether they (Kikumbwe and Bugunwire) had been in dispute before 2005. I do not know that in 2002 over 50 people were called and Kikumbwe surrendered the land. I know the father of the plaintiff. I do not know whether he had land or not but he had where he was staying. I do not know the details of ownership. I do not know the land in dispute."

At page 1 of its judgment; when addressing the first issue as to the ownership of the disputed land, the trial court observed as follows;

"I have gone through the evidence on record and the submissions of both Counsel and I find it clear that the land in dispute belongs to the defendant. The plaintiff adduced evidence of himself and other witnesses to show how he acquired this land from his mother Edinansi Bugunwire. This is the same Edinansi Bugunwire who categorically denied that she gave the plaintiff land pursuant to settlement in High Court Civil Misc. Application No.10/95. The land was surrendered to the defendant and the plaintiff's Powers of Attorney were revoked and High Court Civil Suit 10/95 was withdrawn. The plaintiff was denied by his own parents. I do not see any where else the plaintiff derives title to the disputed land from."

After reappraisal, there is not a shred of credible evidence which shows or tends to suggest that the land disputed ever belonged to the Appellant. The so – called "Will" dated 12/12/2002 *(Exhibit PX1)* of Edinansi Bagunwire, through which the Appellant claims right to the suit land was no Will at all in the eyes of the law. In addition, it does not bestow any ownership of the land on the Appellant. Further still, Edinansi Bugunwire categorically denied that she gave the Appellant the land, and pursuant to settlement in ***High Court Civil Misc. Application No.10 of 1995*** the suit land was surrendered back to the Respondent as the rightful owner. Even the only witness for the Appellant at trial, Rwamugundu Molly, testified that she did not know the details of ownership, and did not know the land in dispute.

In my view, the trial court properly evaluated the evidence on the issue of ownership of the suit land, and came to the correct conclusion, as this court has done, that the Appellant did not own the suit land which rightfully belonged Respondent. I will therefore not disturb the finding of fact by the trial court.

Regarding the issue of failure to visit the *locus in quo* by the trial court, I do not find such an omission to be misdirection as submitted for the Appellant. The object of *locus in quo* visits is well settled. Sir Udo Udoma CJ (R.I.P)) in ***Mukasa v. Uganda (1964) EA 698 at 700,*** which was relied on by the Court of Appeal of Uganda in ***Matsiko Edward v. Uganda, C.A. Crim. Appeal No.75 of 1999*** held that;

> ***"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible to have such evidence ocularly demonstrated in the same way a court examines a plan or map on some fixed object already exhibited or spoken of in the proceedings."***

Also in ***Yeseri Waibi v. Edisa Lusi Byandala [1982] HCB 28,*** which was relied on by the Court of Appeal in ***Yowasi Kabiguruka v. Samuel Byarufu, C.A. Civ. Appeal No.18 of 2008 [2010] UGCA 7*** it was held that;

> ***"The practice of visiting the locus in quo is to check on the evidence given by witness and not to fill the gap for then the trial magistrate may run the risk of making himself a witness in the case ….."***

Clearly, the stated rationale of a *locus in quo* visits does not seem to mandate the trial courts to conduct such visits in every case. Much as it should have been desirable, the question to ask is whether such a failure to visit the *locus in quo* occasioned a miscarriage of justice; which is purely a question of evidence. From the evidence, even if the visit to the *locus in quo* had been carried out it would not have affected the outcome. Ground 3 and 8 of the appeal accordingly fail.

As indicated earlier the resolution of issues substantively as regards ownership of the land effectively disposes of all the other grounds of appeal, which accordingly fail. I will only briefly comment on the issue of general damages in Ground 9 by way of resolution.

Counsel for the Appellant criticised the trial court in that it exercised discretion to award general damages un-judiciously by basing on mere conjecture and surmise. That whereas the law is that the award of general damages is at the discretion of the court; in so doing the court must base self on established and existing facts. Counsel cited page 2, paragraph 3, of its judgment where the trial court stated that;

> ***"As to the quantum of general damages no proper evidence was laid before court to help court arrive at a proper sum of damage."***

That by this finding alone, the prayer for general damages ought to have failed, but that the court awarded the sum of 5,000,000/= that had not been prayed for by the Respondent. Counsel for the Appellant submitted in the alternative that the damages should at least be adjusted.

Counsel for the Respondent supported the decision of the trial court arguing that it exercised its discretion judiciously, and that there is no reason to fault the decision. That at page 2 of its judgment (paragraph 3 lines 2-4) the trial court considered the evidence that the Appellant had been using the disputed land since 2002 and that there was a eucalyptus forest on the land which the Appellant was using, and rightly awarded general damages of Shs.5 million. That an order for temporary injunction had been issued by the District Land Tribunal stopping the Appellant from destroying the property on the disputed land which he ignored even after being detained.

It is indeed the true position of the law that the award of general damages is at the discretion of court, and always as the law will presume to be the natural consequence of the defendant's act or omission. ***See James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993***. Further, in the assessment of the quantum of damages, courts are mainly guided, *inter alia*, by the value

of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach. See ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***.

Furthermore, a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong**.** See ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.Civ.Appeal No.17 of 1992.*** It is also trite that the party should lead evidence or give indication that such damages should be awarded on inquiry as the quantum. ***See Ongom v. Attorney General. [1979] HCB 267.***

In the instant case, it is not true that the Respondent never prayed for general damages. It is clearly on record that the prayer was in fact made. In addition, the Respondent proved to court how the Appellant was in occupation of the land in dispute for over five years and that the land was planted with eucalyptus forest, banana plantation and the Appellant had constructed there a residential house. For these reason the trial court exercised its discretion and awarded the Shs.5, 000,000/= as general damages.

In the case of ***Paul Mugalu v. Manjeri Nabukenya, C.A.Civ.Appeal No.19 of 2003,*** it was held that;

> ***"It is trite law that an appellate court would only interfere with the discretion to award general damages of the award was illegal or based on a wrong principle of law or where it is manifestly excessive or inordinately low."***

Regarding the assessment of the quantum of damages, it is trite law that this is peculiarly the province of the trial court, and the appellate court will only interfere if the finding is out of proportion to the facts. It has not been shown that the award of general damages at Shs.5, 000,000/= was illegal or based on a wrong principle of law or manifestly excessive in the circumstances of this case. In the premises, I would decline to interfere with the trial court's award of general damages. This ground of appeal fails.

The net effect is that the entire appeal fails. It is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

30/04/2013