THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0051-2011
(Arising from MBR-00-CV-CS-0034 of 1994)

JOHN KATOROBO :::::::::::::::::: :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

VINCENT KAFUREKA :::::::::::::::::::::::: :::::::::::::::::::::::::: RESPONDENT

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

This appeal is against the decision of His Worship Phillip Odoki Chief Magistrate – Mbarara *(hereinafter referred to as the "trial court")* in ***Civil Suit No. 0034 of 1994. VINCENT KAFUREKA*** *(hereinafter referred to as the Respondent")* filed a suit in the trial court against ***JOHN KATOROBO*** *(hereinafter referred to as the "Appellant")* seeking for a declaration that he is the owner of the land situate at ***Kabingo, Nshenyi, Isingiro District****(hereinafter referred to as the "suit land")* general damages for trespass, a permanent injunction restraining the Respondent, his workmen, agents and/or servants from committing further acts of trespass, waste and alienation, and costs of the suits

Background:
The Respondent purchased the suit land from one Karegeya Geoffrey in 1982. He occupied and utilised it. Subsequently he obtained a lease and became the registered owner for two adjacent plots of land comprised in ***Isingiro Block 90, Plot No. 8 and 10*** sharing a common boundary with the Appellant's land. It is stated by the Respondent that the Appellant went over the common boundaries and fenced off parts of the Respondent's land, and planted "Ruyenje" trees along the boundary fence, which cut across the Respondent's said plots of land.

The Respondent instituted the suit against the Appellant for trespass in the trial court, but before the trial could commence, the Appellant approached him proposing to have the

dispute be settled amicably out of court. Pursuant to the request the two parties signed an agreement *(Exhibit P4)* on the 20/05/ 1994, whereby the Appellant made a commitment to remove the barbed wire fence from the Respondent's land, and to pay him the costs so far incurred within a period of two weeks from the date of the agreement. However, that Appellant reneged on his commitment and the case proceeded for hearing in the trial court.

At the trial the Appellant denied the alleged trespass, arguing that he occupied the land in 1978 after he purchased it from Karegyeya Geoffrey, and that his land does not extend into the Respondent's titled land, and that in case it did then the Respondent must have obtained the title by fraud. The Appellant also denied the agreement of 20/05/1994, saying that he was hoodwinked by the Respondent and the lawyer Mr. Katembeko Hilary into signing it after the two persuaded him to settle the matter out of court. He further denied that he accepted having gone beyond his boundaries or that he should pay the costs. The trial court, however, decided the case in favour of the Respondent. Dissatisfied with the decision, the Appellant filed this appeal and preferred ten grounds of appeal as follows;

1. ***The learned Chief Magistrate erred in fact and law to hold that the appellant had admitted liability and offered to settle out of court vide a document dated 20th May 1994 where as the evidence showed otherwise.***
2. ***The learned Chief Magistrate erred in fact and law to hold that Miscellaneous Application No. 731/2004 did not form part of the suit.***
3. ***The learned Chief Magistrate erred in fact and law to shift the burden of proof regarding the survey mark stones and to further hold that the survey mark stones were genuine whereas the evidence glaringly demonstrated there wise.***
4. ***The learned Chief Magistrate erred in fact and law to decide that whereas the dispute was Plots 8 and 10 and that the Appellant trespassed on land comprised in those titles when there was no proof to the effect.***
5. ***The learned Chief Magistrate erred in fact and law to hold that the witness of the Appellant failed to turn up at the locus in quo because he feared that his lies would be exposed when there was no proof to the effect.***

6. ***The learned Chief Magistrate erred in fact and law to ignore the contradictions in the evidence of the Respondent and his witness which if he had taken the same into account would have decided the suit in favour of the Appellant.***
7. ***The learned Chief Magistrate erred in fact and law to ignore the contradictions in the pleadings and evidence of the Appellant that did not translate on the ground when court visited the locus in quo.***
8. ***The learned Chief Magistrate erred in fact and law for ignoring the developments and other features of the Appellant on the suit land.***
9. ***The learned Chief Magistrate erred in fact and law to award Shs. 20,100,000= as general damages which had no origin both in pleadings and evidence.***
10. ***The learned Chief Magistrate erred in fact and law to decide the suit in favour of the Respondent who failed to prove his case on the required standard.***

I need to point out at the outset that all the grounds of appeal, save ground 4, do not go to the substance of the appeal, but only appear to stress peripheral issues particularly of procedural nature. Considering them one way or the other would not substantively dispose of the appeal. I have therefore, opted shift the focus largely to ground 4 which encompasses substantive issues pertaining to ownership of the suit land, and whether in fact acts of trespass were committed or not. These being issues at the heart of the entire appeal, resolving them will effectively dispose of the entire appeal, even though I will briefly consider ground 1 and 2 separately.

The duty of this court, as a first appellate court, is to re-appraise the evidence adduced at the trial 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 nor heard the witnesses and should, therefore, make due allowance in that respect. This duty was stated in ***Selle v. Associated Motor Boat Co. [1968] E.A 123*** and followed in ***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 of 1998.*** With this in mind, I proceed to resolve ground of the appeal.

Ground 1.

The Appellant faults the trial court for holding that he admitted liability and offered to settle the dispute out of court by the agreement of 20/05/1994 *(Exhibit P4)* between himself and the Respondent, whereas the evidence showed otherwise.

Mr. Mwene-Kahima, Counsel for the Appellant, started off criticising the trial court for framing its own issues for trial, especially one concerning the *Exhibit P4* in which the Appellant allegedly acknowledged liability. Counsel argued that the trial court should not have done so as to do so would be veering off the issues framed and argued by the parties. Counsel relied for this proposition on the Supreme Court of Singapore case of ***OMG Holding PTE Ltd v. POS AD SND BHD [2012] SG CA 36*** where court observed quoting a passage of Sharma J. in ***Yanagi vs Ong Boon Kiat [1971] 2 MLJ 196****;*

> ***". . . The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the plea on which the parties are at variance."***

In reply, M/s. Niwagaba & Mwebesa Advocates, Counsel for the Respondent submitted that the both Counsel submitted on the issue which Counsel for the Appellant now criticises the trial court of having added on its own. Further, that the trial court was justified to frame the issue even if it had not been raised by either of the parties because it is the duty of court to frame issues as would be necessary for determining the matters in controversy as between the parties. Counsel relied for this proposition on the case of ***Oriental Insurance Brokers Ltd. v. Transocean (U) Ltd, S.C.Civ.Appeal No. 55 of 1995.***

In consideration of this point, I have not found the arguments of Counsel for the Appellant plausible, nor is the case he cited helpful in light of the binding decision of the Supreme

Court of Uganda which is at variance with the Singapore case bearing on the same issue. In ***Oriental Insurance Brokers Ltd. v. Transocean (U) Ltd (supra)*** it was held that;

> ***"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. A part from those provisions, the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but rises from the facts stated by the parties or their advocates on which a decision is necessary in order to determine the dispute between the parties".***

In addition, the provisions of ***Order 15 r.3 CPR*** are to the effect that it is the duty of the court to frame issues for determination, and the court is vested with the discretion to do so. It has not been shown in the instant case, either in the evidence at trial or Counsel's submissions, that in exercising its discretion the trial court applied a wrong principle or that the Appellant was prejudiced thereby. Therefore, this court cannot be called upon to interfere with the trial court's exercise of discretion.

The main thrust of ground 1 is on the agreement of 20/05/1994 (***Exhibit P4),*** which the trial court (at page 9 of its judgment) relied on and treated as an admission by the Appellant that he had trespassed onto the Respondent's land. It is imperative to note that in the negotiations which led to the agreement before lawyer Mr. Katembeko, both parties made concessions and commitments in order to settle the matter amicably; which they reduced into writing and signed as a demonstration of their intention to be bound by the content of the document. It is only later that the Appellant attempted to deny the document claiming to have been hoodwinked, and that he did not understand what he had signed.

It is trite law, however, that once a party voluntarily signs a document he or she is bound by its terms and content, unless it can shown that the document was procured by fraud and or misrepresentation. It is not a defence that a party did not read it or understand it. Once

signed, the document is *prima facie* an indication of the acceptance to be bound by it See ***LGS Strange v. Graucob (1934) KB 394.***

At page 10 of its judgment the trial court, rightly in my view, found that the Appellant admitted liability under ***Exhibit P4,*** and offered to settle the dispute out of court. I can only add that on that account judgment on admission would be entered for the Respondent in the terms of the agreement, if he applied for it, under ***Order 8 r. 6*** of the ***Civil Procedure Rules (CPR)***. The rule is to the effect that;

> ***"Where the court is of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, it may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted."***

Further, the trial court, at page 7 of its judgment, observed that the Appellant merely alleged being hoodwinked into signing ***Exhibit P4*** but led no evidence at all to prove how; which would have established fraud. I agree with the trial court's finding basing on provisions of ***Order 6 r.3 CPR*** that a party seeking to relay on fraud or misrepresentation as a ground must plead and adduce particulars to prove the same. ***Section 101*** of the ***Evidence Act (Cap 6)*** places the burden of proof a particular fact on the person who alleges it. In the instant case the Appellant did not plead or adduce particulars to prove how he was hoodwinked, and to that extent fraud could be inferred from his evidence.

Important to note also is that the standard of proof where fraud is alleged is more than a mere balance of probabilities, though not beyond reasonable doubt. See ***R.G. Patel v. Lalji Makanji [1957] EA 314.*** Also in ***Kampala Bottlers Ltd. v. Damanic. (U) Ltd. S.C.Civ. Appeal No. 22 of 1992,*** it was held stated that;

> ***"....it generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters . . ."***

Nothing on the record in the instant case as it relates to *Exhibit P4* shows how the Appellant was hoodwinked, or that there was any misrepresentation on part of the Respondent. By simply alleging that he was hoodwinked without giving particulars as to how, The Appellant failed in his duty to prove fraud. For the foregone reasons, this ground of appeal must fail.

GROUND 2

The main complaint in this ground is that at the trial court erred in fact and in law to hold that ***Miscellaneous Application No. 131/2004*** did not form part of the suit. Counsel for the Appellant contended that the said application was for the amendment of the Appellant's Written Statement of Defence (WSD) at trial, which was allowed, and that it was strange for the trial court to hold that the application was not part of the suit, when the trial was conducted with the resultant WSD. Further, that it is not logical to admit the WSD as part of the record and at the same time state that the application which brought it onto the record is not part of the court record.

In reply, Counsel for the Respondent submitted that the purpose of ***Miscellaneous Application No. 131 of 2004,*** as far as ***Civil suit No. 34 of 1994*** is concerned was only to validate the Appellant's amended WSD, but not evidence to be relied upon by court in deciding the case. Further, that the affidavit in support of the said application was neither used as evidence during trial nor was it among the exhibits on court record and thus could not form part of evidence in the trail as provided under ***Order 18 CPR.***

In re-evaluating the evidence, I have found that the trial court comprehensively, and correctly in my view, addressed this issue in its judgment. The Appellant's affidavit in support of the application was for the sole purpose of validating the Appellant's amended pleadings, but not to be used as evidence for purposes of trial in the main suit. To do so would grossly flout provisions of ***Order 18 CPR*** which govern the hearing and examination of witnesses in court. The evidence adduced for trial in in the main was not by way of affidavit. If that had been the case the Respondent would also have been at liberty to cross-examine the Appellant his affidavit as stipulated under ***Order 19 r.2 CPR***.

The findings above are fortified by the decision of the Supreme Court in ***Kasifa Namusisi & 2 O'rs. v. Francis MK Ntabaazi, S.C.Civ.Appeal No. 4 of 2005*** which cited with approval the case of ***Dhanji v. Malde Timber Co. [1970] E.A 422)***. In that case a situation similar to one in the instant case arose and an appellant was cross-examined on an affidavit at the trial, but the affidavit was not admitted in evidence. On appeal the appellant's Counsel sought to rely on that affidavit to support the appellant's case. The Court of Appeal held that it could not look at the affidavit as it was not part of the evidence at the trial. This position applies squarely in the instant case, and ground 2 of the appeal must fail.

Ground 4.

The Appellant's major complaint is that the trial court erred in fact and law to decide that the dispute was on ***Plots 8 and 10*** and that the Appellant trespassed on land comprised in the titles, when there was no physical proof to that effect.

Counsel for the Appellant submitted that the Respondent, while testifying, stated that he had the boundaries of his two plots of land opened by the Mbarara Lands & Survey Department, and that a report to that effect was made, but that it was not tendered in evidence, and that there was no evidence of a person from Mbarara Lands & Surveys Department who was involved in the alleged opening up of boundaries, which rendered unbelievable the Respondent's claim that the report stated that Appellant had trespassed into the Respondent's registered land.

In response, Counsel for the Respondent submitted that the Respondent tendered in court the certificates of title which were admitted as ***Exhibits P1 and P3*** for ***Plots 8 and 10*** respectively, but that the Appellant, on the other hand, had no title to show despite claiming to have bought the land in 1978. Further, that the Appellant claimed to have bought land from DW3, Karegeya Godfrey, and secured a receipt from the sub – county, but that he failed to present it in court and gave no reasons for the failure. Counsel contended that the Appellant had failed to show that the Respondent's boundaries extended into his land.

It would appear that the trial court decided in favour of the Respondent (at page 12 of its judgment) based on the finding that the Respondent proved his ownership through registration and obtaining of the lease for ***Isingiro Block 90 Plot No. 8 and 10,*** and that he adduced evidence of certificates of title (***Exhibit P.1 and P3)***. The trial court also observed that at the *locus in quo* the Respondent was able to show survey mark stones of his registered land in the titles, which proved that the Appellant went over the boundaries into the titled land and planted 'Ruyenje' trees as his boundary marks.

The trial court went on to state that even though Counsel for the Appellant told the court that the mark stones were suspect, the Appellant did not adduce any evidence to show that the boundaries of ***Plot 8 and 10*** were not where the Respondent showed them to be to the court. The opined that the Appellant was not able to challenge the evidence of the Respondent by showing where the correct mark stones were planted, and on that account the trial court concluded that the Appellant trespassed into the Respondent's registered land.

It is quite clear that the trial court's finding were influenced by the principle of indefeasibility of a certificate of title encapsulated under ***Section 59*** of the ***RTA (supra)*** that a certificate of title shall be conclusive evidence of ownership of the land described in the certificate. However, it is evident that the trial court completely ignored the exceptions stipulated under ***Section 176 RTA (supra)*** where the major consideration relevant to the matter at hand would be fraud under ***Section 176 (c) (supra).***

It was held in ***Kampala Bottlers v. Damanico(U) Ltd (supra)*** that under ***Section 59 RTA*** the production of a certificate of title in the names of a party is sufficient proof of ownership of the land in question, unless the case falls within the provisions of ***Section176(supra).*** Therefore, having found that the Respondent obtained certificates of title, it was imperative for the trial court to determine whether the Respondent obtained the titles by fraud or not, since the issue had been brought up in the Appellant's pleadings in the WSD.

The Appellant averred in his amended WSD that if the Respondent's land extended into his, then the Respondent must have obtained the title to it by fraud. He particularised the fraud in

the WSD and set about adducing evidence, particularly of DW3 Karegyeya Geoffrey the original owner of the land, to prove the fraud.

DW3, Karegyeya Geoffrey, testified that he knew both parties very well having dealt with them, and that he first sold land to Appellant on 10/8/1978, which is situate in Nsenyi in Kikagati by then Mbarara District (now Isingiro District) and that an agreement was made stating where the land is situate and its specific boundaries. That on one side the land boarders river Kagera, the other side with DW3 to the land that he had not sold, on another side it boarders with Respondent's land which the latter got from Kiryomunju, and the other side it also boarders with DW3. That they planted "Ruyenje" trees as boundary marks after the Appellant had bought the land.

DW3 further stated that after he sold land to Appellant, there remained another part of the same land which he later sold to Respondent around 1982. Further, that the land he sold to Respondent did not have a title, but that the Respondent applied for a lease from the Lands Office for the entire 80 hectare land for which DW3 had received a lease offer, including the land DW3 had sold to Appellant. DW3 clarified that when he sold the land to Respondent, he showed him the extent of the boundaries and where he would stop, and that there were "Ruyenje" trees as boundary marks for the Appellant's land which were four years old.

Furthermore, DW3 stated (at pages 33-34 of the proceedings) that one year after he sold the other part of the land to the Respondent, the latter came to him with a transfer forms and requested him to sign. That DW3 signed them and that Respondent could have processed a land title for the entire land. DW3 stated that the "Ruyenje" trees he showed the Respondent were planted on the 10/08/1978 as boundary marks between the land he sold to the Appellant and the remainder of the unsold land. DW3 also stated that in signing the transfer forms, he was signing for only the part of the land he sold to Respondent, and that it did not include the land he sold to Appellant. Further, that when he sold to Respondent, DW3 had showed him the land that he (DW3) had sold to Appellant in 1978.

The Respondent for his part testified that he first acquired ***Plot No. 8*** customarily in January 1974, and later applied for a lease from Ankole District Land Committee. He was granted the lease offer and the Land Committee inspected the land and he got the title on the 2/2/1982. Further, (at page 20 of proceedings) the Respondent stated that he bought ***Plot 10*** from DW3,Karegyeya Godfrey on the 28/04/1982, who gave him the lease offer from ULC and a receipt indicating that the offer had been accepted. That the Respondent took surveyors on the land, and started using and developing it as he processed the title, which he obtained the 25/11/1982 for the entire 80 hectares.

The Respondent further stated (page 21 of the proceedings) that he contacted the Lands & Surveys Department of Mbarara to open up the boundaries which they did, and found that the Appellant had trespassed on both his plots of land, and made a report to the effect. The reading of the record, however, does not show the said Surveyor's report was ever tendered in evidence at trial as observed by Counsel for the Appellant.

The Respondent also adduce evidence of PW2, Elly Karegire, one of the witnesses to the sale agreement, who testified (at page 26 of proceedings) that the land Karegyeya sold to Respondent had a lease offer and receipt from ULC, but no land title, and was a total of 80 hectares. PW2 further stated that he did not know that Karegyeya had sold land to the Appellant, and that the trenches were dug by Karegyeya, but that PW2 was not present. Furthermore, that there were "Ruyenje" trees with poles put there by Appellant at the time the Respondent bought the land.

After exhaustive re-appraisal of the evidence, it is clear that DW3, Karegyeya Godfrey, owned 80 hectares of land for which he had applied for a lease from the ULC. He sold part of the 80 hectares to Appellant on the 10/08/1978, and on 28/04/1982 sold the remainder to the Respondent, which later came to be ***Plot 10.*** At the time DW3 sold to the Respondent in 1982, the boundaries of the land he had sold to the Appellant already existed and were distinctively marked by the planted "Ruyenje" trees, which were four years old.

Clearly, ***Plot 8*** is not disputed and belongs wholly to the Respondent, but the dispute is only on ***Plot 10*** which was bought in 1982 as part of the remainder of the land DW3 had sold to the Appellant in 1978. It was thus erroneous for the trial court to hold that the Appellant trespassed on to the Respondent's registered land by planting there "Ruyenje" trees, because at the time the Respondent bought and got registered on the land, the said "Ruyenje" trees already existed.

It is also evident that by the time the Respondent applied and obtained certificate of title for the entire 80 hectares based on the lease offer DW3 had previously got from ULC, the Appellant was already in occupation and utilised the portion of the suit land he bought in 1978. It follows that the Respondent was, or ought to have been aware of the subsisting interest of the Appellant when he applied and obtained the lease over the entire land. The Respondent could not feign ignorance of this in view of the fact that DW3 showed him the physical boundaries of the Appellant's land in 1982 when the Respondent bought.

The Respondent was thus put on notice of the Appellant's subsisting interest, which could not be extinguished merely by the Respondent's obtaining of a lease over the entire 80 hectares. Proceeding to obtain registration over the unregistered interest of the Appellant in the land amounted to nothing short of fraud on part of the Respondent under ***Section 176 (c) RTS (supra).***

It is trite law that procurement of registration of title in order to defeat the unregistered interest amounts to fraud. See ***Horizon Coaches Ltd.v. Edward Rurangaranga & A'nor,S.C.Civ.Appeal No.14 of 2009; See Kampala District Land Board v.National Housing & Construction Corporation (2005)2 EA 69.*** It is more so when the fraud is attributable to the transferee as in this case. Accordingly, the respondent's title would be impeachable in the terms of ***Section 176(c) RTA (supra).*** See ***Kampala Bottlers (U) Ltd. v Damanico (supra).***

I also find the finding of the trial court (at page 15 of its judgment) quite erroneous that the sale agreement *(Exhibit P4)* did not mention the size of the Appellant's land, and that it only

states the neighbours to the land. The agreement actually gives a detailed description of the boundaries to the land, and as I understood it, the land lay between Katorobo on the left, Karegyeya on the right, on the south River Kagera and that on top is Karegyeya. Logically, the land circumscribed by the stated demarcations is what constituted the subject of the sale agreement, and the actual size would not be a relevant consideration.

It was also a misdirection for the trial court to have concluded that the fraud was attributable to DW3 (vendor) and not the Respondent, when actually DW3 showed the Respondent the extent of his land, and boundaries of the Appellant's interest which should have put the Respondent on notice. By signing the transfer forms, DW3 was clear that he was transferring to the Respondent the 80 hectares, less the portion he had sold to the Appellant in 1978. I have not read any untruthfulness in the testimony of DW3 that led the trial court to impute the fraud on him.

From the foregoing, the Respondent fraudulently included the Appellant's land into his certificate of title. This finding disposes of ground 5,6,7, 8,9 and 10. Accordingly, the judgment and orders of the trial court are hereby reversed and substituted as follows:

1. ***The appeal succeeds.***
2. ***It is ordered that the Respondent's Certificates of Title to the suit land be rectified to exclude the portion of the Appellant.***
3. ***The Appellant is awarded costs of the appeal and in the court below.***

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BASHAIJA K. ANDREW A
JUDGE
22/05/2013