

that Ssemambo and Kiddu subsequently sold a portion of the land to the Appellant, who exceeded his boundaries, trespassed on the Respondent's land. The Appellant forcibly erected numerous shacks and kiosks on the land. Additionally he encouraged his agents to litter the Respondent's compound. Further, he weakened the Respondent's house through pouring water on its walls.

In response, the Appellant who was the (Defendant in the lower Court) denied liability for trespass and in a counterclaim, pleaded fraud against the Respondent. It was the Appellant's averment that he had bought land measuring 25ft by 18ft in width and 86ft in length from Ssemambo and Kiddu. He prayed that: Court directs the Respondent to execute a mutation and transfer forms in his favour; Court awards him costs of the suit, and general damages.

The issues for determination in the lower Court were:-

1. Who is the owner of the disputed land
2. Whether there was trespass
3. What remedies are available to the parties

At the conclusion of the hearing, the trial Magistrate gave Judgment in favour of the Respondent. She declared the Respondent as the lawful owner of the portion of land sold by Goobi. The Respondent was declared as the lawful owner of part of the land previously owned by Kiddu and Ssemambo. She further made declarations that the Respondent is the lawful owner of $\frac{3}{4}$ of the original total area reflected on the title. She held that the remaining $\frac{1}{4}$ of the original total area thereof belong to Semambo. The trial Magistrate made an Order for permanent injunction against the Appellan as well as directing that the Respondent executes a mutation and transfer form in respect of the land that belongs to Kamya Semu. The land in question is $\frac{1}{4}$ of the total land as reflected on the title. The trial Magistrate awarded general damages of a sum of 500,000 /= to the Respondent for trespass and costs of the suit.

The Appellant filed this appeal on the 23.02.2010 against that decision. The grounds as set forth in the Memorandum of Appeal are that:-

1. The learned Trial Magistrate erred in law and fact when she decided a land dispute without establishing the actual area in dispute in terms of measurement or even visiting the locus in quo;
2. The learned Trial Magistrate erred in law and fact when she decided the land dispute in favour of the Respondent who did not prove the actual area and acreage he was claiming from the Appellant's plot;
3. The learned Trial Magistrate was biased during trial and prevented the Appellant from calling all his witnesses in proof of his case;
4. The learned Trial Magistrate erred in law and fact when she decided the case basing on contradictory evidence;
5. The learned Trial Magistrate failed to properly evaluate the evidence for both sides and made wrong and erroneous conclusions against the Appellant.

The Appellant prayed that this Court allows the Appeal; Judgment and that Orders of the lower Court be set aside; a retrial be Ordered and Costs in the lower Courts be payable by the Respondent. It should be observed, however, that in his written submissions, Counsel for the Appellant abandoned Ground 3 and the prayer for retrial of the suit. I will also handle the grounds raised in the Appeal jointly.

During the hearing, the Appellant was represented by Counsel Mbogo Charles of M/s Mbogo & Co. Advocates whereas the Respondent was represented by Counsel Kamugisha Vincent of M/s Kamugisha & Co. Advocates. Both Counsel for the parties filed written submissions.

RESOLUTION

I have had the opportunity of perusing the record of Appeal and submissions for both parties. It is the duty of this court to make determination of each of the grounds raised by the Appeal. I will first resolve ground 5 of the appeal and then make a determination on the other grounds raised by this Appeal.

Ground 5 of the Appeal is that the learned Trial Magistrate failed to properly evaluate the evidence for both sides and made a wrong and erroneous conclusion against the Appellant.

The basic principle of law is that when an Appellate Court is called upon to re-evaluate evidence, it does not assume the mantle of a trial Court. It is supposed to subject the evidence adduced in the lower Court to fresh and exhaustive scrutiny weighing the conflicting evidence and drawing its inferences and conclusions from it. Although, in so doing, an Appellate Court has to bear in mind that it has neither seen nor heard the witness and should, therefore, make due allowance in that respect. See *Selle & Anor v. Associated Motor Boat Co. [1968] EA 123; Ruhemba v. Skanska Jensen (U) LTD [2002] 1 EA 251.*

The trial Magistrate decided in favour of the Respondent and made due reference to the historic ownership of the land. While resolving the 1st issue regarding the ownership of the suit land, the trial Magistrate observed that Goobi bought the portion of the disputed land from Kiddu and Ssemambo. They later sold to Eric Balame, the Respondent in this Appeal. The trial Magistrate also held that the other half of land comprised in block 266 and Plot 134 remained in the hands of Ssemambo and Kiddu Charles respectively.

It was the trial Magistrates' finding that PW2 (Kiddu Charles) and DW2 (Ssemambo James) from whom both the Respondent and Appellant respectively derive their interests, acquired their respective interests differently. Therefore they did not qualify to be joint tenants on the disputed land and each party could distinctively deal with his respective interest.

It should be observed that both Counsel in their respective submissions dealt with all the grounds of appeal together.

In his written submissions, Counsel for the Appellant stated that on the basis of the evidence, the property was held in joint tenancy otherwise, if it belonged to Ssemambo James and his sister Nagujja Joyce exclusively, there would be no way Kiddu Charles would have shared the proceeds of the 2nd sale after the first sale to Goobi Lameck. Furthermore, that Exhibit P Exh.3 dated 6th April 2000, a Memorandum of Understanding executed between the Administrator of the Estate of the Late Charles Nakibinge on one part and the family of the late Ruth Nakatudde on the other part. This Memorandum of Understanding was over taken by the Agreement of 19th October 2001 in respect of which Susan Nakibinge sold Busiro, Block 266, Plot 134 to Ssemambo James and Kiddu Charles. It was the contention of the Appellant's Counsel that the trial Magistrate made an error when she put into consideration the history of the land without

having regard to the Respondent's pleadings. Counsel for the Appellant referred Court to paragraphs 7 and 8 of the Respondent's Written Statement of Defence. He noted that the Respondent failed to plead the fact that Kiddu Charles sold half the plot to him on 12th May, 2006. Further, that it is inconceivable that Balame Eric and his Counsel could forget this crucial fact in their pleadings.

In response, Counsel for Respondent contested the fact that the suit land was under joint tenancy. He relied on the testimonies of Joyce Nagujja who stated that the land belonged to her grandmother, Nakatude Lucy *alias* Kasubi who subsequently divided it into two parts and transferred the same to his children, namely Sesanga Damasio and Namukasa Perusi. It was Counsel for the Respondent's contention that for as long as the suit land remained in the names of the original owner, it was indivisible. However, the moment Nakatude Lucy distributed the same to her children, which was done subsequently, the land ceased to be held under a joint tenancy and would hence be divisible.

I have considered the record and submissions made by both parties. It is true that Exhibit P. Exh.3 is a Memorandum of Understanding between the Administrators of the Estate of the Late Charles Nakibinge, his widow, Susan Nakibinge on one part and the family of the late Ruth Nakatude, on the other side. The Agreement bears the date 6th April, 2000 and covers a dispute relating to default in payment of ground rent by the family of the late Nakatude Perusi to the Estate of the Late Nakibinge. I am of the considered view that this memorandum of understanding does not bear any relevancy to the issues for determination in this appeal or the suit below. This is premised upon the fact that the land which forms part of the Estate of the Late Nakibinge has already been dealt with and the same has been transferred to third Parties through a Sale. Therefore, this Agreement will only seek to prove the legitimacy of the customary title whereas the dispute in respect of these proceedings is one which requires the determination of issues relating to an unspecified portion comprising the land previously owned by Ssemambo James and Kiddu Charles. This unspecified portion was subsequently transferred to the Appellant and Respondent respectively.

The Respondent derived interest through Kiddu Charles, pursuant to an agreement dated 12/05/2006 and admitted as P. Exh.2. The Respondent's claim in the Magistrate's Court was for inter alia trespass, and a permanent injunction. It became apparent at the hearing that the

Respondent was only claiming a portion of the land which had been trespassed upon by the Appellant. Therefore, the whole Judgment should be centered on that portion. In that regard, the Memorandum of Understanding is irrelevant to the issues for determination. I have however noted that no injustice was occasioned by adducing or putting into consideration the Memorandum of Understanding. I therefore hold that this issue has no merit.

Joint tenancy issue

On the issue of joint tenancy, it is important to note that the distinctive feature of a joint tenancy is that the property is held in equal and undivided shares. In order to presume a Joint tenancy, there must exist four unities. These are the unity of time; the unity of possession; the unity of title and the unity of possession. See Dictum by Sir George Waller in **AG Securities vs. Vaughan and Others [1988] 2 ALLER 173**. Similarly, in **James Katuku & Others vs. Kalimbagazi Civil Suit No. 1823 of 1984** reported in **(1987) HCB 75 Okello J** (as then) stated that where a person is admitted as a joint tenant, his right of possession, interest, title and time over the land is the same as those of the others.

There are no specific testimonies on record of how Ssemambo James, Kiddu Charles and Nagujja Joyce acquired title, however, according to a Complaint Statement made by Nagujja Joyce which was admitted as D. Exh 1; she states in part:

‘... My grandmother Lucy Nakatudde alias Kasubi bought a plot from Paul Nakibinge. Later Nakatudde died but she had already allocated the same plot to my father Ssessanga Damasco. When he died I and Ssemambo took over responsibility of the said plot which is situated within Wakiso Town Council. On the same plot, before Nakatudde died, she had divided it into two parts. One part was belonging to one Namukasa. When she also died her son Kiddu took over. However, in 2001 the 3 of us, I, Ssemambo and Kiddu decided to buy the plot in form of a land in order to acquire the land title... later I and Ssemambo sold a piece of land to uncle Lameck Goobi. Goobi also sold his part of land to Balame Eric ...’

This fact was corroborated by evidence of Kiddu Charles who testified as PW2 (Kiddu). He stated that the land originally belonged to Prince Nakibinge and that both his father and mother used to stay on the land. Therefore from the above statement it is clear that the trial Magistrate properly held that the land was not held in joint tenancy.

I am cognizant of the contradictions and inconsistencies in the evidence adduced in the lower Court through the testimony of Semu Kamya regarding the two Agreements, which relate to the same title in dispute.

Counsel for the Appellant submitted that the police statement states that the Appellant bought land from Semambo James and Joyce Nagujja but this was contradicted by the Appellant's own sworn evidence. The Appellant stated that on 13th September, 2006, he bought a plot comprised in Busiro, Block 266, Plot 134 from Nagujja Joyce, Ssemambo James and Charles Kiddu at UGX 10,000,000/= (Ten Million Uganda Shillings Only). They paid UGX Shs 8,000,000/= (Eight Million Uganda Shillings Only) and the remainder totalling 2,000,000/= (Two Million Uganda Shillings Only) was to be paid later. Counsel observed that while Court accepted the Agreement where land was bought at UGX. 10,000,000/= (Ten Million Uganda Shillings Only) as P. Exh 6, otherwise D. Exh in C.S No. 129 of 2008 on pages 64 and 65 of the record shows that Kiddu Charles along with Nagujja Joyce and Ssemambo James sold land to the Appellant.

There is evidence from Kamya Semu (DW1) and Ssemambo (DW2) to show that the sale, in respect of the portion of land sold to Kamya Semu in an Agreement dated 13/09/2006 valued at UGX 10,000,000/= (Ten Million Uganda Shillings Only) in respect of which he had paid UGX 8,000,000/= (Eight Million Uganda Shillings Only) out rightly a balance of 2,000,000/= the original agreement in respect of the sale was tendered in and admitted as Exhibit DE1.

But this was contradicted by DW1's own statement signed on 28/12/06 where he stated that he bought a plot of land from Nagujja Joyce and Ssemambo James at a consideration of 8,000,000/= with a balance of 4,000,000/= thus totaling to a consideration of 12,000,000/=. This was as marked Exhibit P.E 5.

I have observed that there was a directive by the trial Magistrate to engage a Government Analyst to handle the signatures on both the Exhibits although his Report is not found on the record. Therefore, in the premise I find that the learned trial Magistrate was right in her decision regarding the contradictions and inconsistencies.

Finally, Counsel submitted that the consent settlement did not bar the Appellant from appealing thus the issue is irrelevant to these proceedings. Counsel asked Court to allow the Appeal with the respective Orders prayed for.

GROUND 1

The 1st ground raised by the appeal is that the learned Trial Magistrate erred in law and fact when she decided a land dispute without establishing the actual area in dispute in terms of measurement or even visiting the locus in quo

Both Counsel did not make a discussion on the issue of *locus in quo* and neither was the same raised during the hearing. However, this Court is cognizant of the fact that the proceedings in the lower Court were ideally based upon an unspecified portion of land of which both parties claimed ownership over.

I note that in the lower Court the Respondent testified as PW1 (Plaintiff in lower Court) and stated that *on 12th May, 2006, Charles Kiddu approached him with an offer of sale of a portion of kibanja which they jointly owned with Ssemambo James at a consideration of Ug shs 5,000, 000/=. Further, that they executed an Agreement to that effect, in which it was agreed that the Parties engage a surveyor to demarcate off the portion which PW1 had bought. The Agreement was dated 12th May, 2006 and signed by Kiddu Charles as the Seller. It witnessed by Sebakumba James; Nabunya Erina and was admitted by the consent of the parties as Exhibit P. Exh 2.*

The evidence shows that the Appellant approached PW1, (Respondent herein and Plaintiff in the lower Court) on the 13th September, 2006. He informed him that he wanted to buy a portion which neighbors his plot of land. He requested PW1 to appear before the LCs. PW1 did appear before the LC authorities but did not sign the Agreement. This was due to the fact that the Defendant included a measure of land which had previously been sold to PW1 by one Kiddu. The agreement was tendered in for identification purposes as ID P. Exh.3. PW1 further testified that the Defendant approached him in October 2006 and informed him that he had completed the payment of the purchase price, he needed PW1 to execute a transfer in that respect.

It was PW1's evidence that he insisted that the Defendant, Appellant now produces the seller for purpose of ascertaining the size of the Defendant's land. Instead, the Defendant reported the matter to the police on a case of concealment of Title Deed and he was prosecuted in Wakiso Magistrates Court though later acquitted. PW1, (Eric Balame) stated that after the lapse of the criminal matter, the Defendant entered upon the suit land and erected containers; a hut and that the wall was damaged in the process. He asked Court to evict the Defendant from the suit land.

In making her decision, the trial magistrate did not bear in mind the issue of the specific measurement in respect to the suit land. In her observation, she noted: *‘it shows that it was different although it was on the same land. The problem only surfaces due to the fact that there were no specific measurements mentioned or what exactly Kiddu and Ssemambo owned respectively. However Court finds out that this land was not held jointly reading from Ssemambo’s police statement on page 2, where he stated that Eric wanted to develop his land and he sent Kiddu and Nagujja to go to the site so that proper measurements could be carried out. He went on to say that this was done and Eric still wanted to process his land title and Ssemambo advised Kiddu that it required processing the title first from Nakibinge, the husband to Susan Nakibinge, the Administrator of the Estate. This shows that Kiddu and Ssemambo could deal with their respective shares in any way they wanted.’*

It should be observed that the claim in the lower Court was for trespass in respect of a portion of land which belonged to the Respondent.

According to Bryan A. Garner, ***‘Black’s Law Dictionary’ 8th Edition. West Publishing Co. 1990***, trespass refers to wrongful entry upon property which is in the possession of another person. In the Supreme Court decision of ***Justine E. M. N. Lutaaya V. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002***, Mulenga JSC, in his lead Judgment, held that *‘Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes, or portends to interfere, with another person’s lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land...’*

Therefore, for an action based upon trespass to subsist, it is important to prove possession legal or equitable as the case may be. In the suit before the lower Court, the Respondent maintained that DW1 (Kamya Semu) trespassed upon his land by erecting two containers on the Respondent’s portion of land. Regard should be borne to the fact that there was no specific evidence called to prove the specifications of the portion which each of the Parties was claiming.

The learned trial Magistrate only made a finding that Kiddu had a right to sell his share to Eric Balame. According to her findings, the land was $\frac{3}{4}$ of the portion as reflected on the title. And the Appellant herein is thus entitled to $\frac{1}{4}$ of the original land measuring 0.003 hectares as

reflected on the title deed. This in my view was misdirection to the Parties because each party needed to know the specifications of his/ her entitlement.

It should be observed that the Respondent bore the burden of proof in the lower Court in respect of the fact that indeed the Respondent is the lawful owner of the portion of land in dispute and that the Appellant trespassed on the plot. This means that the Respondent (Eric Balame) had to adduce evidence showing the extent of his portion of land, which unfortunately was not adduced.

The record shows that the Respondent (Eric Balame) bought his portion of land from Goobi. I take cognizance of the fact that this portion was supposed to be half of the whole piece of land reflected on the title. Furthermore, on 12th May 2006, Charles Kiddu approached Eric Balame (PW1) with an offer of sale of a portion of land over which Kiddu claimed ownership together with Ssemambo. This was evidenced in an Agreement admitted as Exhibit P. Exh. 2 dated 12/05/2006 signed by Kiddu Charles as the seller. The Agreement was witnessed by Sebakumba James and Nabunya Erina. According to that document, there is no specific measurement in respect of which the land was sold. The translated copy of the Sale Agreement reads: *'I Kiddu Charles of Kisimbiri Kyoga have sold tom Mr. Balame Eric of Wakiso part of our plot, I with Mr. Ssemambo James and I have done this without any comparison. I have decided to sell my portion because whenever I got buyers, my joint owner would not care and yet I had problems requiring money, and I have sold it to him at Ug shs 5,000,000/= only. He has paid Ug shs 2,000, 000/=. The balance will be paid to me after bringing a surveyor to divide the land into two parts. I am Kiddu Charles and Ssemambo James'* [emphasis added]

In his examination in chief at page 22 of the record, PW1 testified that they were yet to get a Surveyor to demarcate the portion of land which the Respondent had bought from Kiddu. PW1 also stated that when the Appellant approached him to have him append his signature in respect of the portion of land bought by the Appellant (Kamya Semu) from Ssemambo, he asked him to produce Ssemambo. His presence would enable them to get the proper measurements to the respective portions of the land. This was also corroborated by Kiddu Charles (PW2). He stated that he approached the Respondent with an offer of selling his interest in the portion of land which he owned together with Ssemambo. The said sale was conducted in the absence of Ssemambo (DW2). The land bought was an *ascertained portion* of the land. It is a fact from the

record of proceedings that the Respondent instituted a suit later against the Appellant in the lower Court for trespass hence this Appeal. The only evidence which was adduced in respect of the size of the suit land arose during cross examination of PW1 (Eric Balame) by Court. Therein, Mr. Balame stated that his portion of land is situate at the extreme point and covers 37 ½ feet in width and 76 feet at one end and 80 feet. Mr. Balame also told Court that he did not buy the 12 ½ feet in width which is at the extreme end which adds up to 50 feet.

Regarding the issue of visiting the *locus in quo*, it is my view that this case merited holding a *locus in quo* in order to ascertain the proper boundary dimensions. The basic purpose for a *locus in quo*, as stated in the case of ***Yeseri Waibi vs. Edisa Lusi Byandala [1982] HCB 28***, is to check on the evidence given by witnesses and not to fill gaps or the trial magistrate may run the risk of making himself a witness in the case. In the Civil Court case of ***Yowasi Kabiguruka vs. Samuel Byarufu Civil Appeal No. 18 of 2008*** Engwau, JA in his decision cited the decision of ***Yeseri Waibi V. Edisa Lusi Byandala (supra)*** upheld the decision of the trial Magistrate and held that a retrial was justifiable in order to ascertain the boundaries of the suit land.

This Court is empowered under Section 80 Civil Procedure Act to make and perform as nearly as may be the same duties as are conferred and imposed on a Court of Original Jurisdiction. Therefore, in the circumstances, it would be justifiable to conduct a Survey of the land be made thereof and requisite subdivisions made.

Therefore based upon the above reason, I find that this ground of Appeal has merit and I therefore uphold it.

Finally, I make the following Orders;

1. Grounds 1 and 2 of the Appeal are hereby upheld.
2. Grounds 4 and 5 fail.
3. The Appellant is entitled to ¼ of the land.
4. A survey of the land be conducted for the purpose of ascertaining the specific portions belonging to each claimant. All parties shall contribute equally to facilitate the survey.
5. Costs of the Appeal to the Appellant.

Signed:



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Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

28th February 2014