

IN THE HIGH COURT OF UGANDA AT MBALE

CIVIL APPEAL NO. 130 OF 2014

ARISING FROM SIRONKO CIVIL SUIT NO. 6 OF 2009

DR. J. K. MASAMBU.....APPELLANT

V

PETER KIKWE MUUSA.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant appealed the judgment of HW Hope Namisi dated 7th July 2014 sitting at Sironko on three grounds of appeal that I will revert to later in the judgment. Originally, there were two respondents but the appellant withdrew the appeal against the second respondent Obadio Kikwe Maliro following his death..

The duty of the first appellate court is to re-evaluate the evidence and arrive at its own conclusions bearing in mind that the trial court had an opportunity to observe the demeanour of witnesses.

The appellant sued the respondent in tort. Two issues were framed:

1. Whether the respondent negligently diverted the course of water to the detriment of the appellant.
2. Remedies.

In the plaint , the appellant sued the respondent for negligently and maliciously digging a new trench across the second defendant's land(now deceased) which then caused flooding of the appellant's land.

The trial magistrate decided the suit on the basis that it was a tort of negligence and cited correct principles. I wish to add that while the tort was in negligence , it was also in the category of a nuisance which falls under the tort of negligence.

A nuisance is defined as an unreasonable interference with the plaintiff's enjoyment of the land. (see **Howarth David, Textbook on Tort, Butterworths (1995:499)**). The author explains that

liability of the neighbour lies not so much in the intention to cause the nuisance but whether the plaintiff's enjoyment of his property should outweigh the defendant's activity complained of.

The appellant's case was that the respondent is a neighbor and a brother. That in 2007, the respondent blocked the natural course of rain water with soil, and dug a trench across Maliro's land into the appellant's land. That when it rained, water flooded his land for 24 hours damaging his one acre of upland rice and chain link fence.

The respondent's case was that in 2007, there were heavy rains in the area that affected all residents leading to government intervention.

The 1st respondent's other defence was that flood waters passed through a valley on his land but denied digging a trench .

The appellant in cross examination admitted that the respondent's land is at a lower altitude than his but maintained that the respondent dug a trench which flooded his rice garden.

From my evaluation of the evidence, both parties seem to be in agreement that a water course passed through the defendant's land . Therefore, the digging of a trench cannot arise as there was an existing route for flow of rain water.

Secondly, as rightly held by the trial magistrate, water cannot flow uphill.

What is in issue is whether the respondent , by his actions, interfered with the appellant's enjoyment of his land .

While it is possible that the appellant's one acre of rice was flooded with rain water, there is no connection between this flooding and the respondent's activities on his land. This is because the respondent and his witness were firm that in 2007, there were heavy rains that affected all people in the area including the appellant.

I am persuaded by this defense because the alleged nuisance seemed to have lasted only 24 hours . The appellant alluded to another incident in May 2008 but he did not give details. The explanation for this brief duration of the floods is that it was caused by an act of God and not intentionally or maliciously by the respondent. If this had been the case, there would have been floods each time it rained until the nuisance was removed.

Therefore, I find that while it is possible the respondent did carry out activities on his land with regard to flow of rain water , there is no connection between these activities and the flood in the appellant's land that subsisted for 24 hours in 2007.

I find that the trial magistrate properly evaluated the evidence and arrived at a correct conclusion.

I now turn to the grounds of appeal.

Ground one: The trial magistrate was biased against the appellant.

I find no merit in this ground as the alleged incidences of bias are not enumerated.

Ground two: the trial magistrate erred in dismissing the suit.

The trial magistrate properly evaluated the evidence and arrived at a correct conclusion.

Ground three: the decision has occasioned a miscarriage of justice

I find no merit in this ground

Consequently, I dismiss this appeal with costs to the respondent in this court and the court below.

DATED AT MBALE THIS 28TH DAY OF OCTOBER 2015.

HON. LADY JUSTICE H. WOLAYO