

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0045 OF 2015

(Arising from KAS – CS – LD – No. 040 of 2011)

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BALUKU GIRIGOLI.....APPELLANT

VERSUS

BWAMBALE HERBERT.....RESPONDENT

10 **BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

Judgment

The Appellant, Baluku Girigoli, appealed to this Court against the judgment of His Worship Katorogo Moses delivered on the 9th day of December, 2015, in which the trial Magistrate held that the suit land belongs to the estate of the late Eziron Sejjabi to which the Respondent
15 is the Administrator. The Respondent is Bwambale Herbert.

The Appellant was Represented by M/s Kayonga, Musinguzi & Co. Advocates, while the Respondent was represented by M/s Sibendire, Tayebwa & Co. Advocates, Kasese.

The grounds of appeal were:-

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate
20 the evidence on the record thereby arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he awarded excessive damages and mesne profits thereby occasioning miscarriage of justice.

According to the Court Record, the Appeal came up for hearing on 13/7/2016 with Mr. Bernard Musinguzi for the Appellant. It was adjourned at the request of Counsel for the
25 Appellant to get typed copies of the proceedings and judgment of the lower Court. On 4/10/2016, the Appeal was adjourned to 14/12/2016.

On 14/12/2016, Mr. Rwakatooke is on record as holding brief for Counsel Musinguzi Bernard who was reported to be indisposed.

The Appeal was adjourned to 3/3/2017, in the presence of the parties and their respective Advocates, the appeal was adjourned to 19/5/2017 by M/s Lillian Mwandha, the Deputy Registrar.

On 19/5/2017, Mr. Victor Businge held brief for Bernard Musinguzi who was reported sick. It is on record before Justice Oyuko. A. Ojok that Mr. Victor Businge prayed for 2 weeks to amend the Memorandum of appeal and then one month to file written submissions. The Court granted the Application, and judgment was to be on 8/9/2017. Since, then while Counsel for the Respondent filed Written Submissions, Counsel for the Appellant **has nearly two years** not filed any written submissions.

However, after judgment notices were put on the notice board Counsel for the Appellant filed written submissions which were received on 13/12/2018. This Court reluctantly accepted the same in the interest of substantive justice as provided under the Constitution of the Republic of Uganda, 1995.

The law:

The position of the law is that in Civil cases, it is an established principle that the burden of proof lies on the Plaintiff to prove his/her case on the balance of probabilities. Therefore, a party can only be called to dispute or rebut what has been proved by the other side. This is so because the person who alleges is the one who is interested in the Court believing his contention. (See: **Muller versus Minister of Pensions, [1947] 2 ALLER 372, Lugazi Progressive School & Another versus Serunjogi & Others [2001-2005] 2 HCB 12**).

In the instant case it is therefore the duty of the Appellants to prove their contentions to the satisfaction of this Court.

25 Duty of a first appellate Court:

This is a first appeal from the decision of the learned Magistrate. The duty of the first Appellate Court was outlined by Hon. Justice A. Karokora (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke versus Sam Galiwanga, SCCA No. 48/1995** where he held that;

“...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity...”

5 This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion as per the case of **Banco Arab Espanol versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

The powers of the High Court as an appellate Court are stipulated in **Section 80** of the **Civil Procedure Act Cap 71**. The High Court accordingly has power to determine the case
10 finally, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

Ground 1:

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the record thereby arriving at a wrong conclusion.

15 Counsel for the Respondent submitted that this ground offends **Order 43 Rule 1(2)** of the Civil Procedure Rules for being too general. It was submitted that the Appellant was faulting the trial Magistrate in general terms without raising any specific instance in which the trial Magistrate erred. It is now settled law that such a general fault ground is no longer allowed. In **Arajab Bossa versus Bingi Patrick, HCT – 01 – LD – CA 0015 of 2012**, it was held that
20 such generalised ground offends **Order 43 Rule 1(2)** of the Civil Procedure Rules as it is not concise. I entirely agree with the ruling in the above case and do hereby strike out Ground 1 of appeal.

However, and notwithstanding the striking out of ground 1 of appeal, even on the merits of the case in the lower Court, it was overwhelmingly in favour of the Respondent as an
25 Administrator of the Estate of Eziron Sajjabi Muhirwa. I state so because PW1 Bwambale Herbert produced a Certificate of title in respect of the land in dispute in the names of his deceased father. The same was not disputed by the Defendant, (now Appellant).

PW2 Kamabu Joash, also confirmed that the disputed land is over 100 acres and is for the late Ezironi Sajjabi, now passed on to his son, Bwambale Herbert, the Respondent. PW3, Rev.

Yona Kule, aged 77 years old, corroborated the evidence of PW1 and PW2. He testified as follows;-

“I know Bwambale Herbert the Plaintiff in this Court as the son of the late Sajjabi Keziron. The Defendant is known to me since 2001 when they litigated in LC1 over the land of the late Sjjabi. I knew the late Sajjabi Kezron before he died. We used to share boundaries. The land is in Karujumba Rwentutu Village at the border of the sub county Kyarumba. The late Sajjabi’s is in Kyarumba while mine is in Katwe Sub County but they border each other, the land we share boundaries is the one in dispute. To me the land belongs to the late Sjjabi. Court should believe because even the mark stones are here, share the boundaries. The land was surveyed. Yes it has a certificate of title. We processed it together.”

During cross examination, PW3 confirmed that Sajjabi applied to the land committee in Fort Portal and that after they inspected the same, they were given a lease offer in 1972.

That evidence was further confirmed by PW4, Tibijuka Yowasi who stated that Ezron Sajjabi is the owner of the disputed land who applied and got a lease from Government. He confirmed that the land committee under the Chairmanship of Cyril Mahoma and Yositas Mukirane, and County Chief, and a member of the land committee among others inspected the land.

PW4 added that by then, between 1970 – 1974, it was plain land with nobody staying there.

The Defendant/Appellant on the other hand testified as DW1, He stated that he was not aware of the Certificate of title as the land in question is customary which he acquired from his father. He allegedly litigated with the Plaintiff’s/Respondent’s father in 2001 in the LC1 Court and won. Needless to emphasize, the LC1 Court had no jurisdiction to entertain the dispute over titled land.

DW2 Makwamu Elly confirmed during cross-examination that between 1977 and 2001, the Defendant/Appellant was not on the disputed land. DW2 is the biological brother of the Appellant.

Similarly and as submitted by Counsel for the Respondent, DW3, Masereka Blasio admitted that Sajjabi (Respondent’s father) used to graze cows on the disputed land.

In the premises, it is the finding and holding of this Court that the Respondent proved his case on the balance of probabilities in the lower Court. That is particularly in view of the Certificate of Title in the names of his deceased father, and which title was never challenged by the Appellant now.

5 Counsel for the Appellant in his submissions tried to point out the alleged contradictions in the evidence of PW2, and PW1, with regard to the dates when the Respondent's father acquired the land in question.

I reject such submissions as they do not go to the root of the case. The other submission by Counsel for the Appellant was that the Respondent has over 40 houses on the disputed land
10 which were constructed after the LCI judgment in 2001. As I have already stated, the LCI Court had no jurisdiction and two wrongs do not make a right. The finding and holding of this Court is that the trial Magistrate correctly and properly evaluated the evidence in the lower Court. And His Worship also properly relied on the provisions of **Section 59** and **77** of the Registration of Titles Act to decide in favour of the Respondent.

15 **Section 59** of the Registration of Titles Act provides that a Certificate of Title shall be conclusive evidence of ownership. Furthermore, under **Sections 64** and **176** of the same Registration of Titles Act, a certificate of Title can only be cancelled if it was obtained by fraud. The Appellant in this case did not plead any fraud and in any case, evidence on record reveals that the father of the Respondent, the late Eziron Sajjabi Mulirwa properly acquired
20 the Certificate of Title in respect to the disputed land.

I am therefore unable to fault the judgment of the lower Court and so ground 1 of appeal even on the merits fails.

Ground 2:

The learned trial Magistrate erred in law and fact when he awarded excessive damages and mesne profits thereby occasioning miscarriage of justice.
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Counsel for the Appellant submitted that there was no basis upon which the trial Magistrate awarded general damages of UGX 20,000,000/=. He added that the decision to award general damages was not exercised judiciously. Counsel also faulted the trial Magistrate for the award of mesne profits of UGX 240,000,000/= where no business loss was pleaded.

Counsel for the Respondent on the other hand submitted that the award of any form of damages is at the discretion of the trial Court. He added that the Appellate Court can only interfere with the award if it is found to be unfair.

5 The position of the law is that the ward of general damages is at the discretion of the Court, and it is presumed to be the natural and probable consequence of the acts or omissions complained of.

In **Kalemera Godfrey & Others versus Unilever (U) Ltd & Another, HCCS No.1181 of 1995**, it was held that the Plaintiff may not prove that he suffered general damages.

10 In the present case, I have no doubt that the Respondent suffered mental anguish, and inconvenience over pro-tracted litigation. A lot of time was wasted moving to and fro Court as a result of the Appellant's unlawful encroachment over the Respondent's land in dispute. In the premises, the Respondent is entitled to general damages. In view of inflation and other economic factors, I find the award of UGX 20,000,000/= by the trial Magistrate reasonable.

I shall not therefore interfere with the same.

15 On mesne profits, I am inclined to agree with the submissions of Counsel for the Appellant that the award of mesne profits was not proper because no business loss was pleaded and no particulars of loss were given. The same is therefore disallowed.

20 In conclusion, and in view of what I have outlined, I do hereby dismiss this appeal save for the order of mesne profits. The judgment and orders of the lower Chief Magistrate's Court are hereby confirmed. The Appellant and the persons he wrongfully brought on the Respondent's land are free to negotiate a settlement with the Respondent.

I also do hereby award costs in this Court and the Court below to the Respondent.

18th December 2018

25 **WILSON MASALU MUSENE**

JUDGE