IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 046 of 2018

In the matter between

OKOT PATRICK …… APPELLANT

VERSUS

ABODO MARY …… RESPONDENT

Heard: 7 May, 2019.
Delivered: 30 May, 2019.

Land Law *—sale of unregistered land— a contract relating to a transaction in unregistered land, need not be in writing to be valid—Although desirable, the validity of such a contract is not affected by omission or failure of the neighbours to witness it—A licence will not be inferred without evidence of a fixed or periodic term agreed upon and in light of evidence of conferment of exclusive possession—Limitation —once possession of land is on the basis of a license, limitation based on adverse possession does not arise.*

Civil procedure *—Unrepresented litigants— the notion of "substantive impartiality" in the handling of unrepresented litigants—Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice—an unrepresented litigant should meet the minimum requirements when formulating the grounds of appeal in the memorandum of appeal.*

Contract *—Consideration— the consideration has to be sufficient but need not be adequate—Interpretation of oral contracts—where a contract is oral, its terms may be deduced from the conduct or actions of the parties, or circumstances surrounding the agreement, since their behaviour is most likely to be consistent with the terms agreed upon.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of land measuring approximately half an acre, situate at Tanga Agoro village, Oryang Parish, Amida sub-county, in Kitgum District. She sought a declaration that she is the rightful owner of the land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass to the land, general damages for trespass to land, and the costs of the suit. Her claim was that her late father, Angelo Okee alias Lagira Bob, gave her the land in dispute in 1989 as a gift *inter vivos*. Sometime in the year 2005 the appellant requested her to use the land for cultivation and out of goodwill she permitted him to use it temporarily. When in 2007 she asked him to vacate the land, the appellant refused to vacate. In 2016, the appellant forcefully re-occupied the land and constructed a house thereon, hence the suit.

[2] The appellant never filed a defence even after an interlocutory judgment was set aside and time allowed for him to file one. However in his summary of the case at the scheduling conference, he claimed to have purchased the land in dispute from the respondent by way of payment of a goat and a pig.

The respondent's evidence;

[3] P.W.1 Obol Albino Oruni testified that the appellant is a son of the respondent's uncle. The land in dispute measures approximately 100 x 35 meters. It is the respondent's father that gave her the land. In 1998, the respondent gave land to the appellant. A road separated the appellant's land from the respondent's. In 2007 the respondent permitted the appellant to use the land temporarily but in 2016 he obliterated the road and took over the land by construction of a house thereon. The respondent's daughter, Achayo Rose testified as P.W.2 and stated that the respondent's father left her the land in dispute when he died. The respondent gave the appellant a small piece of land adjacent to the one in

dispute, separated by a road. The respondent permitted the appellant to use the land temporarily. From 2005 to the time of trial the appellant was cultivating the land in dispute. He embarked on planting trees on the land. The appellant did not pay for the land with a goat and pig given to the respondent as he claims.

[4] P.W.3 Opoka Teracio testified that the land in dispute belonged to the respondent's late father. When he died he left it to the respondent's mother. When the mother died the respondent took it over. The appellant is now cultivating the land claiming that he purchased it from the respondent. He has since refused to hand it back to the respondent. P.W.4 Elizabeth Lakot testified that the respondent is her sister and that she acquired the land in dispute from their late father Maritina Amoo. The appellant began trespassing on the land in dispute in the year 2005. The respondent gave the appellant the land he occupies but he has since exceeded the boundary and encroached onto the respondent's land now in dispute.

The appellant's evidence;

[5] Testifying as D.W.1 the appellant Okot Patrick (Alfred) stated that the land in dispute originally belonged to the respondent but she sold it to him in 1995 when he was 18 years old and the purchase price was a goat and a pig. No agreement was written but the transaction was witnessed by a number of people. He has used the land for about 23 years and the complaints arose only in 2014. D.W.2 Okello David testified that at the age of 13, he witnessed the transaction where the appellant paid for the land with a goat and a pig and he was "given" the land. He was the one keeping the pig for his brother, the appellant. D.W.3 Nyeko Walter Opira testified that he witnessed the transaction in 1995 where the appellant paid for the land with a goat and a pig. He initially cultivated the land but after two years he established a home thereon. D.W.4 Opwonya Marino testified that he saw the appellant cultivate the land in 1995 and on inquiry he claimed to have purchased it with a goat and a pig.

The Court's visit to the *locus in quo*;

[6] The court then visited the *locus in quo* where it drew a sketch plan indicating the area in dispute, the location of the respondent's home outside the area in dispute, the appellant's home at the extreme end of the area in dispute on which the appellant had planted crops, paw paw trees, two mango trees within the vicinity of the appellant's compound and two others within the area in dispute which the appellant claimed to have planted. D.W.4 Opwonya Marino was noted as one of the neighbours to the land.

The judgment of the Court below;

[7] In his judgment, the trial Magistrate found that all the witnesses who testified on both sides were related to the parties. The parties too are related by blood. None of the neighbours or local authorities were involved as witnesses to the transaction. At the *locus in quo*, the court observed that the appellant occupied a piece of land North of the one in dispute that is about the same size as the one in dispute. He could not have purchased both parts from the respondent since he claims to have purchased only one piece of land. The respondent gave the appellant only one piece and he went on to encroach onto the other. The appellant therefore is a trespasser onto the land. He granted an order of vacant possession, issued a permanent injunction was against the appellant, awarded the respondent general damages of shs. 2,000,000/= and the costs of the suit.

The grounds of appeal;

[8] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial magistrate failed to evaluate the evidence as a whole, hence coming to a wrong conclusion thereby occasioning a miscarriage of justice to the appellant.

2. The trial magistrate failed to ascertain the evidence of the appellant while at court, he only relied on the respondent's evidence thereby arriving at the wrong conclusion.
3. The trial magistrate erred in law and fact when he failed to dismiss the respondent's suit on grounds of limitation since the appellant occupied the land in 1995 without any interference until 2016 when the respondent brought an action in court an declared the respondent the owner of the land, thereby occasioning a miscarriage of justice.

Submissions of counsel for the respondent;

[9] The appellant did not appear at the hearing of the appeal whereupon a date was fixed for judgment and the parties directed to file their written submissions. Still the appellant did not file any submissions. In their written submissions M/s Odongo and Co. Advocates, counsel for the respondent, argued that the first two grounds of appeal should be struck out for lack of precision. He argued further that the appellant lied when he claimed to have paid a goat and a pig for the land since he did not produce any written agreement and the sale was not witnessed by any of the neighbours. The respondent's evidence was corroborated by observations made at the *locus in quo*. All the respondent's witnesses testified that the boundary between the appellant and the respondent's land was a road. In 1998 the appellant was given a piece of land across the road but he later encroached on the respondent's land around 2005 and 2007 and therefore cannot claim the land by adverse possession. The appellant did not enjoy quiet enjoyment in so far as the respondent reported to the local chief and leaders who intervened and advised the appellant to vacate the land. The trial magistrate therefore came to the correct conclusion and the appeal should be dismissed with costs to the respondent.

The duties of this court;

[10] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[11] This court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The notion of "substantive impartiality" in the handling of unrepresented litigants;

[12] Both parties were unrepresented at the trial. Self-representation has firm roots in the notion that all persons, no matter their status or wealth, are entitled to air grievances for which they may be entitled to relief. Fairness requires a trial Magistrate to treat self-represented litigants fairly and attempt to accommodate unfamiliarity with the process so as to permit them to present their case, hence the notion of "substantive impartiality." The notion requires that courts depart from "formal impartiality" where identical treatment is not necessarily appropriate or conducive to equality. For purposes of enforcing the right to a fair hearing, it may be necessary for the court to intervene so as to give self-represented

litigants additional latitude, assistance and information. This is because to treat people the same without regard to their needs and circumstances can undermine, rather than advance the cause for a fair hearing. In this way, substantive equality may require that parties be treated differently, according to their needs and circumstances.

[13] This notion is explained by the Supreme Court of Canada in *Valentin Pintea v. Dale Johns and Dylan Johns, [2017] 1 SCR 470*, thus;

> [T]aking a substantive approach to impartiality means that not all parties are treated with the same detached passivity, but instead receive the treatment and assistance they need in order to have an opportunity at a fair hearing. In other words, substantive impartiality (like substantive equality) is not necessarily about treating parties the same, but rather about treating them fairly, or in this context, providing self-represented litigants with meaningful legal assistance so they can navigate and function within our legal system.

[14] Access to justice must not be contingent upon retaining counsel, lest the entitlement to a fair trial becomes a mere privilege denied to certain segments of society. Whereas substantive impartiality applies to both procedural and substantive equality for all litigants, nevertheless pleadings are the gateway by which litigants access courts. Consequently, in order to prevent premature dismissal of meritorious cases, pleadings by unrepresented litigants, however inartfully prepared, are held to "less stringent standards than formal pleadings drafted by lawyers" (see *Erickson v. Pardus, 551 U.S. at 94*; *Estelle v. Gamble, 429 U.S. 97 at 106 (1976)* and *Haines v. Kerner, 404 U.S. 519, 520-21(1972*). In any event, it is the law that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment (see *D.T. Dobie and Company Ltd. v. Muchina and another [1982] KLR 1*).

[15] When dealing with pleadings by unrepresented litigants, the court is concerned with the determination as to whether or not the allegations of fact made in the

pleadings, excluding conclusory allegations (assertions for which no supporting specific facts or evidence is offered), permit a plausible inference of wrongdoing on the part of the named defendant. Even an unrepresented litigant should meet the minimum requirements of pleading factual allegations sufficient to suggest that a right was violated, that entitles him or her to redress. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” (see *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009*). Conclusory allegations are entirely comprised of generalisations or summaries of what the underlying facts are. A display of the facts leading to every conclusory allegation made in the plaint, is essential.

[16] In the instant case, the respondent’s claim was for recovery of land founded on the tort of trespass to land. The plain meaning of trespass as per *Halsbury’s Laws of England Vol. 38 page 734* is: - “(a) is a wrongful act (b), done in disturbance of the possession of property of another ….. against his will.” The respondent pleaded that she was given the land in dispute during the year 1989; in the year 2005 upon the request of the appellant, she allowed him to grow crops on the land temporarily; in the year 2007 when she sought to regain possession of the land, the appellant refused to vacate; in the year 2016 the appellant forcefully took over possession of the land, hence the suit. These were sufficient factual allegations which, if true, would tend to support the ultimate conclusion. The Court of Appeal decided in *Departed Asians Property Custodian Board v. Issa Bukenya, S.C. Civil Appeal No.26 of 1992*, that if allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court is to hear evidence which proves the facts and hear submissions of law that the remedies are justified.

[17] The appellant still appeared unrepresented on appeal. Although the same "less stringent standard" approach will apply to the pleadings filed on appeal, still an unrepresented litigant should meet the minimum requirements when formulating

the grounds of appeal in the memorandum of appeal. The grounds should specifically state why the appellant believes the trial court's judgment or order should be set aside. It is for that reason that I find the first ground of appeal presented in this appeal to be too general that it offends the provisions of Order 43 rules (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against.

[18] Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is struck out.

Once possession of land is on basis of a license, limitation based on adverse possession does not arise.

[19] By ground three, the trial magistrate is faulted for failure to dismiss the respondent's suit on grounds of limitation since the appellant occupied the land in 1995 without any interference until 2016 when the respondent filed the suit. This entire argument is misconceived in so far as the respondent's claim was based on violation of a permission she claimed to have granted the appellant to occupy her land temporarily. The respondent in effect pleaded having granted the appellant a bare licence over the land in dispute for an indeterminate period. A

bare licence is constituted by an owner of land giving personal permission to another person to enter and remain on the land. A bare licence may be created orally, may be express or implied by conduct of the parties or from the circumstances (see *R (on the application of Beresford) v. Sunderland City Council [2004] 1 All ER 160*). It may also arise where the landowner has knowledge of the trespass and gives no objection to it (see *Canadian Pacific Railway Company v. The King [1931] A.C. 414*). It is by this means that a trespass may shift into a bare licence.

[20] Otherwise, a licence makes it lawful for land to be used by a person who is not the legal owner, but the licensee will not have the right to have exclusive possession of the land. Adverse possession presupposes occupation of the land without the permission of its owner. Therefore however long the occupancy may be, possession of land under a license is not adverse to the interests of the landowner. Limitation cannot be conceived in absence of adverse possession. According to section 11 of *The Limitation Act*, no right of action to recover land is deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (referred to as “adverse possession”) and that the right of action cannot be deemed to accrue until adverse possession is taken of the land.

[21] Order 7 rule 11 (d) of *The Civil Procedure Rules*, requires rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law. Whether or not a suit is time barred is a question that may be decided based on the pleadings alone, and sometimes after hearing the evidence. According to the plaint, the appellant's alleged adverse possession arose in 2016. From the respondent's evidence, it was stated that the appellant's adverse possession arose in 2014 when the respondent began claiming the land as his. The suit was filed only two years thereafter, in May, 2016 hence it was not time barred. For that reason the third ground of appeal fails.

The interpretation of an oral contract;

[22] The second ground of appeal faults the trial magistrate for failure to appraise the appellant's evidence, thereby relying exclusively on the respondent's evidence to decide the case. It is trite that findings of fact must be based on logically probative evidence, material that tends logically to prove the existence or non-existence of a fact. All the evidence should be analysed closely and evaluated to determine whether there is any conflict in relation to a material fact. During evaluation, all evidence is unlikely to carry equal weight. Assessment of the weight of evidence involves the application of logic, commonsense and experience. The decision should reflect the findings of material facts made, the evidence on which the findings are based, and the evaluation of the evidence. The court should be careful not to make a finding of fact until all the evidence relating to that fact, as adduced by both parties, has been considered (see *Bogere Moses and Kamba Robert v. Uganda, S. C. Criminal Appeal No. 1 of 1997*). If there is a conflict in the evidence, the trial Magistrate should explain why he or she preferred one account over another.

[23] When there are conflicting versions of a factual matter it does not necessarily follow one or the other is lying. Discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of a party's case; whether they create a doubt as to the truthfulness of the witnesses. It is possible for people to perceive and remember events differently. It therefore is generally better to focus on where the truth lies, rather than on who is to be believed. One way of doing that when evaluating a witness’s statement is to examine its internal and external consistency with other available evidence, or other statements by the same witness before. A statement is more likely to be true if it accords with known

facts, available physical evidence, or other evidence from a source independent of the witness.

[24] When the trial court has reached a conclusion on the primary facts, the appellate court when re-evaluating the evidence may come to a different conclusion where; - (i) there was no evidence to support the finding, (ii) the finding was based on a misunderstanding of the evidence, (iii) it is shown that the Magistrate was clearly wrong and reached a conclusion which on the evidence he or she was not entitled to reach, (iv) the findings of credibility are perverse, or (v) it is a finding which no reasonable court could have reached, based on the evidence on record. Though it ought, of course, to give weight to the opinion of the trial court, where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge (see *Benmax v. Austin Motor Company Ltd [1955] 1 All ER 326 at 327*). This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial Magistrate.

[25] It was the testimony of P.W.1 Obol Albino Oruni that a road separated the appellant's land from the respondent's. P.W.2 Achayo Rose testified too that the appellant owned a small piece of land adjacent to the one in dispute, separated by a road. On the other hand, P.W.3 Opoka Teracio testified that the respondent gave the appellant the land he occupies but he had since exceeded the boundary and encroached onto the respondent's land now in dispute. This is the area which on visiting the *locus in quo* the trial court found the appellant's house to be located, at the extreme end of the area in dispute, on which the appellant had planted crops, paw paw trees, two mango trees within the vicinity of the appellant's compound. The evidence suggests that the appellant had his own piece of land before accessing the one in dispute.

[26] Contrary to that evidence, the trial court found that the appellant occupied a piece of land North of the one in dispute that is about the same size as the one in dispute. The court found that the respondent gave the appellant only one piece of land yet he went on to encroach onto the other. The trial magistrate then concluded that the appellant could not have purchased both parts from the respondent since he claims to have purchased only one piece of land. The finding that the part first occupied by the appellant was sold or given to him by the respondent, is against the weight of evidence in so far as it suggests that there were multiple transactions between the parties. It was clearly stated by P.W.2, and the rest of the evidence suggests so, that the transaction between the appellant and the respondent sprung from the need by the appellant to secure more land as the one he occupied was too small. It was one transaction and it related to the land now in dispute between them.

[27] The question then was whether that transaction was a sale of the land as claimed by the appellant or only a license as claimed by the respondent. In deciding that question, the trial magistrate rejected the appellant's version for three reasons; - (i) there is no documentary evidence; (ii) all his witnesses were related to him; and (iii) none of the neighbours or local authorities were involved as witnesses to the transaction.

[28] The first and third reasons advanced are fallacies, a contract relating to a transaction in unregistered land, need not be in writing to be valid. Although desirable, the validity of such a contract is not affected by omission or failure of the neighbours to witness it. As regards the fact that each of the parties presented witnesses related to him or her respectively, the court admittedly correctly observed that they may be interested in the suit. Generally speaking, an “interested witness” is one who has a stake in the outcome of the pending litigation.

[29] While interested witness testimony does tend to be self-serving, the mere fact that it is self-serving does not necessarily make the evidence improper. Although in situations like this the court would be justified to bear in mind the interest of such witnesses in determining or as affecting their credibility, it should not necessarily be considered as turning the scale in matters of doubt, but rather as an important fact to be considered in weighing one witness's testimony against another's. On the facts of this case, considering the blood relationship of the witnesses to the parties was unhelpful in so far as both parties relied on their relatives as witnesses. As a result no satisfactory reason is given for accepting one version and rejecting the other. Even then, it was not shown that any of them had a partisan feeling about the case sufficient to subject their testimony to that caution.

[30] The only common factor between the two parties is that whatever the contract was, whether a license as contended by the respondent or a sale as contended by the respondent, it was oral. Where a contract is oral, its terms may be deduced from the conduct or actions of the parties, or circumstances surrounding the agreement, since their behaviour is most likely to be consistent with the terms agreed upon. The court will look at the parties' actions and communications, to decide what a reasonable person would have understood the parties' intentions to be. The court will then determine which of the of the stated versions is consistent with their conduct following the agreement.

[31] Therefore, in determining whether or not this was a sale or a licence, the trial court should have focussed on; (i) whether or not the arrangement conferred upon the appellant exclusive possession or not; and (ii) whether or not the occupation was stipulated to be for a specified period, and (iii) whether it was permanent or temporary. By looking at the true nature of the occupancy, the court may determine the type of transaction from which it originated. Eventually the answer depended on the nature and quality of the occupancy, the question being whether or not the conduct of both parties evinced an intention that the

appellant should have a stake in the land or only enjoy permission for himself personally to occupy the land under an oral contract. The reality of what was agreed had to be discerned from the conduct of the parties.

[32] A license is an agreement where the landowner gives permission to another party to use the property for a specific, limited purpose. Usually the right is (i) non-exclusive, (ii) for a short term or non-consecutive use, (iii) non-transferrable and (iv) freely revocable. Under a license, land is occupied but not necessarily possessed. A license allows occupation but does not give the occupier exclusive possession nor legal title. The evidence of conduct provided by D.W.2 Okello David, D.W.3 Nyeko Walter Opira, both of whom testified that they witnessed the transaction in 1995 where the appellant paid for the land with a goat and a pig, and D.W.4 Opwonya Marino, a neighbour owning land adjacent to the one in dispute, who in 1995 saw the appellant cultivate the land, was consistent with the findings made during the court's visit to the *locus in quo*, mango trees planted by the appellant were found on the land in dispute.

[33] That evidence established that since 1995, the appellant has had “exclusive possession” and “control” of the land, with the right to exclude all others. During that period of time, the respondent never engaged in any conduct assertive of title to the land, such as determination of the nature of user of the land, the range of crops that could or could not be grown on the land, forcing the appellant to share parts of it with her or other persons, etc. There is no evidence of conduct by the respondent or her servants exercising unrestricted access to and use of the land during all the time the appellant has enjoyed occupation. There is no evidence to show that the respondent retained nor exercised powers of supervision and control of the appellant's activities on the land. She therefore did not adduce evidence to prove that the appellant was a mere licensee on the land.

[34] On the appellant's part, the fact that he paid a goat and a pig for the land is inconsequential. For a contract to be valid, the consideration has to be sufficient

but need not be adequate. Adequacy issues arise in circumstances where the price a person has paid for something is disproportionate to the value of what the person receives in return. For consideration to be deemed sufficient enough to support a simple contract in the eyes of the law it must be of some economic value. *T*here is no requirement that the consideration must be market value, provided something of value is given in exchange. The courts are not concerned with whether the parties have made a good or bad bargain *(see Chappell v. Nestle [1960] AC 87*). In the instant case, a goat and a pig have economic value.

[35] A licence would have been inferred if there was evidence of a fixed or periodic term agreed upon and without conferment of exclusive possession. For all those years, the appellant has in effect been exercising rights as if he were absolute owner of the property. An arrangement which gives a right to exclusive possession is prima facie not a license. A reasonable detached observer would almost inevitably have assumed, from their behaviour and in the absence of discussions, that this was a sale rather than a license. The conduct of the parties is therefore consistent with the appellant's version rather than the respondent's. Had the court properly directed itself it would have come to a different conclusion.

Order :

[36] In conclusion therefore, the judgment of the court below is set aside. Instead judgment is entered dismissing the suit. Since the appeal has substantially succeeded, the appellant is awarded the costs of appeal and of the trial.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Brian Watmon.

For the respondent : unrepresented.