

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CIVIL APPEAL NO.074 OF 2016

(Arising from Civil Suit No.031 of 2007)

NDIKABONA KYOYETERE::::::::::::::::::::::::::::: APPELLANT

VERSUS

ANN ROSE MAGEZI:::::::::::::::::::::::::::::RESPONDENT

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA.

1.0 Introduction

1.1 The appellant through M/S Okalang Law Chambers & Co. Advocates brought this appeal against the judgment and decision of Her Worship Nyamwenge Immaculate delivered on 13/06/2016. Ms. Nassiwa Rose contested the appeal on behalf of the appellant respondent and M/S Okalang Advocates represented the appellant. Both counsel filed written submissions that will partly form the basis of my decision.

2.0 Facts of appeal

The respondent sued the appellant in the lower court in a claim for the recovery of a piece of land measuring four acres situated at Musiima village, Wanyange Parish, Mafubira Sub County, Jinja district (hereinafter referred to as the suit land). The respondent brought the suit on her own behalf as administrator of her late husband's estate, one Daudi Suubi Magezi (herein after referred to as the deceased) and on behalf of her son David Raymond Muzira the co-administrator who gave her general powers of attorney. It was confirmed at the trial that the respondent and other beneficiaries of the deceased's estate enjoyed quiet and peaceful possession of the suit land until early 2007 when the appellant

forcibly entered on the western side of it and destroyed the eucalyptus trees which the respondent/plaintiff had planted to mark the boundary between the suit land and that of the defendant/ appellant. In his defence, the appellant/defendant denied the claim, in particular the encroachment, stating that he was in possession, occupation and utilization of his land which he acquired by way of purchase in 1979. Only the respondent tendered a sale agreement at the trial but it was with reasons, rejected.

2.2 In her decision, the magistrate believed the plaintiff and determined that the suit land belonging to the deceased's estate, extended from the side of Lake View School up to the point where the boundary marks were planted in 2002 under the guidance of its caretaker. She then concluded that the appellant's action to destroy the boundary marks and entering into the suit land without the respondent's consent amounted to trespass.

2.3 Being dissatisfied with that decision, the appellant filed this appeal on the following grounds:-

1. **That the learned trial magistrate failed to properly evaluate the evidence of the lower court thereby arriving at a wrong decision.**
2. **That the whole trial process was biased against the appellant in the lower court and therefore there is no way the appellant could be accorded fair justice.**
3. **That the whole trial process occasioned a miscarriage of justice to the appellant.**

3.0 Duties and mandate of a first appellate court

As the first appellate court I have the duty to subject the evidence presented in the lower court to fresh and exhaustive scrutiny and come to my own independent conclusion. In doing so, I remain mindful of the fact that it is the trial court that had the opportunity to observe, listen and record the evidence at first hand. See for example **Ramkrishan Pandya Vrs R. (1957) EA 336 and Father Nanension Begumusa & 3 Ors Vrs Eric Tibesiga SCCA No. 17/2002 (2004 Kala 236).**

4.0 Reframed grounds of appeal

I discern the appeal to have two points of contention; the manner in which the evidence was evaluated, and the impartiality of the Magistrate.

In my view, the first and third grounds are co-related.

I will accordingly resolve them as one ground which I reframe as follows:-

Ground One

The learned trial magistrate failed to properly evaluate the evidence of the lower court, there by arriving at a wrong decision, which occasioned a miscarriage of justice to the appellant.

4.0 A summary of the submissions

4.1 It was the appellant's bone of contention that the respondent gave evidence in departure of her pleadings and failed to prove ownership of the suit land. Further that it was her testimony that she had sold off a portion of the suit land for Shs. 60,000,000/=, which put into question her allegations that the defendant increasingly extended his trespass onto the land. In their view, the Magistrate failed to properly evaluate the evidence recorded at the locus and instead wrongly resorted to use a popular vote of those who were not witnesses in court, but in favour of the respondent.

4.2 Respondent's counsel responded that the discrepancies between the pleadings and evidence with regard to the appellant's encroachment on the suit land, arose from the fact that the appellant's actions were the result of a continuous trespass, that extended into the life of the suit. She argued further that there was no possibility that the appellant could have purchased the suit land at 19 years and his explanation of how his agreement of sale was lost, were not given or even nonexistent. She further contested the allegations that the trial Magistrate relied on the evidence of one David Muwaza given at the *locus in quo* and concluded that the Magistrate was correct to believe the respondent who showed court boundaries marked out in 2002 in the presence of LCs, neighbours, and the appellant himself.

5.0 My decision

- 5.1 I have perused the record and it is clear that the respondent did not know the size/ boundaries of the suit land or how much was allegedly under encroachment by the appellant. Her claim in the plaint was for the recovery of four acres which would naturally be the portion in contention. She narrated in court that her first visit to the suit land was in 2002. At that visit, the LC representatives were present when she was taken around by the caretakers Ahmed Segujja and Muwaza, along with the appellant whom she admits was a neighbour. She specifically stated that “...*We asked them to show us where they think my land starts and stops and they showed us after taking off some hectares...*” which would mean that she relied on the caretaker’s knowledge of the boundaries. She added that she noticed then that the appellant and caretakers had stolen about 2 acres off the suit land. She was also not satisfied with the boundaries pointed out by the appellant and caretakers, but was none the less persuaded to confirm them by planting boundary marks (eucalyptus and Musizi trees). She did not explain why she doubted the boundaries pointed out to her or how she came to know any alternative boundaries herself. In my view, the only point of certainty at that visit was that the opinions of Segujja and Muwaza about the boundaries of the land were accepted in 2002 and that and the appellant was the respondent’s neighbour.
- 5.2 The respondent confirmed that when she returned in 2006, the appellant’s encroachment had extended to 5 feet (9 sticks) on which he grew cassava and that he had felled the boundary trees. That encroachment grew to 6 hectares and then 16-17 acres which were unsurveyed and for which she was not certain because it was also not surveyed.
- 5.3 Her confusion on the size of the land was abundant in cross examination. She first mentioned an encroachment of 10-15 acres, whose certainty could not be confirmed because it was not surveyed and then changed and claimed it was the entire piece of land. She then contradicted herself on her earlier evidence in chief of the appellant’s ownership when she stated that he was not the deceased’s neighbour during the latter’s life time and therefore the agreement he had attempted to adduce in evidence was fake. She finally concluded that she did not know whether the appellant was a neighbour with respect to

the original 20 acres. I would agree that such wide discrepancies on the size of the land, reflect a departure from her proceedings.

- 5.4 PW2 Byakika Magala Musiime's testimony was not very helpful on the material issue of the appellant's encroachment. As LCI Chairperson, he was present at the respondent's first visit on the land in 2002 and his estimate was that the suit land measured 15 acres with the area in dispute being only 3-5 acres. On the other hand, PW3 Wagabaza James put the land in dispute to about eight acres. However he did confirm the respondent's testimony that at her visit in 2002, she was prepared to take the land within the boundaries shown to her and that what remained, belonged to the appellant.
- 5.5 Significantly none of those present at the inspection in 2002 asked the care takers how they came to conclude that the boundaries given were correct or inquire of the respondent how he had acquired his portion of the land. However, PW3 contradicted the respondent and PW2 by stating that the deceased's land spanned 30 acres of which 22 acres was sold to Lake View. The respondent mentioned a portion of only 10 acres sold to Lake View. I would conclude that PW2 and PW3 did not know the suit land well.
- 5.6 There was inconsistency in the evidence of the respondent not only with regard to the size of the land, but also as regards its ownership. Although PW2 contested the fact that the appellant owned any land in the area by 2006, he contradicted himself in cross examination when he accepted a document bearing his signature in which the appellant/defendant was hiring out the suit land to one Mweriso James in December 2008 and **PW2** himself signed on the document as the chairman LC1. That agreement clearly shows Wanyange girls as a neighbor which would support the appellant's version of the immediate neighbour to his land. On the other hand, PW3 did concede that during the respondent's first visit to the land in 2002, after the inspection was concluded, the appellant laid claim to the residue which was not contested.
- 5.7 In my view, the evidence of the respondent and her witness was seriously contradictory on the issue of the size of what she claimed as the deceased's property, and what belonged to the appellant who she accepted as a neighbour, and how much he had allegedly encroached. Those contradictions were major and should have been interpreted

as misleading or deliberate untruthfulness, liable to be rejected. **See for example Constantino Okwelalias Magendo Vrs Ug SCCA 12/1990.**

- 5.8** On the other hand, the appellant presented a more credible version of his ownership and occupation of adjoining land. He testified that in 2002 he was invited as a neighbour to witness the respondent as the widow, receiving the deceased's land. He moved around with, but did not direct the process and watched as the boundary was mapped out and boundary marks planted, which the respondent accepted.
- 5.9** He narrated that he purchased 14 acres of land at 19 years from one Petero Ochia on 3/7/1979 and quoted his previous and current neighbours. He stated that he was in possession of his portion on which he grew food crops. He produced a copy of the sale agreement which was rightly rejected by the Court for being a copy and with no translation into court language. In my view, it was well explained why an original copy was not available, and it was negligent for his lawyer not to have tendered a translation, which would then have qualified the copy to be an exhibit.
- 5.10** He further testified that although he was not resident there, he has remained in possession of his land since 1979 and had over the years sold out, leased and rented out parts of it to various people, a testimony supported by PW2. He admitted that the deceased and Wanyange Girls were his immediate neighbours.
- 5.11** That evidence was supported by DW3 Byansi Patrick Paul who stated that the appellant rented out land to him in 1986 and later sold him a portion in 2002. He confirmed that the respondent had a fence round her land, which followed boundary marks (probably the ones planted at the first inspection in 2002). It was not clear from the record that the appellant was convicted of removing those particular boundary marks. In fact, it was the respondent's evidence (at page 7 of the record) that the trees (or boundary marks) she found uprooted were on the land that the respondent and caretakers had purportedly divided among themselves. That was the land she had surrendered to them during the inspection of the land in 2002. She would be estopped from re-claiming it and alleging trespass. Counsel Nassiwa's assertion that the appellant's appeal against a conviction was dismissed would be evidence from the bar.

- 5.12 The procedure to be followed at locus in quo was well stated by both counsel. Both counsel appeared to be in agreement that the evidence of Muwaza the caretaker only taken at locus and not in court, should not have been considered. Counsel Nassiwa argued that in fact, the court did not rely on it. I disagree.
- 5.13 Although Muwaza was depicted as one who had most knowledge about the suit land and its boundaries, having never testified in court, he should not have been allowed to give any evidence at the locus. Although the Magistrate appeared not to have relied on Muwaza's evidence, she considered the fact that the defendant had not disputed the boundaries mapped out by Muwaza in 2002 and again, when Muwaza pointed them out at locus. It cannot be ruled out that Muwaza's evidence and evidence of other people who argued against the opinion of Muwaza but agreed with the Chairperson LC.I, did influence the decision of the Magistrate.

To quote the Magistrate,

“Since the plaintiff and Defendant and the rest of the people relied on what was being showed to them by the caretakers and at the locus visit the surviving care taker showed court a boundary different from that of the Defendant i.e running across the suit land, and this was done in the presence of the Defendant both in 2002 and when court was for locus visit but the defendant did not dispute it, I have no choice but to believe that the suit land extends from the side of Lake View School up to the point where the boundary mark were planted in 2002 under the guidance of the care takers. That at locus visit the plaintiff plus most of the people who were present argued against the boundary showed by David Muwaza, they however agreed with the one showed by the Chairman LC1 that passed a Lukone tree up to Wanyange Girls. With all these facts, I find that the suit land was owned by the late Magezi of which now forms part of his estate and is claimed by plaintiff as administrator.”

- 5.14 In summary, clearly the boundaries as set by Muwaza in 2002 (which he again attempted to show the Magistrate at the locus in 2002) were considered by the Magistrate in her final decision. The respondent failed on a balance of probabilities to prove the boundaries of the suit land under her claim. She also failed to prove the extent if any, of the

respondent's encroachment who she acknowledged as her immediate neighbour. Since the evidence of Muwaza, (who was known to have had knowledge of the boundaries in 2002) was not presented to court, there would be no basis for the court to believe the boundaries showed by the LCI Chairperson at the locus. That evidence was even adulterated when the Magistrate considered evidence of "... *most of the people who were present...*" to confirm the Chairperson's evidence.

I would conclude that the trial Magistrate wrongfully evaluated the evidence which resulted into a wrong decision and a miscarriage of justice.

Ground one accordingly succeeds.

6.0 Ground 2:

That the whole trial process was biased against the appellant in the lower court and therefore there is no way the appellant could be accorded fair justice.

6.1 In the absence of any statutory definition of bias, recourse is had to Black's Law Dictionary 9th edition at page 183 which defines bias as inclination, prejudice or predilection. It was held on **Baryaruha v Attorney General (Miscellaneous Cause No.149/2016) [2019] UGHCCD 67 (29 March 2019)**; that bias may be actual or implied.

6.2 The test of whether there was bias is whether a reasonable person in the possession of the relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way. See **HCCA-128/2011Seyani Brothers & Co. Ltd Vs Cassia Limited (at page 4)**.

6.3 The commentary on the Bangalore Principles (at p.56 and para. 60) **(Quoted by Justice Mulyagonja in Shell (U) Ltd & Ors Vrs. Rock Petroleum (U) Ltd M/A 645/2010 (No. 1)**. Further lists conduct or attitudes that may **not** be construed as bias as follows;

"A judge's personal values, philosophy, or beliefs about the law, may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding. Opinion, which is acceptable, should be distinguishable from bias, which is unacceptable. It has been said that 'proof

that a judge's mind is a tabula rasa (blank slate) would be evidence of a lack of qualification, not lack of bias' Judicial rulings or comments on the evidence made during the course of proceedings also do not fall within the prohibition. Emphasis of this court.

6.4 Counsel for the appellant argued in his submissions that the Magistrate in her judgment was biased as her stated that that all the parties did not have documentation to prove ownership of the suit land, yet the appellant had tendered in a photocopy of the sale agreement and an affidavit deponed by the person who lost the original. Also that her statement in the judgment that the affidavit and agreement were falsified, alluded to fraud which was neither pleaded nor proved. Further that although the Magistrate himself was in doubt as regards the actual boundaries of the plaintiff, she still went ahead to conclude that the suit land belonged to the plaintiff and the defendant who was in active possession, was in trespass, showed bias on his part.

6.5 I do agree and have already found that some of the Magistrate's findings were not supported by the evidence presented. Contrary to his decision, the appellant did adduce an agreement of sale which was rightly rejected on a technicality. Again, there was no evidence adduced to support her decision that the agreement of sale and affidavit of Sebowa were forged. Appellant's counsel concluded that those conclusions pointed to bias. I disagree.

Much of what was said and concluded by the Magistrate was as a result of her evaluation of the evidence, as part of the proceedings. This is excluded from bias. Having a contrary view would result into every losing party to consider a decision against them as an act of bias by a Judicial officer. Proceedings and decisions of judicial officers would as a result loose meaning.

Ground two accordingly fails.

7.0 Conclusion:

7.1 In the end result and for reasons given herein this judgment, this appeal succeeds in one part. The findings and judgment of the Magistrate GD 1 is set aside. The appellant is entitled to one half of the costs on appeal and the costs of the lower court.

I so Order

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EVA K. LUSWATA
JUDGE
DATED 8/5/2019