

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO.048 OF 2019

(Arising From Kagadi Civil Suit No.001/2015)

KATABARWA GORRET:.....APPELLANT

VERSUS

BARONGO FRANCIS:.....RESPONDENT

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] This is an appeal by **Katabarwa Gorret**, the plaintiff/Appellant, against the decision and orders of **H/W Niyokwizera Emmanuel**, Magistrate Grade 1, Kibaale Chief Magistrates' court at Kagadi, dated **18th/09/2019**.
- [2] The brief facts of the appeal that the plaintiff/Appellant sued the defendant/Respondent in the lower court for a declaration that the plaintiff is the rightful owner of the suit land, a declaration that the defendant is a trespasser thereon, a demolition order, a permanent injunction, general damages, mesne profits, an order for vacant possession and costs of the suit.
- [3] It was the plaintiff's case in the court below that she is the rightful owner of land **measuring 150 x 70 ft located at Mabaale Trading Centre, Katonzi village, Mabaale sub-county, Kbaale District** having acquired the same by way of a gift inter vivos in 1998 from a one **Yozefina (Josephine) Katabarwa**, the appellant's mother, and a document/agreement was executed, witnessed by a one **Aloni Karubanga** which was admitted to that effect.
- [4] The plaintiff averred that in 1998, she built a residential house on the suit land in 1998, and has been in occupation since then until 2014 when the defendant trespassed onto her land by digging and constructing a house foundation thereon.
- [5] The defendant on the other hand denied the plaintiff's claims and contended that he has never trespassed on the suit land as alleged by digging a foundation thereon. He contended that the suit land belonged to his mother **Nagayi Mary**, an auntie to the plaintiff. He

contended therefore that he would raise a preliminary objection to the effect that the plaintiff sued a wrong party.

[6] The trial magistrate heard the case and found that the suit property did not belong to the plaintiff, that it belonged to the defendant's mother **Mary Nagayi** and therefore, the defendant was not a trespasser. The suit was dismissed with costs to the defendants.

[7] The plaintiff/Appellant being dissatisfied with the decision and orders of the trial magistrate filed an appeal to this court on the following grounds as enumerated in the memorandum of appeal.

- i. *The trial magistrate erred in law and fact in failing to evaluate the agreement between **Josephine Katarwa** (mother to the appellant) and **Katarwa Gorret** (Appellant) thus occasioning a grave miscarriage of justice.*
- ii. *The learned trial magistrate erred in law and fact when he held that the respondent/defendant was not a trespasser on the suit property yet he is the one who is constructing on the same.*
- iii. *The learned trial magistrate erred in law and fact when he relied on the testimony of DW3 that the said plot was given to the appellant and DW2 to share yet the same was not in the agreement made to the appellant hence reaching a wrong conclusion.*
- iv. *The trial magistrate erred in law and fact when he visited the locus in quo and failed to establish that the plaintiff's/appellant's 50 x 100ft is not fully used by her as alleged and it's the same where the building materials were ferried hence reaching a wrong decision.*
- v. *The learned trial magistrate erred in law and fact when he failed to rely on the appellant's /plaintiff's agreement marked as PEX 1 in his judgment which occasioned a miscarriage of justice.*
- vi. *The trial magistrate erred in law and fact when he accorded costs to the defendant yet it is a family issue of sister and brother, leading to a miscarriage of justice.*

Counsel legal representation

[8] At the hearing of this appeal, the Appellant was represented by Counsel **Kasangaki Simon** of M/s Kasangaki & Co Advocates, Masindi, and the Respondent was represented by Counsel **Emmanuel Uswama** of M/s P. Wetaka Advocates, Mukono.

Duty of the Appellate court

- [9] As correctly submitted by counsel for the Appellant, the law governing first appeals like the instant one is well settled. The duty of the first appellate court is to evaluate the evidence on record for itself in order to determine whether the decision of the trial court should stand. In so doing, court must bear in mind that an appellate court should not interfere with the discretion of a trial court unless it is satisfied that the trial court, in exercising its discretion, misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result there has been a miscarriage of justice; **STEWARDS OF GOSPEL TALENTS LTD Vs NELSON ONYANGO H.C.CIVIL APPEAL No. 14/2008**, See also **N.I.C Vs MUGYENYI [1987] HCB 28**.
- [10] This being a first appellate court, it has a duty to re-evaluate the evidence adduced before the trial court as a whole by subjecting it to fresh and exhaustive scrutiny and then draw its own conclusion of the facts and determine whether on the evidence, the decision of the trial court should stand; **PANDYA Vs R (1957) EA 336**, See also **SELLE & ANOR Vs ASSOCIATED MOTOR BOARD CO.LTD & ORS (1968) EA 123**.

Preliminary Objections

- [11] In his submissions, counsel for the Respondent/defendant raised the following preliminary objections of which the way I understood them, are as follows:
- 1) That grounds 2,3,4, & 6 in the appellant's written submissions are argumentative and are in contravention of the law, **O.43 r.1(1) and (2) CPR** which provides that an appeal to the high court be presented by a **memorandum of appeal** and that the **memorandum of appeal** shall set forth concise, under distinct heads grounds of objection without argument or narrative. That the grounds are in contravention of the law, the consequence of which is that they be struck out.
 - 2) That grounds 2,3,4,5 and 6 in the appellant's submissions are a departure from the Appellant's memorandum of appeal and that as a result, they be expunged from the record or otherwise be struck off record. He relied on the authority of **ISINGOMA ABUBAKER Vs UGANDA CRIM. APPEAL No.74/2018(CA)** where it was held that the Appellant's submissions should relate to the grounds of the appeal set

out in the filed **memorandum of appeal**. That also **O.43 r 2(1) CPR** is instructive in that it prohibits the Appellant from arguing any other grounds not indicated in the memorandum of appeal without leave of court.

- [12] In his submissions in rejoinder, counsel for the appellant as regards the 1st preliminary objection maintained that all the six grounds as clearly set out in the memorandum of appeal dated 4/10/2019 which was served upon the Respondent confirmed to the requirements set out in **O.43 r.1(2) CPR**.
- [13] Upon perusal of the grounds of appeal, as argued in the submissions of counsel for the Appellant and as contained in the memorandum of appeal on record dated 4/10/19, I found that it is true that the grounds are argumentative and narrative to the extent that they raised and argued evidence and the exhibits instead of being concise, distinct grounds of objections to the decision appealed from without any argument or narrative thus offending **O.43 r.1(2) CPR**.
- [14] In **KITGUM DLD Vs LAMWO DLG H.C.CIVIL APPEAL No. 08 OF 2015(GULU)**, Justice Mubiru had this to say;
“A ground of appeal must only state the objection to the decree without any argument or narrative. Although there is no maximum requirement as to the length or the fullness of detail of a ground of appeal, the argumentation which is necessary for the objection to the decree should be reserved for the written or oral submissions. To include justifications, elaboration or illustrations of the objection in the ground itself risks introducing argument or narrative into the ground.”
- [15] In **NYERU JEMA & ANOR Vs ANJELLA OBINA & 4 ORS H.C.CIVIL APPEAL No.50/18[2020 UGHC161]** when once again faced with grounds of **O.43 r.1(1) and (2) CPR**, Justice Mubiru observed thus;
*“That should have been the end of the appeal but I consider the general duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal to override the short comings of this nature of pleadings...in a bid to do substantial justice rather than uphold mere technicalities. By virtue of **Article 126(2) (e) of the Constitution of the Republic of Uganda, 1995**, courts are to administer substantive justice without undue regard to technicalities. It is thus*

not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds.”

- [16] In the instant case, the memorandum of appeal was drafted by the Appellant in person without aid of counsel, similarly in the court below, she was not represented by any counsel. It is trite that the general principle is that the rules of procedure are intended to serve as hand maidens of justice not to deter it; **IRON & STEEL WARES LTD Vs C.W. MARTYR & CO [1965] 23 EACA 175 at 177**. In a deserving case, the court may rightfully exercise its discretion to overlook the failure to comply with rules of procedure, upon such conditions as it may deem fit intended to guard against the abuse of its process.
- [17] In view therefore of the provisions of **Article 126(2)(e) of the Constitution** which dictates that we administer substantive justice, I find the present matter as such, that require this court to proceed and entertain the merits of the appeal on the basis of the offensive grounds of appeal.
- [18] As regards the 2nd preliminary objection, counsel for the Appellant insisted that it is not true that the Appellant submitted a ground not in her memorandum of appeal.
- [19] Indeed, I have not been able to appreciate counsel for the Respondent's objection on this point. On perusal of the memorandum of appeal on record dated 4/10/19 and the appellant's submissions, I find no discrepancy at all, the Appellant is consistent in her grounds of appeal. It is instead the Respondent's counsel who submitted on alien grounds of appeal. It is not clear as to what or whose memorandum of appeal counsel for the respondent based his submissions especially his grounds 2-4 as enumerated in his submissions. They are not in line with the grounds set out in this appeal. This court would be justified not to consider them while determining the appeal.
- [20] In the premises, I find this preliminary objection frivolous and I reject it accordingly and proceed to entertain and determine this appeal on its merits.

Consideration of the merits of the Appeal

[21] This court shall consider grounds 1,2,3 and 5 together because they all relate to the way the trial magistrate evaluated the evidence before him.

Grounds 1, 2, 3 and 5; Evaluation of evidence

- [22] The determining issue for this appeal is whether the plaintiff was the lawful owner of the disputed plot of land. Counsel for the Appellant submitted that the plaintiff(PW1) testified that the suit plot was given to her by her mother **Josephine Katarbarwa** who also testified as **DW3** and she has a formal agreement (**P.Exh.I**) to that effect which **DW3** never denied. It bore the size of the plot given to her as **150 x 70ft** which the trial magistrate ignored.
- [23] The salient features of the plaintiff's (PW1) evidence are that on 20/3/1998, her mother **Josephine Katarbarwa** (DW3) gave her a plot of land measuring **150 x 70ft**. A document to that effect was executed and witnessed by the village council 1 chairperson **Mr. Aloni Karubanga**. She took occupation and constructed thereon a house and has been in occupation to date. Then in 2014, the defendant and or his mother **Mary Nagayi** (DW2) who is a sister to the plaintiff's mother poured building materials on the plaintiff's plot and commenced construction of a house to foundation stage.
- [24] Both the plaintiff's mother **Josephine Katarbarwa**(DW3) and her sister, the defendant's mother **Nagayi Mary**(DW2) testified admitting severally that building materials were poured on the suit plot and that the plaintiff's mother **Josephine Katarbarwa**(DW3) gave the plaintiff that plot of land where she constructed her house.
- [25] It is however apparent that the suit plot is comprised of a bigger piece of land on which the plaintiff's mother (DW3) also gave the defendant's mother (DW2) a portion. No evidence was however led by the defendant or DW2 as regards what size she was given.
- [26] The trial magistrate on his part observed that the document upon which the plaintiff's mother gave her the suit plot (**P.Exh.I**), was not translated in English. I think this was not correct. On record there is an English translation of the **P.Exh.I** that was done by a one **Byekitinisa Franklin** who professed to be well conversant with both Runyoro and English. It is therefore not clear as to why the trial

magistrate made such unfortunate observation that **P.Exh.1** from which the plaintiff derived her interest which was on record was not translated into English yet he allowed it to be exhibited! The fact that he allowed it to be exhibited is proof that indeed, its English translation was available as the language of court.

- [27] The trial magistrate at p.3 of his judgment established that the plaintiff was given land by her mother but then observed that when the mother of the plaintiff(DW3) testified, she revealed that she gave the plaintiff a plot of land measuring 50 x 100ft (not 150x 70ft as per **P.Exh.1** which she authored) and that the portion which had the foundation of a house belonged to the mother of the defendant.
- [28] It is my view that the trial magistrate misdirected himself on this aspect. DW3's evidence was at variance with **P.Exh.I** which conferred the plaintiff a plot of land measuring **150 x 70 ft**. DW3 never disputed **P.Exh.1**. The trial magistrate did not address himself to **P.Exh.I** presumably because, he had already gotten a misconception that it had not been translated into English, the language of court which as I have already observed, was erroneous.
- [29] As correctly put by counsel for the Appellant, oral evidence of DW3 could not be accepted to vary the written document she authored that conferred to the plaintiff the plot of land measuring 150 x 70ft; **Sections 91 & 92 Evidence Act**. See also **DSS MORTORS LTD Vs AFRI TOURS & ANOR H.C.C.S No.12 OF 2013** where it was held that the parol evidence rule is to the effect that;
"evidence cannot be admitted and that even if admitted it cannot be used to add, to vary or contradict a written instrument."
- [30] It follows therefore, that in the instant case, the trial magistrate erred in law and fact when he used the oral evidence given by **DW3** to the effect that the suit plot belonged to the defendant's mother to vary the documentary evidence contained in exhibit **P.Exh.I** which was to the effect that DW3 gave the plaintiff/Appellant the suit plot measuring **150 x 70ft**. The documentary evidence, **P.Exh.I** as adduced by the Appellant was conclusive proof that the Appellant was the lawful owner of the suit plot measuring **150 x 70ft** and the claims by DW3, that she gave the Appellant a plot of **100 x 50ft** and claims by DW2 that **P.Exh.I** was only intended to enable the plaintiff acquire a loan, are not backed by any evidence.

[31] In conclusion, grounds 1,2,3, and 5 of the appeal are allowed. The plaintiff/Appellant was the lawful owner of the disputed plot of land.

Ground 4. The Trial magistrate erred in law and fact when he visited locus and failed to establish the Appellants 50 x 100ft is not fully used by her as alleged and it is the same where the building materials were ferried hence reaching a wrong conclusion.

[32] Counsel for the Appellant referred this court to the authority of **MUKASA Vs UGANDA [1964] EA 698 at 700** where Udo Udoma C.J (as he then was) observed that,

"A view of a locus in quo ought to be, I think is to check on the evidence already given and where necessary, and possible, to have such evidence ocularly demonstrated in the way a court examines a plan or map or some fixed object already exhibited or spoken in the proceedings."

[33] In the instant case, the trial magistrate having visited the locus, it was incumbent upon him to examine whether the ferried building materials were in the plaintiff's plot measuring **150 x 70ft** and record his observations.

[34] In the instant case, the trial magistrate failed that duty. This ground of appeal also succeeds.

Ground 6. The trial magistrate erred in law and fact when he accorded costs to the Respondent yet it is a family issue of sister and brother leading to a miscarriage of justice.

[35] Counsel for the Appellant submitted that courts have discretion whether or not to award costs and against which parties and in deciding this issue, court is guided by the provision of **Section 27(1) CPA** which confers upon a judge, the discretion and full power to determine by whom and out of what property and to what extent costs incident to all suits are to be paid, and to give all necessary directions for that purpose. That despite this very wide discretion and the general rule of our law, special circumstances may justify the avoidance of costs to the parties in a suit.

[36] I agree. In the instant case, the plaintiff is a cousin sister to the defendant, the mother of the defendant being a sister to the plaintiff's mother. This kind of relationship amounts to special circumstances which may justify avoidance of costs to the parties ~~to~~ the suit.

As a way to promote reconciliation between the parties therefore, the trial magistrate ought to have ordered that each party bear his or her costs.

[37] In the instant case, the trial magistrate dismissed the plaintiff/appellant's case with costs to the defendant/Respondent. In such a family issue, I find that this was an error on the part of the trial magistrate leading to a miscarriage of justice.

[38] In the premises, all the grounds of appeal succeed. The appeal is accordingly allowed and the orders of the lower court are set aside and are substituted with the orders that the plaintiff is the rightful owner of the suit land, the defendant is a trespasser and a permanent injunction issues restraining the defendant, his agents or **Mary Nagayi** and anybody claiming interest from them from trespassing on the suit land. An order for vacant possession of the suit therefore issues with no order as to costs.

No orders are made as to general damages and mesne profits; no evidence was led in the lower court to support them.

Dated at Masindi this 6th day of Dec, 2021.


.....
Byaruhanga Jesse Ruyema

JUDGE.

6/8/21

Appellant absent.

Respondent present.

Mr. Phengene Wilfred of counsel
Pham & Ormerod & Co
Lagos.

Mrs. Kasyari of the Appellant
represented by the Appellant