

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 30 OF 2019
ARISING FROM CIVIL SUIT NO. 025 OF 2016

NAGGAYI JANE ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

LWANGA ROBERT ::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Appellant instituted Civil Suit No. 25 of 2016 against the Respondent on an action for trespass on her kibanja, seeking a declaration that she is the rightful owner, permanent injunction, general damages and costs of the suit. The Appellant's case is that in 1995, the late Lawrence Bamugema bought the suit kibanja measuring approx.. 2 acres at Buligo from one Peter Lubega vide agreement dated 19th June 1995. The Appellant and her late husband started using the kibanja from 1995 without interruption until 2015, when the Respondent came up with the claim that he owns the kibanja and brought a surveyor to mark of boundaries during which process he destroyed the Appellant's crops.

In his Written Statement of Defence and counter claim, the Respondent denied the claim and averred that he bought his kibanja from the late Kaala Green who was the registered proprietor of the kibanja which came to be known as Ssesse Block 51 Plot 20. He bought the kibanja on the 16th day of April 2004 and took possession thereafter. The Appellant's kibanja is situate on Ssesse Block 51 Plot 16 which is different from the Respondent's kibanja and this was determined at a mediation exercise where it was found that the Respondent is the rightful owner.

The Plaintiff PW1 stated in her evidence that her late husband Lawrence Bamugema bought the suit kibanja from one Peter Lubega sometime in the 1990s. They bought the suit kibanja and took possession and in 2015, the Respondent's wife called her and informed her that part

of the suit land belonged to them. After two days, the Respondent cut down her plantations and encroached on her kibanja and in 2016 he planted crops thereon. She reported the matter to the LC in 2016. The kibanja neighbors the Respondent to the south, Kaganga to the north, the late Jane to the east and Najjemba to the west. The Defendant has been her neighbor for over twelve years.

PW2 Joseph Kato Miyonga confirmed the evidence of PW1 and stated that he was informed of the sale by the Appellant's late husband and that the entire suit land was brought by his brother, the Appellant's late husband.

PW3 Herman Nsalabwe stated that he used to see the Appellant and her husband cultivating on the land and he always knew that it belonged to them. It was also his evidence that the kibanja borders the late Jane to the north, the late Kaganga to the south, the late Petero Mukubajinja and Najjemba to the East, Naggayi to the West.

That was the Plaintiff's case.

In his evidence DW1, the Respondent stated that he bought his kibanja measuring approx. 1.90 decimals from the late Kaala Green in 2004 and he was informed that his kibanja was neighboring that of Petero Lubega's kibanja situate on Kezironi's land. At the time, the Appellant and her husband were occupying a small piece of Kibanja neighboring his kibanja on Byantuyo's land. He then gave the kibanja to his mother Namutebi Peruth who used it for cultivation until her death in 2013. In 2014, he discovered that the neighbors including the Appellant had encroached on his land and after conducting a survey he informed them and warned them to stop.

DW2 Jaato William stated that he was the LC1 Chairperson of Buligo in 2014 and that the land of the late Bamugema is approx. 2 acres. He was informed by the late Kaala of the transaction with the Respondent and he knows the boundaries to the late Kaala Green's land.

That was the Defendant/Respondent's case.

In his judgment, the trial Magistrate found that the sale agreement for the Appellant's late husband did not show whether he was the buyer and for that reason he could not consider it. He also found that Lubega Peter did not acquire good title from Ssemakula Lasto as the sale was illegal for the reason that Ssemakula Lasto did not own the kibanja and was simply a caretaker. The trial Magistrate further observed that the Plaintiff's land falls on a different title from the Defendant's land and held that the proper purchaser of the land in dispute is the Defendant. The trial Magistrate upheld the Defendant's counter claim and dismissed the suit with costs.

Being dissatisfied with the judgment of the trial court, the Appellant filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and held against the weight of the evidence that the suit kibanja belonged to the Defendant yet the Plaintiff had been in prior occupation as a kibanja owner;
2. The learned trial Magistrate erred in law and fact when he deviated from the issue of ownership of kibanja interest and proceeded to determine ownership of registered land;
3. The learned trial Magistrate erred in law and fact when he allowed the defendant to proceed on a counterclaim introduced in an amendment to the written statement of defence.

Both Parties filed written submissions.

Counsel for the Appellant submitted on ground three that the amended Written Statement of Defence be struck off the record because the law does not allow introduction of a counterclaim in an amended defence where there was none in the Written Statement of Defence. He made reference to the case of *Rubarekyera James Vs. Geoffrey Rwanyamuzira & 2 others CS No. 67 of 2015 (unreported)*.

Counsel argued grounds two and three concurrently and submitted that the issue to solve by the trial court was now of ownership but rather boundaries of the Plaintiff's kibanja since the land was not registered. Counsel further argued that the Plaintiff proved her case on a balance of probabilities that she had been in prior occupation of the kibanja and knew its boundaries yet the Defendant did not adduce evidence ascertaining the boundaries of the kibanja he was purchasing. Counsel prayed for the appeal to succeed.

Counsel for the Respondent raised a preliminary objection that the Appellant did not have capacity to institute the suit since she did not state that she was suing as a beneficiary and neither did she have letters of administration. Counsel relied on *Sections 180 and 191 of the Succession Act* along with decided cases on capacity to sue on a deceased's estate. On ground three, counsel argued that the counter-claim filed was a separate suit on its own and not an amendment of the WSD and further that proceedings in Magistrates Courts are governed by *Order 6 Rule 27* which gives powers to the Magistrate to direct on further pleadings on trial.

It was also Counsel's submission that the trial Magistrate properly evaluated the evidence on record by considering the Appellant's evidence in PEXH1, the sale agreement and relying on the survey report which showed that the Appellant was trespassing on the Respondent's kibanja. Counsel further argued that the joint survey conducted by the surveyor who was appointed by the Parties was sufficient in proving that the Appellant was trespassing and further that the Appellant's evidence was full of inconsistencies about who her landlord is yet the court established that the suit kibanja is Kaala's land which the Respondent purchased.

Determination of the appeal:

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. (*See: Fredrick Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997; Banco Arabe Espanol v.*

Bank of Uganda, S.C.C.A No. 08 of 1998.) With this duty in mind, I proceed to consider the grounds of appeal.

I will resolve the grounds of appeal in the same order as they were argued by Counsel for the Parties.

Ground three; The learned trial Magistrate erred in law and fact when he allowed the defendant to proceed on a counterclaim introduced in an amendment to the written statement of defence.

I have carefully perused the record and it is apparent that the Respondent amended his Written Statement of Defence and in the amendment, introduced a counter-claim. Counsel for the Appellant faults the trial Magistrate for allowing the defendant to proceed on a counterclaim introduced in the amendment.

The rules of procedure are very clear on filing written statements of defence and counter-claims. The Defendant is required to file a counter-claim in their defence as it is a separate suit. Counsel for the Respondent has rightly argued that a counter-claim is a separate suit but failed to address the law of filing counter-claims.

Order 8 Rule 2 of the Civil Procedure Rules provides that a Defendant may set off or set up by way of counter-claim. In the instant case, there was no counter claim in the defense filed on the 19th day of October, 2016 and yet it was introduced in the amendment of 7th November, 2016.

A counter-claim should be filed and responded to by the Plaintiff within 15 days. If the original defence does not include a counter-claim, the Defendant is at liberty to apply for leave to file a counter-claim out of time. This was not done in the instant case.

Counsel for the Respondent seeks to rely on Order 6 Rule 27 of the Civil Procedure Rules which gives guidance on institution of suits in Magistrates Courts. It is to the effect that suit may be instituted by lodging a complaint. This is an alternative way providing for suits instituted in Magistrates Courts. This provision does not bar the applicability of other

provisions where suits are instituted by Plaintiff. Needless to say, the provision is specific to institution of suits and not amendments.

It is therefore my finding that the trial Magistrate was wrong to allow the Respondent to proceed on a counter-claim which was introduced in an amendment without leave of court to file the same out of time.

Ground one therefore succeeds.

Ground two; The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and held against the weight of the evidence that the suit kibanja belonged to the Defendant yet the Plaintiff had been in prior occupation as a kibanja owner;

Ground three; The learned trial Magistrate erred in law and fact when he deviated from the issue of ownership of kibanja interest and proceeded to determine ownership of registered land;

I have carefully considered the evidence of both Parties. Counsel for the Appellant argued that the trial Magistrate did not need to inquire into the ownership of the registered land and he further sought to rely on the evidence that the Appellant had been in possession for over twenty years to assert that she owns the suit kibanja.

Kibanja holders derive their interests in the kibanja from their landlords and owners of the registered land. It was not an error for the trial magistrate to consider the history and ownership of the registered land on which the suit kibanja is situated in order to establish the true owner of the same.

The evidence of the Appellant is that her husband bought the suit kibanja from one Peter Lubega and she adduced an agreement to that effect. The Respondent on the other hand adduced evidence that he bought his kibanja from one Kaala Green. I have established from the two sale agreements that the kibanja bought by the Respondent was neighboring land belonging to one Peter Lubega. It is not in dispute that the Parties were neighbors which is why the gist of the case is trespass.

It was therefore important for the court to establish clear boundaries for the bibanja belonging to the Parties. The trial Court ordered for a survey to be conducted which was done and the survey report in CExh (a) shows that both Parties hold Bibanja although the Appellants kibanja was on two different plots 16 and 20 and the Respondent's kibanja is on Plot 16 registered to a one Byantuyo.

It was the Respondent's evidence that the Appellant and her husband owned a kibanja next to his on Byantuyo's land. This evidence was corroborated by the survey Report.

Furthermore, the Respondent adduced evidence of mediation proceedings showing that it was found and agreed that the suit kibanja belongs to him at which proceedings the Appellant was party. I find that this evidence was sufficient to prove that the Respondent is the true owner of the suit kibanja and the trial magistrate was right to hold so.

The Appellant should maintain her kibanja situate on Plot 16 and the Respondent should maintain his kibanja situation on Plot 20.

In the result, this appeal succeeds in part regarding ground three of the counter-claim. The award of general damages of Ugx. 5,000,000/= is hereby set aside.

Grounds one and two have succeeded and as such, the Appellant's claim against the Respondent fails and is hereby dismissed. Since the appeal has succeeded in part, I make no orders as to costs in the appeal. The Respondent maintains the award of costs in the trial Court.

I so order.

Dated at **Msaka** this 22nd day of October, 2021

Signed;



Victoria Nakintu Nkwanga Katamba
Judge