THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 59 OF 2019

ARISING FROM CIVIL SUIT NO. 159 OF 2013

DDAMULIRA ALOYSIUS :: APPELLANT

VERSUS

NAKIJOBA JOSEPHINE :: RESPONDENT

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Respondent instituted Civil Suit No. 159 of 2013 against the Appellant, on a claim for trespass seeking a Permanent Injunction, a declaration that the Appellant is not entitled to the disputed land measuring 5 acres, declaration that the disputed land was given to the daughters of the late Joseph Katende, intervivos, general damages and costs of the suit. The Respondent/Plaintiff`s case was that she is one of the five daughters of the late Joseph Katende. The late Joseph Katende left behind ten acres of land at Luwoko village, Kitanda sub-county, Bukomansimbi district, and before his death, he distributed the said land equally into two parcels of 5 (five) acres each between his daughters and sons. In November 2013, the Appellant/Defendant without a lawful claim of right trespassed onto the Respondent`s portion of land and constructed a permanent house thereon.

In his Written Statement of Defence, the Defendant denied the claim and stated that he occupies three acres of the land which he inherited from his late father Leonard Ssemakula son of the late Joseph Katende, and one acre which passed to himself as the caretaker and heir to the late Joseph Katende`s Kibanja comprised in Kiggya.

The Plaintiff`s case opened for hearing on the 10/6/2012 with the Plaintiff`s testimony in which she stated that she sued the Defendant for trespass onto her kibanja (5 acres out of her late father Joseph Katende's land given to the female children). She is the

Administrator to the late Joseph Katende`s estate and letters of administration were tendered into evidence and marked PEX1. Her deceased father left 10 acres of land; 5 acres (for the girls) were given to her and the other 5 acres (for the boys) to Leonard Semakalu. Certificate of title for the land comprised in Block 104 Plot 20 registered in the Plaintiff`s names as administrator was admitted as PEX2. She is in the process of parceling off the 5 acres and the land was surveyed in 2011. The Defendant trespassed in 2011 after the survey and removed the mark stones, constructed a house thereon and parceled off the coffee and banana plantations.

PW2 Mukuubi Isa Chairperson LC1 testified that the Plaintiff`s father left 10 acres of land, 5 for the girls and the other 5 acres for the boys. The boys 5 acres were occupied by Semakula Leonard. The defendant is entitled toa share in his father's estate. The land was still together but the Plaintff made demarcations and the Defendant constructed on the part owned by the girls and cut down the banana plantation. He visited locus as a member of the clan to sit with the LC and try to resolve the dispute between the Defendant's father and the Plaintiff. After the Defendant`s father's death, the defendant took over as heir. There are demarcations on the land separating the parties.

PW3 Ssemambo Yazid testified that the Defendant is his grandfather by lineage. His evidence is that: The late Joseph left 10 acres of land which he divided before his death between his daughters and sons with the boys getting 5 acres and the girls getting 5 acres. The deceased told him about the division of the land. There was a dispute between the Plaintiff and the defendant`s father but it was settled and mark trees (Biwanyi) were planted. Part of the disputed land is on Semakula's side with burial grounds. The mark trees were uprooted by the Defendant. The disputed land is not the one with burial grounds. The Defendant's construction is not on Semakula`s portion.

PW4 Namakula testified that the Defendant had built in the Plaintiff`s part which the Plaintiff had shared from as a girl. The plaintiff got the land from her late father when he was distributing for his daughters and sons. The late Nakasola called a meeting to distribute his property and made a document like a Will that was for distribution of the properties but

the meeting never sat. He showed her the land and the boundaries for the girls and boys. The boys were given the portion going to the graveyard. The girls got 5 acres and so did the boys. After sharing, each used their own portions. Plaintiff is using her portion but part of it is being used by the Defendant claiming that he is heir to the late Ssemakula. The defendant's father was cooperating with the plaintiff during his life time. There are boundary marks between the portions.

That was the Plaintiff`s case.

DW1 Kato Vincent testified that the Defendant is the heir to the late Semakula and inherited the suit land. The land in dispute was distributed by Nakasola and he left the disputed kibanja as ancestral burial grounds. Semakula is heir to Nakasola and that is why the Defendant claims the burial grounds to be his. He was present when Nakasola was distributing his properties and he is the clan head. He distributed Semakula's properties and the part in dispute had been distributed to Semakula as heir by Nakasola and he distributed it to the defendant as Semakula`s heir.

DW2 the defendant stated that the late Nakasola left 2 portions of land undistributed. One acre with Coffee, and another with burial grounds. The acre for burial grounds was given to the defendant`s as heir of Nakasola. The plaintiff wanted to distribute the portion with burial grounds but the clan decided that it is Semakula's grounds. Semakula died in 2012 and the land was given to the defendant as his heir.

DW3 Sekiwunga Tadeo stated that the Plaintiff had a dispute with the Defendant`s father over a portion of their late father`s land. The Plaintiff was disputing over the portion that was handed over to Semakula to care take it as family land. It is the same portion in dispute because the defendant is heir to Semakula. The late Joseph left 2 portions of land undivided. A meeting was held and they divided between the plaintiff and defendant's father. The portion with burial grounds was given to the Defendant`s father and it is the portion in dispute. At the time of distribution, no one had obtained letters of administration. It is not true that the defendant constructed a house beyond his kibanja.

DW4 testified that the late Katende left one acre as burial ground for his family. Before his death, the late Katende gave out 3 acres to the defendant`s father, 2 acres to the Plaintiff and he remained with 2 acres one for cultivation and another as burial grounds. After his death, the acre for cultivation was divided between the Plaintiff and Semakula, and the burial grounds were handed to Semakula as heir. DID1 was executed to this effect.

The trial Court visited locus on the 27/4/2017. The plaintiff showed court the boundaries between the daughters' land and the sons' land, and the defendant's house which she claims is encroaching on her land. The Defendant stated that the house is on the portion of ancestral grounds. PW1 stated that the late Joseph divided his 10 acres and gave the boys 5 acres including the grave yards. Court observed that the defendant's house is on the portion alleged to be for the girls, the house of the late Joseph is on the boys' side, grave yards behind that house. The Plaintiff stated that the ancestral burial grounds were on the side of the boys.

In her judgment, the trial Magistrate framed two issues for determination.

1. Whether the defendant is a trespasser on the suit land
2. What remedies are available to the parties

The trial Magistrate relied on evidence as observed at locus that the defendant`s house encroached on the Plaintiff`s land and found that the plaintiff proved her case to the required standard that the defendant trespassed on her land.

Being dissatisfied with the trial Magistrate's judgment, the Defendant appealed to this court on the following grounds;

1. That the learned trial Magistrate erred in law and fact when she declined to visit locus in quo to ascertain the actual facts of the land in dispute.
2. That the Magistrate misdirected herself on the law and fact and reached wrong decisions.

3. That the learned Magistrate erred in law and fact when she failed to properly evaluate the evidence adduced by the appellant that the Appellant has a house on one acre.

Both parties filed written submissions and they are on the record.

Counsel for the Appellant submitted as follows: That failure by the trial Magistrate to visit locus after the closure of the Defendant's case was a material error in law and fact and occasioned a miscarriage of justice to the Appellant. The sketch maps do not show the disputed area as claimed by the Plaintiff or the location of the alleged house the subject of the trespass. Court's reasoning basing its judgment on the questionable locus notes of the former trial Magistrate occasioned a miscarriage of justice. This was a proper case that required locus visit after the hearing of the defendant`s case since the parties were disputing the boundaries of the kibanja. Counsel invited this court to find that the instant case was a deserving case for locus visit, and the reliance on the locus minutes of the former trial magistrate a nullity. The trial court was faced with determining whether the defendant was a trespasser on the suit kibanja. The trial magistrate erroneously declared the defendant a trespasser yet the plaintiff rightly told court that she had no claim over the five acres because the defendant was not using it. There was no evaluation of the witnesses by the court, the trial magistrate passed judgment based on the observations from locus by the former trial magistrate, which was wrong. The decision declaring the defendant as trespasser was made in total disregard of the evidence. Counsel invited this court to find that the trial court failed to properly evaluate the evidence thereby occasioning a miscarriage of justice, and prayed for the appeal to be allowed with costs.

In response, Counsel for the Respondent submitted that the locus proceedings were properly carried out in the presence of residents and the parties to the suit. There was no need to conduct a second locus visit as parties agreed to adopt locus notes on the record. The appellant agreed to adopt the locus minutes and is estopped from appealing on the same. He averred that locus visits are necessary to enable court determine boundaries of the land in dispute or the special features thereon, especially where this cannot be reasonably

achieved by the testimonies of the witnesses in court. The Appellant was present at the locus visit, he exercised his right to cross-examine the Respondent`s witnesses and even showed court the developments on the land admitting that the house on the disputed land was his. The appellant fully exercised his right during the locus visit and the court made clear and proper observations. There was no injustice occasioned in the matter. The Appellant stealthily came up with the 1 acre of the burial grounds and stretched the acreage to the side of the girls thus partially encroaching on the girls' portion and trespassing on the same by constructing a house thereon. The Appellant is on a fishing expedition with malicious intent to defeat the Respondent from realizing the fruits of judgment. Counsel prayed that the appeal be dismissed and orders of the lower court be upheld.

Determination of the Appeal;

This being a first appeal, this court is under an obligation 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 in *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.

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

Ground one; That the learned trial Magistrate erred in law and fact when she declined to visit locus in quo to ascertain the actual facts of the land in dispute.

Locus in quo proceedings are provided for ***Order 18 rule 14 of The Civil Procedure Rules*** which provides that the Court may at any stage of a suit inspect any property or thing concerning which any question may arise. Locus in quo proceedings form part of the trial and all rules observed in court are also observed at locus proceedings.

It was held by Sir Udo Udoma CJ. (R.I.P) *in* ***Mukasa versus Uganda (1964) EA 698 at page 700*** that:

"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence clearly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence.

The purpose of locus proceedings is to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them ***(see Fernandes v. Noroniha [1969] EA 506\ De Souza v. Uganda [1967] EA 784\ Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and Nsibambi v. Nankya [1980] HCB 81).***

In the instant case, the trial court visited locus on the 27/4/2017. Counsel for the Appellant faults the trial Magistrate for failing to re-visit locus considering that she was not privy to the locus visit and that it was conducted before hearing the defendant`s case.

I have carefully perused the proceedings and observed that the Plaintiff`s case was closed on the 28/5/2015. Between then and when locus visit was conducted, there had been eight adjournments. ***Order 18 Rule 14*** cited above provides that the locus may be conducted at any stage. The fact that the locus visit was conducted before hearing the Defendant`s case does not discredit the locus proceedings if all the procedures were followed.

In any case, it was just and fair the locus visit be conducted following the eight adjournments. Courts have a duty to deliver timely justice. In the instant case, the matter was delayed for almost two years which was an injustice to the Plaintiff who was always present/represented at court unlike the defendant.

Proceedings at the locus in quo require the parties and their witnesses to freely lead the court by demonstrating to it the features and the corresponding description of the land as

they had testified to in court. Both parties may point out material features and observations to the court which they wish to be placed on record. ***(Alimarina Okot..)***

Counsel for the appellant submitted that failure to visit locus and the adaptation by the trial Magistrate of the former trial Magistrates locus visit notes created a miscarriage of justice on the appellant. Counsel cited the case of Mukhoda Twaha v Wendo Christopher Civil Appeal 0142 of 2012 where court held that failing to visit locus in a deserving case is fatal and renders such a trial a nullity.

Locus in quo is meant to help both parties clearly indicate to court what their claim is and in matters where the claim is based on boundaries and location, parties are given the opportunity to show court the boundaries and location as claimed. The question to answer, therefore, in relation to the instant case is whether the locus visit conducted before the defendant`s case was heard, fulfilled the purpose of the locus visit.

As earlier stated, the locus was conducted on the 27/4/2017, both parties were present. The Appellant agreed for court to proceed with locus. Evidence of both the Parties was taken and the Appellant exercised his right to cross examine the Plaintiff and her witnesses. Both parties had the opportunity to show court their disputed boundaries/location of the suit land, the court observed and minutes were taken down.

Upon hearing the Defendant's case, counsel for the Defendant prayed for another locus visit which was scheduled by the court. However, the court later chose to adopt the previous minutes following the defendant's intention to adopt the same which his counsel agreed to. The trial Magistrate in her finding relied on the court's observation at locus that the house constructed by the appellant was on the portion allotted to the daughters of the late Joseph Katende.

The guidelines set down in ***Practice Direction No. 1 of 2007*** require that all parties, their witnesses, and advocates are present, parties and their witnesses are allowed to adduce evidence and be cross-examined, all proceedings are recorded including a sketch plan if necessary.

In the instant case, the locus visit was conducted before hearing the Defendant's case to avoid injustice to the Plaintiff who was diligent in attending court unlike the defendant. At the locus visit, the defendant allowed for the visit to proceed, he was allowed to give evidence and cross-examine the plaintiff and her witnesses. Court made its observations and the proceedings were recorded.

I find that despite the locus visit being conducted before hearing the Defendant`s case, the proceedings as conducted fulfilled the purpose of the locus visit and court was able to observe the disputed land and consider the claims. The Appellant chose to adopt the locus visit minutes as recorded on the 27/4/2017 and his Counsel did not object. There is therefore no fault or irregularity by the trial Magistrate adopting the notes made by court which the appellant agreed to be adopted. No miscarriage of justice was occasioned by the trial Magistrate in adopting the previous minutes and foregoing another locus visit. A miscarriage of justice occurs when it is reasonably probable that a result more favorable to the party appealing would have been reached in the absence of the error. ***(see Olanya James vs Ociti Tom and three others Civil Appeal No. 064 of 2017)*** The trial court had already taken evidence of the parties at locus and they both had the opportunity to cross-examine each other on their evidence. I agree with the submission of Counsel for the Respondent that the locus in quo proceedings were properly carried out by the trial Court in the presence of residents and both parties to the suit hence it was not necessary to conduct a second locus visit. Conducting locus in quo again was unnecessary and failure to do the same did not occasion any miscarriage of justice to the appellant.

This ground therefore fails.

Grounds 2 and 3;

That the Magistrate misdirected herself on the law and fact and reached wrong decisions.

That the learned Magistrate erred in law and fact when she failed to properly evaluate the evidence adduced by the appellant that the Appellant has a house on one acre.

Counsel for the Appellant submitted that the trial Magistrate misdirected herself when she declared that the defendant was a trespasses yet the Plaintiff rightly told court that she had no claim on five acres because the defendant was not using it. From the record of proceedings, the plaintiff at page 12 stated that, "I am claiming for this portion where the defendant is trespassing. I am not claiming for the down part of my five acres because the defendant is not utilizing it."

This court has a duty as the first appellate court to re-evaluate the evidence and reach its own conclusion bearing in mind that it did not have the opportunity to hear the evidence as given by the parties. From the reading of the above statement as made by the Respondent, it is clear that she was directing/showing court the portion of land that had been encroached upon by the Appellant and stating that it was the area in dispute, and not the rest of the land which was not being utilized by the Appellant. It is my observation that Counsel misunderstood this statement to mean that, the portion she claimed did not form part of the five acres.

Counsel also submitted that the evidence of the Respondent and her witnesses was full of contradictions and the Respondent's conduct was wanting. It is true that the Respondent testified that she was in charge of the burial grounds and then changed her statement saying that the defendant was in charge of the burial grounds. Counsel for the Respondent submitted that this was a minor contradiction and should be disregarded.

The gist of this matter is trespass. Sufficient evidence was adduced by both parties and their witnesses that the burial grounds form part of the land that is for the defendant. The Plaintiff and her witnesses testified that the burial grounds form part of the 5 acres left to the boys, and the Defendant and his witnesses testified that the burial grounds were left in charge of the Appellant to care take them as the heir. The Appellant testified that the late Joseph Katende distributed his land before his death which corroborates the Respondent`s evidence. He also testified that 2 acres were left undistributed and that the clan members divided them between the sons and daughters However, DW1 testified that the late Joseph Nakosola had distributed his properties and the part that was in dispute had been distributed

to Semakula as heir. This contradicts DW1/Appellant`s evidence. DW3 confirmed that none of the parties who allegedly distributed the 2 acres had letters of administration. This is contrary to Section 191 of the Succession Act which requires having letters of administration before dealing in an intestate's estate. ***Section 25 of the Succession Act*** states that all property in an intestate devolves upon the personal representative of the deceased upon trust for those persons entitled to such property.

Both parties testified that the late Nakasola had 10 acres of land which were divided equally amongst his children. DW4 confirmed that the late Nakasola had only 10 acres of land. PW2 testified at the locus visit that they measured 5 acres for the girls and that the burial grounds were on the side of the boys and the defendant`s grandfather had a house on the left side separating him from the girls` land.

Court observed at locus that the house of the defendant is on the alleged side of the girls and the house of the late Nakasola on the side of the boys` grave yards.

It is clear from the proceedings that the Respondent is not claiming or assuming ownership of the land that hosts the grave yards, but the portion on which the Appellant constructed a house. The Appellant did not adduce evidence challenging these allegations but rather evidence that he was given 1 acre which hosts the burial grounds. DW4 testified that the Appellant constructed houses on the 1 acre which was given to him as heir to the late Semakula .PW3 corroborated PW1's evidence that the disputed land is not one with burial grounds.

I therefore find that there was sufficient evidence to prove that the Appellant had trespassed on the Respondent`s land by constructing a house thereon with no permission from the Respondent. This was observed at the locus visit and there was no need for another visit to establish the same finding.

I find that the trial Magistrate properly evaluated the evidence on record to reach her findings and there was no fault on her part in holding that the Appellant was a trespasser on the Respondent`s land. No miscarriage of justice was occasioned by how the proceedings

were conducted and the judgment of the trial Magistrate. This appears to me to be a matter rooted in patriarchy with the Appellant/Defendant and the clan defying the Plaintiff's distribution because the girls are girls and in their opinion should not receive equally with the boys. The Respondent /Plaintiff's father clearly distributed his property before he died and nothing else should be imported into that distribution to affect is equity. ***Article 26 (1) of the Constitution of the Republic of Uganda*** protects the right to own property. The law protects the right to equal inheritance and both women and men should exercise their right to properly especially in a cases like this where the owner of the property distributed the same equally amongst his children. It is unfair and unjust for the clan leaders together with the Appellant to deprive the respondent of her property which she received from her father during his life time.

This appeal bears no merits and is therefore dismissed with costs to the Respondent. The orders of the trial Court are therefore upheld.

I so order.

Dated at Masaka this 10th day of March, 2021

Victoria N. N. Katamba

Judge