THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 34 OF 2019

(ARISING FROM CIVIL SUIT NO. 009 OF 2018)

SSEMAKULA DANIEL :: APPELLANT

VERSUS

1. SSAWALU EMMANUEL
2. PETER KATAMBA
3. SSELUYIMA WASSWA
4. MAGALA EVARISTO :: RESPONDENTS

BEFORE; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Appellant/Plaintiff instituted civil suit No. 009 of 2018 in the Chief Magistrates of Rakai at Kakuuto against the Respondents/Defendants jointly and severally on a claim of trespass, seeking a permanent injunction, general damages and costs of the suit. The Appellant`s case is that he acquired land measuring approximately 4 acres situate at Kyakachwere Kakuuto in Rakai (the suit land). A dispute arose between the two over the suit land and the local leaders advised that they divide the suit land equally. Each party got 2 acres. On the 3rd day of May 2018, the 2nd, 3rd, and 4th Respondents acting on the 1st Respondents authority brought a tractor and cleared part of the Appellant`s land. To this, the 1st Respondent alleged that he owned the entire 4 acres. The Respondents proceeded to encroach on the Appellant`s land despite several warnings.

In their joint Written Statements of Defence, the Respondents/Defendants denied the Appellant`s claim and averred that indeed the Appellant and the 1st Respondent acquired a lease together which later got expired and was never renewed. The suit land is separate from the land that is being used by the Respondents and the suit land is idle as it was public land. The land that was being cultivated belongs to the 2nd Respondent and it was inherited from his father.

The parties raised two issues for determination;

1. Whether the defendants are trespassers
2. Remedies available

The Plaintiff`s case opened for hearing on the 29th day of October 2018.

PW1 the Plaintiff Semakula David testified that the 1st Defendant is his Uncle, 2nd, 3rd and 4th are his young brothers. The suit land is 1 acre, neighboring the 1st defednat to the east, a Rwigi Samuel to the west, 4th and 2nd Defendants to the north. The land is demarcated by a footpath. The land is public land and he acquired a lease offer to it with the 1st Defendant vide lease offer form dated 6/6/2006. In 2008, the land was divided into two equal parts and the Plaintiff took the eastern part while the western part was taken by the 1st Defendant. They used mulamula as boundaries. They also signed a document after the distribution. (PEx1) The 1st defendant distributed the suit land to the other defendants and they have been cultivating it. He has no certificate of title to the suit land and the same was never surveyed but measured in yards. (4 yards)

PW2 Ndibarekera Susan testified that the defendants (2-4) are her sons and the 1st defendant is her brother –in-law. The suit land of about 2 acres belongs to the Plaintiff. The defendants ploughed the Plaintiff`s land. The plaintiff and 1st defendant got the land as a lease and shared it. They planted mulamula after sharing it. She identified PEx1 which she witnessed as No. 5. The land was 4 acres and it was never measured in yards.

PW3 Bbale Ismail testified that he was at home when the Plaintiff called him to see a tractor grading his land. He went and told the 1st Defendant who said that the plaintiff wanted to grab his brother`s land. He doesn't know the ownership of the land but the Plaintiff and 1st defendant have used it before. The plaintiff allowed him to graze on the land to which he has been a neighbor since 2003. A distribution was attempted but disagreed to.

PW4 testified that the suit land belongs to the plaintiff and 1st defendant as they were both given a lease offer by the lands office in 2006. The land was divided and the 1st defendant

is now trespassing on the plaintiff`s portion. She witnessed the distribution and a document of the division was made but the 1st defendant refused to sign it.

That was the close of the plaintiff`s case.

The Defendants` case opened on the 21st day of January 2019 with the testimony of DW1 Ssewalu Emmanuel the 1st Defendant. He testified that he obtained a lease to the suit land with the plaintiff in 2006. They were meant to survey the land but lacked the money for the services and left the land as it was. They never concluded the lease process. He never got a share of the land and it has never been split. He occupies the land he got from his late father. The 4th defendant occupies his late father`s kibanja. The 2nd defendant and the plaintiff are brothers and when their father died, his kibanja was split and given to them. A document to that effect was made but the plaintiff refused to sign it.

DW2 the 2nd defendant stated that the tractor was used on his kibanja which he got from his father. Their (him and the plaintiff) father died in 2001 and his kibanja was divided into two and given to him and the Plaintiff. The plaintiff cultivated on his kibanja and was told to remove them by the local leaders. The lease land and his kibanja are distinct.

DW3 the 3rd defendant testified that the land he cultivates is his kibanja which was given to him by his father, the 1st defendant. The suit land and his kibanja are distinct.

DW4 the 4th defendant stated that he uses the kibanja he inherited from his father. He knows where the lease land is and it is distinct from his kibanja. He has been cultivating on his kibanja since 1997 and the Plaintiff has never complained.

The trial Court visit locus in quo on the 29th day of April 2019 and established that the lease land is grassland typically used for grazing. It appeared distinct from the other land occupied by the 3rd and 4th defendants. The land occupied by the 3rd and 4th defendants looked like it had been utilized for so many years from the coffee plantation on the land and an old house. The 2nd defendants kibanja is far from the lease land.

In his judgment, the trial Magistrate found that the purported distribution was not mutual and for that reason, cannot stand. He concluded that the land occupied by the 3rd and 4th defendants predates the lease application and that application was subject to the bibanja occupied by the 3rd and 4th defendants. They cannot be trespassers in respect of the bibanja they occupy. He held that none of the defendants were trespassers on the suit land (lease land) and dismissed the suit. The trial Magistrate further advised that the plaintiff and 1st defendant follow up with the lease offer they had obtained and pursue the same to its conclusion.

Being dissatisfied with the judgment of the trial Magistrate, the Appellant appealed to this court against the same on the following grounds;

1. That the trial Magistrate erred in law and fact when he failed to evaluate the evidence on record thus arriving at a wrong decision;
2. That the trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby made an erroneous judgment.

Both parties filed written submissions.

The Applicant submitted that the dispute between the parties is only centered on the trespass by the Respondents onto the Appellant`s land arising out of the subdivision of the suit land that the Appellant shared with the 1st Respondent but not on the determination of whether the lease was granted or not. The Appellant adduced evidence as to the distribution but the trial Magistrate stated that it was a mockery yet the Respondent did not adduce evidence showing that he does not know about the said subdivision. The trial Magistrate ignored to refer to the said two descriptions of the 1st respondent on the suit land to the lease application that was admitted to court as DEx1 signed by both parties, hence contravening section 91 of the contracts Act and failing to evaluate evidence on record.

The Respondents submitted that the issue of trespass was solely dependent on the existence of a valid lease jointly owned by the Appellant and the 1st Respondent which the trial Magistrate dealt with. The trial Magistrate rightly observed that the interest of the

Appellant and the 1st Respondent in the suit land are identical as joint claimants. The respondents prayed for the appeal to be dismissed with costs.

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.

The Appellant raised one general ground of appeal and duplicated it.

Order 43 Rules (1) and (2) of The Civil Procedure *Rules* require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. 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. Such general grounds of appeal relating to evaluation of evidence and not clearly stating where the trial Magistrate was at fault, are used by litigants and advocates as a fishing expedition on appeal.

Nevertheless, litigation must come to an end and for that reason I will proceed to determine the ground of appeal.

The Appellant`s first argument is that the suit was about trespass and not the validity of the lease. To this, the respondents submitted that the issue of trespass was dependent on the existence of a valid lease from which the Appellant derived his interest.

I have carefully perused the evidence on file and indeed the parties applied for a lease jointly and the lease offer (PEX2) was provided.

It is not true that the lease was not an issue in this suit since the Appellant claims his interest and rights over the suit land from the land that is subject of the lease. Furthermore, Paragraph one of the lease offer form states the size of the land to be Approximately 4 acres and also gives conditions for the lease which included obtaining the necessary consents and payment of the survey and registration fees. Both the Appellant and 1st Respondent stated that they never conducted a survey of the land. Since this was a condition precedent to the grant of the lease, it is therefore clear that the lease was never completed and therefore the parties have no authority to use the land that is subject of the lease.

I therefore agree with the finding of the trial Magistrate that since they didn't comply with the terms of the lease offer, neither the Appellant nor the 1st Respondent can claim ownership of the suit land.

The Appellant also faults the trial Magistrate for failing to evaluate evidence as to the distribution of the suit land. The Appellant adduced evidence in PEX1 of a division of the suit land. The document was only signed by the Appellant and PW2. It was also contested by the 1st Respondent. ***Section 101 of the Evidence Act*** requires a party alleging a fact to prove it. The Appellant claims that the distribution was mutual yet the evidence adduced is to the contrary as it does not include the signature of the Respondent. PW3 testified that the distribution was not concluded and PW4 testified that she witnessed the distribution but did not sign the document. This evidence shows that the alleged distribution was irregular. Nevertheless, as already resolved, the parties had no right to deal in the land as they had not concluded the lease. The trial Magistrate was therefore right to hold that the alleged distribution was a mockery.

The Appellant challenged the evidence relied on by the trial Magistrate in holding that the land was never surveyed and its exact size is not known. It is true that Section 91of the Evidence Act requires facts that have been reduced into a document to be proved by that document. However, in the instant case, both parties stated that they never conducted a survey of the land. The court established at locus that the exact size of the land was not known by the parties as they had not conducted the survey by themselves but simply relied

on the measurements stated on the lease offer. The matter was also not about boundaries but a specific plot of land which is the land that is subject of the lease. The trial Magistrate established at the locus in quo that this plot of land is grassland and is distinct from the Respondents` bibanja. For that reason, it is immaterial as to the size of the land as the location was sufficient to prove that the Respondents utilized land that was away from the suit land and hence could not be trespassers.

The Appellant submitted that the Respondents never adduced any witnesses. The Evidence Act is clear that no particular number of witnesses is required to prove a fact (Section 133). The Respondents adduced sufficient evidence to prove that they are not occupying or utilizing the suit land and this was further established at the locus in quo.

It is the law of evidence that the party who bears the burden must produce evidence to satisfy it, or his or her case is lost. ***(see Richard Evans and Co. Ltd v. Astley, [19U] A.C. 674 at 687).*** The Appellant`s interest stems from a lease offer which was never concluded as the conditions precedent were not fulfilled. The parties were using the land prior to that without authority. The trial Magistrate was right in advising them to complete the lease acquisition process so that they can use the land lawfully.

In the result, having re-evaluated the evidence on record, I find no fault in the trial Magistrate`s decision. The trial Magistrate properly directed himself and determined the case thereby reaching the right conclusion.

This appeal has no merits and is hereby dismissed with costs to the Respondents.

I so order.

Right of appeal explained.

Dated at Masaka this 10th day of March, 2021.

Victoria Nakintu Nkwanga Katamba
Judge