**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**

**CIVIL APPEAL NO.028 OF 2017**

(Arising out of Hoima C.S No.0010 of 2014)

**NSANZIMANA EZEKIEL :::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**TUMUBOINE SAMUEL :::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**JUDGMENT**

***Before: Hon. Justice Byaruhanga Jesse Rugyema***

[1] This is an appeal from the decision and orders of the Magistrate Grade1, Kagadi, Hoima Chief Magistrate's court dated 28/4/2017. The Respondent/plaintiff sued the Appellant/defendant in the Chief Magistrate's court of Hoima at Kagadi Grade 1 court vide **C.S No.0010 of 2014** seeking among others;

a) A declaration that the plaintiff is the rightful owner of the suit land situated at Muzizi 'A' village, Kyaterekera sub county in Kibaale district and that the defendant is a trespasser.
b) Eviction order and transfer of vacant possession.
c) General damages for trespass.

[2] It was the plaintiff's case that he is the rightful owner of the suit land measuring approximately 3 acres acquired by way of purchase from a one **Daniel Buturo** on 10th /12/1994 at shs. 40,000/=. That however, on or about around June 2003, the defendant without any color of right started trespassing on the suit property by way of cultivation of eucalyptus trees and some food crops like beans and sorghum.

[3] The plaintiff contended that the defendant's acts were wrongful, unlawful and amounted to criminal trespass and conversion which has caused him to suffer inconvenience, mental torture, embarrassment and loss of which he held the defendant liable by way of general damages.

[4] The defendant on the other hand denied the plaintiff's allegations and contended that he is the owner of the suit land **measuring approximately 10 acres** which he purchased from a one **Munyantole**

**George** at shs. 8,000,000/=. The said **Munyatole** had also purchased the same from a one **Rwamwenge Joseph** and **Nzarireki Asuman**, both sons of the late **Buturo Daniel**.

[5] Upon analysis and evaluation of the evidence before him, the trial Magistrate found that the contested land was originally owned by the late **Buturo Daniel** who prior to his demise, had sold it to the plaintiff. The plaintiff left the said land in possession of his mother in law. That on the other hand, the late **Daniel Buturo** left his remaining portion of land to his sons; **Nzaireki Asuman** and **Joseph Rwamwenge** who sold off their portion to a one **George Munyantole** who in turn sold it to the defendant in this matter. That however, though both parties bought land in the suit area, the plaintiff bought his portion of land before the defendant purchased his from **Buturo** and upon **Buturo's** demise, one of **Buturo's** sons entered into a transaction of the suit land with the defendant without the knowledge of the plaintiff or his mother in law who was in possession and that is when the interest/portion of the plaintiff's land was trespassed on by the defendant.

[6] The trial Magistrate concluded that the defendant entered onto part of the land of the plaintiff **measuring approximately 4 acres** and therefore, the defendant is liable in trespass for that portion which the plaintiff had entrusted in the hands of his mother in law. He decreed that suit portion of land to the plaintiff and the defendant was ordered to surrender it to the plaintiff with costs.

[7] The Appellant/defendant was not satisfied with the decision and orders of the trial Magistrate and being aggrieved, he filed an appeal on grounds as contained in his memorandum of Appeal:

1) *The learned trial Magistrate erred in law and fact when he concluded that the Appellant trespassed on the Respondent's four (4) acres of land.*
2) *The learned trial Magistrate erred in law and in fact when he entertained extrinsic/oral evidence to vary the contents of a written agreement.*
3) *The learned trial Magistrate erred in law and fact when he handed the Respondent four (4) acres of land when he clearly purchased 20 yards thereby occasioning a miscarriage of justice.*
4) *The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.*

5) *The learned trial Magistrate erred in law and fact when he improperly conducted a locus in quo visit.*
6) *The learned trial Magistrate erred in law and fact when he heavily relied on the Respondent's agreement which was never exhibited in evidence.*
7) *The learned trial Magistrate erred in law and fact when he awarded costs to the Respondent.*

**The duty of the first Appellate court**

[8] It is trite that a first appeal as the instant one is in the nature of a retrial and the first appellate court is bound to subject the evidence on record to fresh scrutiny and come to its own conclusion; **Mujuni Ruhemba Vs Skanska Jensen (U) Ltd C.A No.56/2000 (C.A). See also Pandya Vs R (1957) E.A 336.** In reviewing the evidence, the appellate court has to reconsider the evidence on record and make up its own mind without disregarding the judgment appealed from but carefully weighing and considering it.

**Legal counsel representation**

[9] The Appellant was represented by **Counsel E.Wosamwa** of **M/s P.Wettaka Advocates, Kampala** while the Respondent was self-represented. Both the counsel for the Appellant and the Respondent himself filed written submissions for court's consideration in the determination of this appeal.

**Resolution of the grounds of Appeal**

[10] **Grounds 1,2,3,4 and 6** relate on how the trial Magistrate evaluated the evidence before him. I shall tackle them together and then **grounds 5 and 7** shall be tackled separately.

**Grounds 1,2,3,4 and 6: Evaluation of Evidence**

[11] The Respondent submitted that there is compelling evidence on record to prove that he is the owner who has always been in actual possession and using the suit land.

[12] Then, as regards **ground 4,** the Respondent submitted that it offends **O.43 r.1(2) CPR** for it is too general and does not in any way set out concisely the grounds of objection in the judgment, in other words, the specific areas or points alleged to have been wrongly decided by the trial court. That it is now trite law that a ground of appeal must challenge a holding, a *ratio decidendi* and must specify points which were wrongly decided; See **National Housing Corporation Vs Pelican Air Services [2001-2005] Vol.2 HCB 59.**

[13] He concluded that the trial Magistrate properly and correctly addressed his mind to the evidence on record, thereby allowing the plaintiff's case with costs.

[14] Counsel for the Appellant on the other hand submitted that there cannot be trespass when the Respondent has never been in possession of the disputed property. That the trial Magistrate therefore erred and wrongly concluded that the appellant was a trespasser on the suit land when the Respondent was not in possession; **Justine L.M.N Lutaya Vs Sterling Civil Engineering Co. Ltd S.C.CA No.11/2002**.

[15] That the trial Magistrate correctly found that both the appellant and the Respondent purchased land in the area but the Respondent's agreement in particular clearly indicates that he purchased 10 yards (60ft) yet the trial Magistrate decreed him 4 acres of land. That in doing so, the trial Magistrate relied on extrinsic evidence to alter the agreement which was a grave error that occasioned a miscarriage of justice.

[16] **S.101(1) of the Evidence Act** provides that;

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."*

**S.103 of the Evidence** Act goes further to provide that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

The general principle derived from the above provisions of the law is that "he who alleges must prove." In the instant case, the burden was

on the plaintiff to prove his case on a balance of probabilities that the disputed portion of the land belonged to him and that the defendant was a trespasser thereon; **Nsubuga Vs Kavuma (1978) HCB 307**.

[17] In his bid to prove his case, the plaintiff/Respondent at p.6 of the proceedings testified during cross examination thus;

> *"I am the owner of the disputed piece of land. The agreement is between me and Buturo Daniel since 1994. My land is 4 acres...the boundary marks are here. I am not sure of the size...my mother was stopped cultivating here. The land was grabbed. There is nothing like crops of my mother in law."*

In his pleadings, the plaintiff has claimed to be the rightful owner of the suit land measuring approximately 4 acres which he purchased from **Buturo Daniel** on 10/12/1994. In evidence, he stated that upon purchasing the suit land, he left it under the care pf his mother in law, **Tibehendera Priscilla** (PW3) who testified that her son in law, the plaintiff purchased the suit land from Buturo at **shs.40,000/=** and it measured 20sticks an equivalent of about $3^1/_2$ acres according to her. She lost possession of the suit land to the defendant on 10/10/2013 when the defendant forcefully took it over.

[18] The plaintiff however never produced the purchase agreement upon which he purchased the claimed suit land from **Buturo** on 10/12/94. He did not even offer any reasons why he could not produce it in court for its inspection. As a result, the plaintiff's failure to produce the purchase agreement upon which he bought the suit land, the inconsistencies by the plaintiff's case regarding whether the suit land is 4 acres as put across by **PW1** and **PW2** or $3^1/_2$ acres equivalent of 20 sticks as put across by **PW3** remain un explained.

[19] On the other hand, the defendant adduced evidence to the effect that he purchased from the children of **Buturo** who included **Nzaireki Asuman** (DW2) and a one **Munyantole George** a total of **10 acres** of land as per the 2 agreements presented (D.Exh.1). **Esabairwa Amos** (DW3), theL.CI chairperson of the area who witnessed both purchases by the plaintiff and by the defendant testified that the plaintiff purchased **2 bipande (half an acre)** found to be equivalent to **20 yards**.

[20] In the absence of the purchase agreement by the plaintiff, I am inclined to believe the evidence of the L.CI chairperson as regards the size of

the land purchased by the plaintiff. In any case, at locus, the plaintiff eventually conceded that his claimed portion of land measured **20 yards.** He also conceded that it was the defendant using the land. Though both **PW1** and **PW3** claimed that at the top of the suit land, they measured **20 yards**, no explanation is given as to why they did not measure the entire land to ascertain its actual size.

[21] From the foregoing evidence in court and at locus, it is clear that the Respondent was not in possession of the disputed property. Trespass to land as per **Justine E.M.N.Lutaya Vs Sterling Civil Engineering Co. Ltd supra** occurs when a person makes an unauthorized entry upon land and thereby portends to interfere with another person's lawful possession of the land.
In this case the defendant led evidence as to how he lawfully obtained the suit land by way of purchase. It was therefore an error in law and fact for the trial Magistrate to conclude that the Appellant trespassed on the Respondent's **4 acres** of land yet the defendant/Appellant is the one who had been in possession before the dispute commenced.

[22] 2ndly, the plaintiff having failed to produce the purchase agreement upon which he acquired the claimed portion of land, the trial Magistrate should not have not found him to be the owner of the suit land in contrast to the defendant/Respondent who presented his purchase agreement as proof of his interest in the suit land. At best, the available evidence point to a **20 yards** portion of land that is being utilized by **Tibehendera Priscilla** (PW3) on behalf of the plaintiff as the plaintiff/Respondent entitlement. The defendant/Appellant conceded that this, **20 yards** portion of land is what the plaintiff/Respondent owned. Counsel for the defendant/Appellant invited court to rule decreeing the **20 yards** portion of land as to what belonged to the plaintiff/Respondent.

[23] In the premises, I would find the 1st, 2nd, 3rd and 6th grounds of appeal in the affirmative. The bear merit and they are accordingly allowed.

[24] As regards **ground 4**, the Respondent correctly submitted that it is too broad/general, inconcise and in contravention with the provisions of **O.43 r. (1)(2) CPR** which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Properly framed grounds of appeal should respectively point out errors observed in the course of the trial, including the decision which the

Appellant believes occasioned a miscarriage of justice: **Katumba Byaruhanga Vs Edward Kiwalabye Musoke C.A No.2/1998 (C.A).** This ground of appeal is accordingly struck out since in any case, issues regarding the evaluation of evidence were amply tackled in **grounds 1,2,3 and 6.**

**Ground 5: The learned trial Magistrate erred in law and fact when he improperly conducted a locus in quo visit.**

[25] Counsel for the Appellant has failed to demonstrate how the trial Magistrate's decision to put witnesses on oath occasioned a miscarriage of justice. It is trite that the purpose of visiting locus is for each party to indicate what he or she is claiming and each party to indicate what he is claiming and each party must testify on oath or be reminded of the oath he/she took in the court room when he/she was testifying; **Badru Kabalega Vs Sepriano Mugangu [1992] KALR 265.** There is no evidence of improper conduct on record save that the witnesses only confirmed what they had originally stated as evidence in open court. This ground therefore fails.

**Ground 7: The learned trial Magistrate erred in law and fact when he awarded costs to the Respondent.**

[25] It is trite that costs follow the event unless for good reason court orders otherwise; **Section 27 CPA**. The Respondent having been the successful party in the lower court, he was entitled to costs.

**Conclusion**

[26] The present appeal having succeeded in the major grounds of appeal, it is generally allowed. The decision of the Magistrate Grade 1 Kagadi is quashed and or set aside. The Appellant is awarded costs of this appeal.

Dated at Masindi this **26th** day of **May, 2022**.

**Byaruhanga Jesse Rugyema**
**JUDGE.**