

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0083 OF 2014

(Arising from Civil Suit No. 0033 of 2013, Buliisa Magistrate's Court)

SONGI WAMARA APPELLANT

VERSUS

1. MUHINGO KAGORO
2. BABYENDA MUGANZI
3. AMOS SAMWIRI } RESPONDENTS

JUDGMENT

Before: Hon. Justice Byaruhanga Jesse Ruyyema

[1] This is an Appeal from the Judgment and Orders of the learned **Grade One Magistrate of Masindi Chief Magistrate's Court sitting at Buliisa, HW Gaudense Albine Okongo Japyem Esq.** dated 25th September, 2014 by which the Respondents were the successful parties.

[2] **Facts of the Appeal**

The Appellant sued the Respondent for trespass to land situate at **Kakora village, Buliisa Sub-county, Buliisa District**, the suit land.

[3] It was the Plaintiff/Appellant's case that he inherited the suit land from his late father **Gawunga Raphail** who had acquired the suit land by way of first occupation. That by the time of his late father's death, there was no dispute on the suit land until

his death, when the Defendants forcefully trespassed on the suit land while claiming that it was given to them by the 1st Defendant/Respondent.

[4] The Defendants/Respondents on the other hand denied the Plaintiff/Appellant's allegations and contended that they are neither staying on the suit land nor have they ever trespassed on the said land save for the 2nd Defendant/Respondent who is occupying the land with the consent of the 1st Defendant, the lawful owner of the land.

[5] The trial Magistrate on his part found that the suit land was lawfully owned by the 1st Defendant/Respondent and occupied by his agents, the 2nd, 3rd, 5th, 6th and 7th Defendants/Respondents. The 4th Defendant was found a trespasser on the suit land. The Plaintiff's suit was therefore dismissed as against the 1st, 2nd, 3rd, 5th and 7th Defendants/Respondents with costs. The Plaintiff/Appellant was dissatisfied with the whole Judgment and orders of the learned trial Magistrate and appealed to the High Court on the following grounds as per his amended Memorandum of Appeal.

1. *The learned trial Magistrate erred in law and in fact when he declared the 1st, 2nd, 3rd, 5th, 6th, and 7th Defendants as the lawful owners of the suit land.*
2. *The learned trial Magistrate erred in law and in fact when he declared the Plaintiff a trespasser.*
3. *The learned trial Magistrate erred in law and in fact when he failed to properly evaluate evidence on record thereby reaching a wrong conclusion.*

4. *The learned trial Magistrate erred in law and in fact when he ordered the eviction of the Plaintiff by the Respondent.*

Counsel Legal Representation

[6] The Appellant was represented by **Mr. Lubega Willy** and **Ms. Zemei Susan** while the Respondents were represented by **Mr. Tuhangane Wilbroad**. Both Counsel filed Written Submissions as permitted by Court, for Court's consideration of the Appeal.

The Duty of the First Appellate Court

[7] It is now trite that the duty of the first Appellate Court is to re-examine, re-appraise and re-evaluate the evidence on record and come to its own decision and in so doing, it should subject the evidence on record to a fresh and exhaustive scrutiny; **Banco Arabe v Bank of Uganda S.C.C.A. No. 8 of 1998 [1999] UGSC 1**. A first appeal is by way of re-trial and the Appellate Court is in as a good position as the trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact; **Karanja Kago v Karioki Njenga & Anor; Civil Appeal No. 1 of 1979 (K-CA)**.

[8] This being a first Appellate Court, it therefore has a duty to re-evaluate the evidence adduced before the trial Court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of facts and determine whether on the evidence the decision of the trial Court should stand.

Determination of the Appeal

[9] Grounds of Appeal; **1,3** and **4** rotate or revolve around how the trial Magistrate evaluated the evidence before him and came to

the conclusion he reached. These grounds were therefore argued jointly by Counsel and ground 2 was argued independently. I follow suit as I determine the Appeal.

Grounds 1,3 and 4: Evaluation of Evidence

[10] **S.101 (1) and (2) 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 the facts which he or she asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[11] The Plaintiff/Appellant in the case below sued the Defendants/Respondents for trespass. It follows therefore that the Plaintiff/Appellant bore the burden of proof to prove that he owned and or possessed the suit property and the Defendants/respondents trespassed upon it. The standard of proof was on the balance of probability; **Nsubuga v Kavuma [1978] HCB 307.**

[12] In his bid to prove his case and discharge the above burden, the Plaintiff/Appellant adduced evidence of a total of 3 witnesses. The Plaintiff in particular testified as follows:

“The suit land belongs to me. I was born there in 1971, my father Gawunga Raphail was on the suit land, he died at 117 years. He died in 2008. He left me on the disputed land. The Defendants have just trespassed ...”.

His witnesses, **Kagoro Bazil** and **Okuru Gilbert** also merely testified to the same effect.

[13] The 1st Defendant, **Muhingo Kagoro** on the other hand testified that he inherited the suit land from his father and has sought

to have it registered. That the Area Land Committee inspected the land and it was certified that the land was his. He is the one who permitted the 2nd and the 3rd Defendants/Respondents to occupy and utilize the suit land. That he constructed a house and has cultivated his gardens thereon.

[14] The locus proceedings on record reveal that at locus, it was established that the Plaintiff has never occupied and had no activity being carried on the suit land unlike the Defendants/Respondents. No where is it shown at locus for example, that the Plaintiff/Appellant showed Court any of the graves of his people who could have been buried on the suit land, including his late father **Gawunga Raphail**. The Plaintiff/Appellant having been born on the suit land as he claims, it would be logical to find his or his peoples' homesteads on the land. He did not locate any to the trial Magistrate.

[15] As a result, the trial Magistrate correctly remarked that at locus in quo, the Plaintiff/Appellant did not show any relevant development made by him on the disputed land. He concluded and in my view, correctly, that the suit land belonged to the 1st Defendant/Respondent. The Plaintiff/Appellant had no interest whatsoever on the suit land. I have no reasons to depart from the trial Magistrate's findings on this aspect.

[16] I do agree that the trial Magistrate permitted **Warindi Simon**, **Mukonizi Kiiza** and **Orege Emmanuel** whom he described as independent witnesses to adduce evidence at locus, however, it is not correct that he based his decision greatly on these so called independent witnesses who testified during locus in quo. His decision was based on his observations at locus, that

though the Plaintiff/Appellant asserted claim was based on inheritance, there was nothing to support such a claim without any developments made on the suit land or any other evidence at that, yet the defendants had evidence of occupation and use of the land in question.

[17] In conclusion, I find that though the admission of fresh independent evidence at locus is an irregularity; **Onek Manacy vs Omona Micheal H.C.C.A. No. 32 of 2016** and **Painteno Omwero vs Saulo s/o Zebuloni H.C.C.A No. 31 of 2010**, in the instant case, the admission of such evidence did not occasion any miscarriage of justice for the trial Magistrate did not base his decision on such kind of evidence. The Plaintiff/Appellant in this case failed to discharge his burden of proof and as a result the suit was dismissed with costs.

[18] In the premises, I find grounds 1,2 and 3 of appeal devoid of any merit and they accordingly fail.

Ground 2(a) The learned trial Magistrate erred in law and in fact when he declared the Plaintiff a trespasser

(b) the learned trial Magistrate erred in law and in fact when he ordered the eviction of the Plaintiff by the Respondents

[19] In his Judgment, the trial Magistrate clearly held that during the visit of locus in quo, the Plaintiff/Appellant did not show any relevant developments made by him on the disputed land and therefore, there was no activity being carried on by the Appellant on the suit land. It was held in **Sheikh Mohammed Lubowa v Kitara Enterprise Ltd H.C.C.A. 04 of 1987**, that

trespass is said to have been committed where the defendant without claim of right or consent of the owner enters on the land. It follows therefore, the trial Magistrate's finding of the Plaintiff/Appellant a trespass was erroneous in the circumstances. I find that the trial Magistrate erred in law and in fact when he found the Plaintiff/Appellant a trespasser without any evidence of any entry by the Plaintiff into the suit land and or any encroachment as a neighbor. In any case, there was no counter claim on the part of any of the Defendants/Respondents to justify the declaration in favour of the defendants that the Plaintiff/Appellant was a trespasser and for the eviction orders.

[20] However, this Court is not able to see how the impugned orders i.e. trespass and eviction prejudiced or would prejudice the Plaintiff/Appellant where it has been found that the Plaintiff/Appellant had no interest whatsoever in the suit land and the 1st Defendant/Respondent was found and declared the lawful owner of the suit land. To expound on the above aspect, in **Justine E.M.M. Lutaya v Sterling Civil Engineering Co. Ltd; S.C.C.A. No. 11 of 02** trespass to land was defined to occur;

“when a person makes an authorized entry upon land, and thereby interfere or portends to interfere, with another person's lawful possession of that land ... the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land”.

The action can be maintained against anyone who interferes, with the right of ownership or possession whether the invasion is by a person or by something that a person has set in motion.

[21] In the instant case, the trial Magistrate while concluding the issue of ***“who is the lawful owner of the suit land”*** remarked thus:

“The Plaintiff claims that the land belongs to his late father but did not provide relevant developments on the suit land by the late father or by him”.

[22] The catchword in the findings of the trial Magistrate was the Appellant’s failure to provide ***“relevant developments”*** on the suit land. The “relevant developments” are those related to or in proof of ownership and or possession but mere adverse constructive possession of property with no developments may entitle any person to maintain an action for trespass as long as it interferes or transgresses with any other person’s right of ownership or possession.

[23] In conclusion, in this case, I find that though the Appellant was found guilty of trespass which is actionable per se for damages without the need to prove them, no damages were awarded against him. In view, therefore, of the fact that the suit land was found to belong to the 1st Defendant/Respondent, no miscarriage of justice was occasioned to the Appellant by the trial Magistrate’s declaring the Appellant a trespasser and or with the Eviction Order as he was neither condemned to damages nor as he found to have any interest in the suit land. What is clear from the trial Magistrate’s record however, is that the Appellant/Plaintiff failed to prove his case. The 1st Defendant was the rightful owner of the suit land. The suit was accordingly dismissed.

[24] All in all, this Appeal accordingly fails, the Judgment and Orders of the trial Magistrate are upheld. It is dismissed with costs to the 1st, 2nd and 3rd Respondents.

Signed, Dated and Delivered at Masindi this **26th day of August, 2022.**

Byaruhanga Jesse Ruyema
JUDGE