THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 76 OF 2018

(ARISING OUT OF CIVIL SUIT NO. 06 OF 2015)

(LYANTONDE MAGISTRATES COURT)

BAMANYA ANDREW MULINDWA :: APPELLANT

VERSUS

NAMULEME JOSEPHINE

NABAKOOZA CAROLINE :: RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

BACKGROUND OF THE APPEAL

The Appellant/Plaintiff instituted Civil Suit No. 06 of 2015 in the Magistrates Court of Masaka at Lyantonde, against the Respondents/Defendants in a claim for trespass to land seeking a declaratory order, a permanent injunction, an eviction order, general damages, costs of the suit and any other relief deemed fit. The Appellant is the registered proprietor for land comprised in Kabula Block 75 Plot 77 land at Kyabazaala, Kabula, Lyantonde District (the suit land). He is in occupation of the land and uses it for grazing as a farm. The Respondents without the Appellant`s consent entered on the said land, constructed structures and started using it to his detriment. The Respondents are illegally occupying the said land and have caused loss and damage to the Appellant.

In her Written Statement of Defence, the 1st Respondent averred that she has never trespassed on the suit land as she inherited the same from her late mother Namatovu Mary who bought the same from a one Byaruhanga Edward. She stated that she has an equitable interest in the land as a kibanja holder.

In his judgment, the trial Magistrate dismissed the suit with costs and made orders declaring that the suit kibanja is not situate on Kabula Block 75 Plot 77, the

Respondents are lawful occupants, Byaruhanga Edward needed less consent of the appellant before selling to the 1st Respondent`s mother.

The Appellant being dissatisfied with the said judgment filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence as a whole.

2. The learned trial Magistrate erred in law and fact when he exhibited bias and partiality and as such arrived at a wrong conclusion.

3. The learned Trial Magistrate abdicated his judicial duty of properly guiding unrepresented litigants and thus arrived at a wrong conclusion.

4. The court erred in law by causing boundary opening of disputed land without the services of qualified surveyors.

5. The learned trial Magistrate erred in law and fact when he departed from pleadings of the party and thus arrived at a wrong conclusion.

6. The learned trial Magistrate misdirected himself on the law on landlord's consent before purchase of Kibanja.

7. The learned trial Magistrate erred in law and fact when he found that the defendant/Respondents were legally occupying a Kibanja on the appellant's registered land.

Both parties filed written submissions.

Determination of the Appeal

It is the duty of this court as a first appellate court 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 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 (***see Lovinsa Nankya v. Nsibambi [1980] HCB 81).***

Before determining the merits of the appeal, I will first resolve whether this appeal is properly before this court. This is because judgment in the lower court was entered on the 21st day of August, 2017. The Memorandum of Appeal was filed in this court on the 20th day of November, 2018. That was over a year since the judgment was entered.

Section 220 (1) (a) of the **Magistrates Courts Act**, provides for appeals as of right, from the decrees and from orders of a Magistrates Court presided over by a Magistrate Grade one in the exercise of its original jurisdiction, to the High Court. According to **Section 79 (1) (a)** of the **Civil Procedure Act**, every appeal should be filed within thirty days from the date of the decree or order of the court, except where it is otherwise specifically provided in any law. These time specifications are aimed at avoiding delays. The subsequent provisions are designed to dictate a time schedule within which certain steps ought to be taken and as such, as was held in ***Njagi Vs Munyiri (1975) E A 179***, for any delay to be excused, it must be satisfactorily explained.

Counsel for the Appellant in his submissions stated that they received instructions to represent the Appellant on the 28th day of August 2017, and filed a request for the record of proceedings with the Magistrate`s court on the 30th day of August 2017. Counsel submitted that their efforts to obtain the record of proceedings were frustrated until the 31st day of October, 2018.

I have perused the record, and indeed, a letter requesting for the record of proceedings was filed with the lower court on the 30th day of August, 2017. This was still within the 30day period for filing an Appeal in this court.

Order 43 Rule 1 of the Civil Procedure Rules provides that every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his/her advocate. Court in ***Nawemba Suleiman v Bwekwaso Magenda {1989} HCB 140***, held that it would be anomalous for a party to be required to file a proper memorandum of appeal before obtaining or having access to the record of the lower court.

Section 79 (2) Civil Procedure Act provides that in computing the period of limitation, the time taken by the court or registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded. In ***Godfrey Tuwangye Kazoora v Georgina Kitarikwenda {1992-93} HCB 145***, it was held that the time for lodgment of an appeal does not begin to run until the appellant receives a copy of the proceedings against which he or she intends to appeal.

In the instant case, the Appellant acted prudently by writing the letter requesting for a record of proceedings of the lower court, while he was still within the time period for appeal. It is clear that the record was prepared in November 2017 as it was certified on the 24th day of November, 2017. The record of proceedings is supposed to be accompanied by a certificate of correctness from the trial Magistrate but in this case the certificate attached on the index of appeal, does not bear a seal or stamp of the lower court nor does it bear the trial Magistrate`s signature. It is not clear what day the Appellant received the record of proceedings. However, the record and original file were forwarded to this court on the 28th day of November 2018. Counsel submitted that they were able to receive the record on the 31st October 2018.In the absence of any evidence to the contrary, that is when time for lodging the appeal started to run. The Memorandum of Appeal was filed in this court on the 20th day of November 2018. I therefore find that the appeal is properly before this court.

I will now proceed to determine the appeal on its merits.

Ground one; The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence as a whole.

Order 43 Rule (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. This is a general ground addressed to the trial Magistrate`s evaluation of evidence. Since the duty of this court as the first appellate court is to re-appraise the evidence as a whole, I will exercise that duty in addressing the other grounds of the appeal.

I will resolve grounds 2 and 3 concurrently.

Ground two; The learned trial Magistrate erred in law and fact when he exhibited bias and partiality and as such arrived at a wrong conclusion.

Ground three; The learned Trial Magistrate abdicated his judicial duty of properly guiding unrepresented litigants and thus arrived at a wrong conclusion.

Bias is defined in the ***Black's Law Dictionary (9th Edition)*** to mean an inclination, prejudice or predilection. "**Actual bias**" is also defined therein to mean the genuine prejudice that a judge, juror, witness, or other person has against some person or a relevant subject.

Principle 4 of the Uganda Judicial Code of Conduct provides that impartiality is essence of the judicial function and applies not only to the making of a decision but also to the process by which the decision is made. Justice must not merely be done but must be seen to be done.

Lord Denning in Rep vs, Barnsley Licensing Exparte Barnsley and District Licensed Victuallers Association (1960) 2 QBD 169 (cited in Kinyara Sugar vs Hajji Kazimbiraine Mahmood and 4 others HCMA 03 of 2020) stated that: In considering whether there was a real likelihood of bias, the court does not look at the Justice himself

or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see 1f there was a real likelihood that he would, or did, in fact favor one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if does sit, his decision cannot stand. Nevertheless, there must appear to be the real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which no reasonable man would think it likely or probable that the Justice or Chairman as the case may be, would or did favor one side unfairly at the expense of the other.'

In ***GM Combined (U) Limited vs. AK Detergent Limited and Others (1999) 1 EA 84***- the Supreme Court observed that; As regards the evidence of bias, the authorities are clear that there must be reasonable evidence to satisfy the court that there was a real likelihood of bias. There must be something in the nature of a real bias, for instance evidence of proprietary interest in the subject matter before the court or likelihood of bias based on close association with one of the parties.

In arguing this ground, Counsel for the Appellant submitted that the trial Magistrate exhibited bias when he went on to determine issue 1 as to whether the suit kibanja was situate on Block 75 Plot 77 of the Appellant, yet this was already an agreed fact according to the scheduling conference.

From the above cited cases explaining what the test to determine whether a judicial officer is guilty of actual or apparent bias, Counsel`s reasons do not in any way prove that the trial Magistrate was biased. Counsel`s submissions in support of this ground are about how the trial Magistrate considered/handled the matter. No reasonable man would take this as evidence to mean that trial Magistrate had proprietary interest in the matter or close association with the parties as per the test in ***GM Combined (U) Limited vs. AK Detergent Limited and Others (1999) 1 EA 84***.

Ground two of the appeal therefore fails.

Having resolved that that the learned trial Magistrate was not biased when hearing and determining the matter, I will now address Counsel`s arguments on the merits of the appeal and in the interest of justice.

It is clear from the record of proceedings that a scheduling conference was conducted and among the agreed facts, was that "the kibanja in dispute is found on Block 75 Plot 77 in the names of the Appellant/Plaintiff." The first issue framed at scheduling was; "**whether the suit kibanja situate at the plaintiff`s land Block 75 Plot 77 when Byaruhanda Edward was selling to Mariah Namatovu.**"

The first issue for determination according to the trial Magistrate`s judgment was; "**whether the suit kibanja is situate at Block 75 Plot 77 of the Plaintiff which Edward Byaruhanga sold to Mariah Namatovu in 2004**."

The way these issues were framed does not provide clarity as to what the parties need resolved. The parties were not represented and needed to be guided by the learned trial Magistrate. I am hard pressed to understand the meaning of the first issue. Among the agreed facts is the fact that the kibanja is found on Block 75, Plot 77. In reframing the issues, the learned trial Magistrate stated the issue for determination as thus: Whether the suit kibanja is situate at Block 75 Plot 77 of the Plaintiff which Edward Byaruhanga sold to Mariah Namatovu in 2004. To my understanding, the trial Magistrate resolved a different issue from what was agreed upon by the parties at scheduling. As poorly drafted as it was, I believe that the first issue as was agreed upon by the parties is in regards to legal ownership of the suit kibanja at the time the Respondents mother purchased the land. It seeks to determine whether the Appellant was the owner of the land comprised in Block 75 Plot 77 when the Respondents` mother purchased the property. This is what I believe.

What the trial Magistrate raised and determined as the first issue was; "**Whether the suit kibanja is situate at Block 75 Plot 77 of the Plaintiff which Edward Byaruhanga sold to Mariah Namatovu in 2004.**" This issue seeks to determine the location of the suit kibanja, that is, whether it is on the Appellant's land or not. This was an agreed fact according to the scheduling notes and did not require further determination. It is also different from what was agreed upon by the parties as the issue for determination.

Order 12 rule 1 (1) of *The Civil Procedure Rules* mandatorily requires trial courts to hold a scheduling conference before the commencement of any trial. The declared purpose of such a conference is "***to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement."***

I find that the first issue as determined by the Trial Magistrate was trying to resolve what the parties had already agreed upon in scheduling. There was no need for this. He went on to hold in his judgment that the suit kibanja is not situate at Kabula Block 75 Plot 77 departing from what was agreed upon by the parties.

This is an error apparent on the record and I find that it occasioned a miscarriage of justice. 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)***

I also find that this error occurred because the parties were unrepresented but mostly because they were not guided by the trial Magistrate. It is most crucial for trial Magistrates to guide and direct unrepresented litigants on the pertinent matters of court process and procedure because unlike litigants represented by advocates, unrepresented litigants are not familiar with court process nor do they have Counsel to guide them. When handling matters with unrepresented litigants, trial Magistrates should ensure to

guide them on court process and advise them to seek counsel in order to avoid occasioning a miscarriage of justice and arriving at wrong decisions.

In the premises, Ground 2 regarding bias fails and Ground 3 succeeds.

I will now proceed to exercise the duty of this court as the first appellate court and reappraise the evidence on record to reach my own findings and conclusion based on the issues for determination in the lower court, the disagreed facts as per the scheduling conference, the evidence on file and the grounds of appeal in this court.

Ground four; The court erred in law by causing boundary opening of disputed land without the services of qualified surveyors.

In arguing this ground, Counsel for the Appellant submitted that the trial Magistrate relied on evidence adduced at locus that the suit kibanja was far away from Block 75 Plot 77 which was an error since the services of a surveyor were not sought to ascertain this allegation.

Counsel for the Respondents submitted citing the case of ***Onek Manacy and Anor vs Omona Michael Civil Appeal No. 0032 of 2016*** where court held that visits to locus quo are essentially for the purposes of enabling the trial magistrate understand the evidence better. Counsel further submitted that PW2 told court that he knew that the suit kibanja was on 5 acres though did not know the measurements. PW2 told court that he did not survey before he sold the land on which the kibanja is and that it was vivid that the plaintiff/Appellant did not have knowledge on how big the land is thus a locus was desired by the trial court to ascertain the aspects of the said kibanja.

One of the authorities in which the purpose of visiting the locus in quo in a matter such as this is the case of **Safina Bakulimya & Another versus Yusufu Musa Wamala, Civil Appeal No. 68 of 2007**, in which it was held interalia as follows:

"Visits to the locus in quo are also provided for by Practice Direction No. 1 of 2007, where guideline 3 provides that during the hearing of land disputes the Court should take interest in visiting the locus in quo, and lays down what should happen when it does so. However, a visit to the land in dispute is not mandatory. The Court moves to the locus in quo in deserving cases where it needs to verify the evidence that has been given in Court, on the ground. It is my view that such visits are necessary to enable the Court to 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."

In the instant case, the trial court visited locus on the 14th day of August 2017. Upon explaining the purpose of the locus in quo to the parties, the Plaintiff/Appellant showed the disputed kibanja and a sketch map of the same is on the record. The Respondents did not agree with his sketch map and therefore showed and provided their own. The Plaintiff/Appellant disputed the boundaries as shown by the Respondents. The Appellant/Plaintiff clarified that the suit kibanja is not on Block 75 Plot 77 and that Block 75 Plot 77 is far away from the disputed kibanja.

In my opinion, it was important at this point to have the boundaries opened by a licensed surveyor in order to determine clearly the actual boundaries of the Appellant`s land, the location and the ownership of the suit kibanja.

The actual location of any boundary is subject to the evidence of an on-ground assessment of the facts pertaining to the matter, and is best undertaken by a Registered (or Licensed) Surveyor. Surveying deals with the determination of land boundaries for legal purposes and land ownership. ***(see Adrabo Stanley vs Madira Jimmy HCCS No. 24 of 2013)***

I therefore find that the trial Magistrate erred in law and fact when he relied on evidence relating to the location and boundaries of the suit kibanja which was disputed by the

parties, in reaching his conclusion without ascertaining the matter using a survey report from a licensed surveyor. In the circumstances, ground 4 also succeeds.

I will now proceed and determine grounds 5, 6 and 7 concurrently.

Ground five; The learned trial Magistrate erred in law and fact when he departed from pleadings of the party and thus arrived at a wrong conclusion.

Ground six; The learned trial Magistrate misdirected himself on the law on landlord's consent before purchase of Kibanja.

Ground seven; The learned trial Magistrate erred in law and fact when he found that the defendant/Respondents were legally occupying a Kibanja on the appellant's registered land.

In his judgment, the trial Magistrate made orders declaring that the Respondents are lawful occupants and that Byaruhanga needed less consent of the Appellant/Plaintiff before selling the suit kibanja to the Respondents` mother.

Counsel for the Appellant faulted the trial Magistrate for reaching his decision and conclusions based solely on the locus in quo without considering the pleadings and evidence on record. Counsel submitted that the Respondents did not adduce evidence to show that they secured consent from the registered proprietor before acquiring interest in the suit land.

Counsel for the Respondents argued that PW2 is estopped from alleging that DW2 never sought consent to sell the Kibanja to the Respondents` mother since he was indeed approached with the intent and details to sell the land but never objected to the same. He cited the case of **Pan African Insurance (U) Ltd Vs International Air Transport HCCS 0667 of 2013.** Counsel further submitted that if the sale is found to have been void due to lack of consent, the Kibanja would not return to the Appellant but to DW2, Byaruhanga Edward, the former kibanja owner.

PW1, the Appellant, bought the land comprised in Block 75 Plot 77 (PEXh1) in 1989 from a one Abdul Ssekawu. Land was transferred to his names on the 11th day of August 1992. Edward Byaruhanga had kibanja on Abdul`s land and sold it to the Respondents` mother without PW1`s consent. Land boarders Matovu Onesima and the luwanyi.

PW2 Abdul sold the land to the Appellant in 1987 and 2007. Byaruhanga was his tenant in 2004 or 2005. The land borders the Appellant, Matovu, Ssebanja Eric and Namabale Zakaliya. The disputed kibanja formerly belonged to Edward Byaruhanga and is part of the 5 acres that he, PW2, sold to the Appellant in 2007. Pw2, Abdul Sekawu was the landlord in 2004 and he first requested Byaruhanga to buy but he didn't have money. He introduced Byaruhanga to the Appellant as a tenant. Byaruhanga took possession in 2006. The kibanja in dispute is currently in the possession of the Respondents.

DW1, Namulema Josephine, the 1st Respondent, testified that her mother, Nalubega Maria alias Namatovu bought the kibanja from Byaruhanga in 2004 and at the time the land was for Abdul Ssekawu. The agreement was written by Edward Byaruhanga. The kibanja bordered the Appellant, Eric Ssebanja and Mworekye Komwani son of Obey.

DW2 Byaruhanga's testimony is that he sold the land to the Respondents` mother in 2004 vide agreement dated 25/2/2004 (DEXh2). The landlord was Abdul. He went to Abdul Sekawu, PW2, before selling to the Respondents` mother in 2004. He had bought the land from a one Siraje Mukasa vide agreement dated 21st January 2003.

DW3 Eric Ssebanja's evidence is that the Respondents` mother bought the kibanja from a one Matovu. There was an agreement and the borders of the land he sold to Siraje Mukasa are Matovu Onesimus, Ssebanja Eric, Mworekye Komwani and Abdul Sekawu.

Court visited locus in quo on the 14th day of August 2017. The purpose of the locus visit was explained to the parties and they proceeded to show the boundaries of the disputed kibanja and confirm evidence given in court. Both parties provided sketch maps. PW2

retracted his testimony and stated that the disputed kibanja belonged to a one Siraje Matovu (Mukasa). He stated that the portion in dispute belonged to Siraje Mukasa. The disputed land was sold in 2003 not 2007.Court sought clarification from the Plaintiff/Appellant and he clarified to court that the disputed kibanja is not on land comprised in Block 75 Plot 77 (PEXh1).

As earlier mentioned, the purpose of locus in quo is to enable the trial magistrate understand the evidence better. (***Onek Manacy and Anor vs Omona Michael Civil Appeal No. 0032 of 2016)***

The procedure for the conduct of locus in quo was summed by ***Justice Karokora (as he then was) in David Acar & three Ors Vrs Alfred Acar (1982) HCB (cited in Ngobi Patrick and Anor vs Nkuta Wilberforce Civil Appeal No. 070 of 2017)*** as follows: -

"***When the court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is my view not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact, the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given an opportunity to cross examine him. The opportunity must be extended to the other party. Any observation by the trial Magistrate must form part of the proceedings.***"

Counsel for the Appellant faults the trial Magistrate for considering the evidence and observations at locus over the entire evidence adduced in court.

Sir Udo Udoma CJ (as he then was) in De Souza Vrs Uganda (1967) EA 784 (cited in Ngobi Patrick and Anor vs Nkuta Wilbrforce Civil Appeal No. 070 of 2017) set the precedent that the purpose of visiting the locus is to check on the evidence given in court but not to fill gaps. He went on to advise that where the court on its volition

invited independent witnesses to Court, they too can be recalled at the locus to testify if necessary. He stressed that the court should always remind the witnesses of the oath (they took in Court) an indication that only witnesses who testified in Court are legitimate witnesses at the locus to avoid the risk of the trial magistrate "…making himself a witness in the case…..".Under no circumstances should a court allow fresh evidence at the locus.

In the instant case, the trial Magistrate allowed the witnesses to clarify their evidence as adduced in court. No new evidence was taken save for evidence that was clarifying and confirming the witnesses` testimonies as already given in court.

In that regard, PW2 clarified his evidence following the evidence of the parties about the boundaries. In his evidence, he established that the disputed kibanja was not what he had sold to the Appellant as he had testified in court, but rather what DW2 had purchased from a one Siraje in 2003. This evidence shows that the Appellant was not the landlord to the disputed kibanja in 2004 and therefore, Byaruhanga did not need to seek his consent to sell the land to the Respondents` mother.

It is as important for trial Magistrates and judicial officers to consider evidence as given by witnesses in their testimonies before court as it is for court to consider the evidence given at the locus in quo clarifying or confirming the testimonies. In fact, evidence taken at locus in quo should make the testimonies clearer for the judicial officer and should most importantly establish the location of the disputed land according to the parties. After conducting a locus in quo, the judicial officer should have a clear physical understanding of the disputed land. If they still have doubt as to the location and boundaries of the disputed land, then they should seek the services of a licensed surveyor for further clarification and better understanding by opening boundaries and determining the location of the land.

The record of proceedings at the locus in quo shows that the Appellant clarified to court that the kibanja in dispute is not on Block 75 Plot 77 (PXh1). This is different from what was agreed upon at the scheduling conference. However, this evidence was corroborated by PW2 at locus in quo when he stated that the disputed land is not on land comprised in Block 75 Plot 77. Counsel for the Appellant faults the trial Magistrate for relying mostly on evidence recorded at the locus in quo to reach his finding and conclusion. I have perused the record and although both parties gave sufficient evidence to prove their claims, the Appellant`s only witness PW2 changed his testimony at locus to clarify his testimony. These clarifications entirely challenged the Appellant`s claim that he was the landlord at the time of the sale and purchase between DW2 and the Respondents` mother and as such should have consented to the sale failure of which would make the Respondents trespassers. Having established at the locus in quo that the kibanja in dispute is not on the Appellant`s land which was also confirmed by the Appellant as he clarified to court, I find that the evidence adduced at the locus in quo in addition to what was testified in court was sufficient to prove that the kibanja in dispute is not on the Appellant`s land.

Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land ***(see Justine E. M. N Lutaaya v Stirling Civil Engineering Company Ltd SCCA No. 11 of 2002).*** In this case, the evidence on the record is clear that the disputed kibanja is not on the Appellant`s land. His claim of trespass cannot stand.

Consequently, Grounds 5, 6 and 7 fail.

In the result, this appeal fails on the whole. The Appellant had the burden to prove that the kibanja is on his land. The Appellant failed to prove his allegation of trespass against his land as he clarified at the locus in quo that the suit kibanja is not on his land comprised at Kabula Block 75 Plot 77 contrary to what had been agreed upon by the parties at scheduling.

Since some of the grounds of appeal succeeded, this appeal was not a waste of court's time and therefore each party shall bear its own costs.

I so order.

Right of appeal explained.

Dated at Masaka this 19th day of January, 2021.

Victoria Nakintu Nkwanga Katamba
Judge