

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT MUKONO
CIVIL APPEAL 0059 OF 2019
(ARISING FROM LD-CS 0166 OF 2009)

MUWAKANYA ELIAS:.....APPELLANT

VERSUS

KAKOMBE FABIANO:.....RESPONDENT

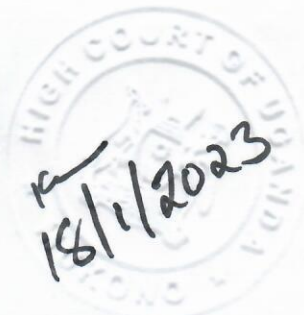
BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA

JUDGMENT

1. Background

The Appellant/Plaintiff brought a suit wherein he sought for orders of vacant possession, permanent injunction, interest and costs of the suit against the Respondent/ Defendant.

The Trial Magistrate on the 16th October 2017, found in favour of the Respondent and ordered vacant possession of the suit land and dismissed the suit with costs. The Appellant now seeks to appeal the judgement of the lower court as demonstrated in the Memorandum of Appeal which was filed on 25th October 2017, the grounds of appeal are laid out as here below;



1. The Learned Trial Magistrate erred in law and fact when she held that the Appellant was a trespasser on the suit land contrary to the law and evidence on the record.
2. The Learned Trial Magistrate erred in law and fact when she misinterpreted the evidence on record, the law and pleadings and thereby arrived at a wrong conclusion.
3. The Learned Trial Magistrate failed to evaluate and ignored the cogent evidence on record, in accordance with the law and facts adduced and hence arrived at a wrong conclusion.
4. The Learned Trial Magistrate erred in law and fact when she applied unlawful principles and analysis of evidence in the judgement.
5. The Learned Trial Magistrate erred in law and fact when she failed, declined to visit the locus in quo when the evidence on record indicated two pieces of bibanja in dispute with the parties.
6. The Learned Trial Magistrate erred in law and fact when she awarded costs to the suit to the Respondent in the circumstances of the case occasioning a miscarriage of justice.

2. Representation

The Applicant was represented by Mr. Sseryazi Benon while the Respondents were represented by Mr. Ssekumba Davis. Both parties filed written submissions.



3. **Issues:**

The issues in this case shall be based on the grounds as enumerated in the Memorandum of Appeal.

4. **Analysis and determination**

The Court has read the written submissions filed by both parties and has reviewed the authorities relied on, the Court will not enumerate in extensio the cases for each party.

5. In the cases of *Selle vs. Associated Motor Board Co. [1968] EA 123*; *Bogere Moses & O'rs vs. Uganda, SC.Crim. Appeal No. 01 of 1997*; and *Kifamunte Henri vs. Uganda, S.C.Crim. Appeal No.10 of 1992*; it was held that the duty of the first appellate court is to subject the evidence to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make allowance in that respect. With that duty in mind, I proceed to consider the appeal.
6. The Court has had the opportunity to review the evidence on record and observes that there was a preliminary objection raised by the Defendant that the matter was time barred. In addressing the point of law, the Trial Magistrate ruled at page 3 of the Judgement thus;



“According to the record of proceedings the Plaintiff testified that the acts of trespass started in 2001 and therefore the Plaintiff was not limited by time because he filed his case in 2009.

Section 5 of the Limitation Act provides that, “No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him.”

7. Perusal of the Plaintiff shows that paragraph 4 (iv) states;

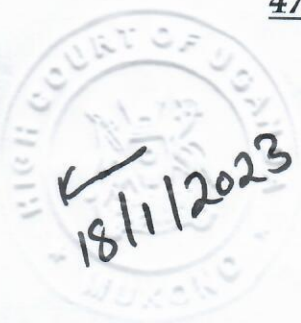
“That on or about 1982 the defendant took it upon himself and encroached on the plaintiff's Kibaja hence the beginning of the dispute”

8. The Civil Procedure Rules provide in Order 6 rule 7 provides that;

“Departure from previous pleadings.

No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.”

9. It is my considered opinion that this was a clear departure from pleadings as illustrated above and which is prohibited in law. It is trite law that parties are bound by their pleadings (O.6 r 7 of the Civil Procedure Rules). This position was re – affirmed in the cases of Jani Properties Ltd versus Dar-es-Salaam City Council (1966) EA 281; and Struggle Ltd versus Pan African Insurance Co. Ltd (1990) ALR 46 - 47, wherein Court rightly observed that;

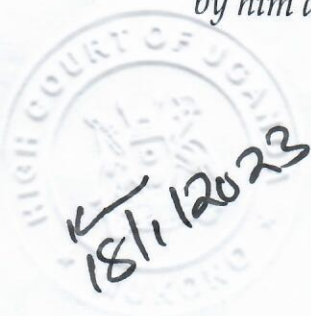


“the parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings” (see also Semalulu versus Nakitto High Court Civil Appeal No. 4 of 2008)”.

10. The Supreme Court in their decision of *Interfreight Forwarders (U) Ltd and East African Development Bank CACA No. 33 of 1992*, underscored the importance of correct drafting of the danger and consequences of departure. They were in that appeal discussing Order 6 rr 1-3 CPR which correspond to Order 43 rr 2 CPR. The Court held inter alia that:

“Order 6 Rule 1 of the Civil Procedure Rules provides that every pleading shall contain only a statement in precise form of the material facts on which the party pleading relies for claim or defence as the case may be, but not evidence by which they are proved.

The system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which the court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial which the court will have to determine at the trial. A party will not be allowed to succeed on a case not setup by him and be allowed at the trial to



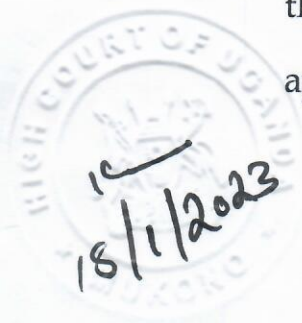
change his case or set up a case inconsistent with what he alleged in his pleadings, except by way of amendment of the pleadings”.

11. For Clarity, I will reproduce the provisions of Order 43 rule 2;

“Grounds which may be taken in appeal.

The appellant shall not, except by leave of the court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule; except that the High Court shall not rest its decision on any other ground unless the party who may be affected by the decision has had a sufficient opportunity of contesting the case on that ground. “emphasis mine.

12. In this case the matter has not been raised as a ground of appeal and neither did the respondent/Defendant cross appeal on that ground. Relying on Order 43 rule 2, the court is not confined to the grounds of appeal set forth in the memorandum of appeal, and is allowed to digress or look further than that where sufficient opportunity has been accorded to contest the ground. As earlier enumerated the parties had the opportunity to duly and did contest the ground which then appeared in the form of a preliminary objection.



13. In *Tanganyika Framers Association Ltd versus Unyamwezi Development Corporation Ltd* 1967 EA 620 it was held that an appellate Court has discretion to allow a new point of appeal if full justice can be done to the parties, provided that the court is satisfied the matter had been previously properly pleaded or that all the facts bearing on the new point of law had been elicited in the court below.

14. This Court is further fortified in the decision to reconsider the ground which outside the memorandum of appeal by the case *Tanganyika* as above, since the matter had been pleaded and raised in the lower court and both parties had traversed it.

15. Secondly, this is an illegality which the Court must for good measure deal with see *His Eminence Cardinal Nsubuga versus Makula International Ltd* 1982 HCB.

16. In the instance case, the Trial Magistrate erred in law when he found that the evidence had in effect amended the pleadings and took and relied on the evidence that the trespass had commenced in 2001. It was therefore not open to the Trial Magistrate to entertain anything else other than investigating whether the Defendants had trespassed on the suit land as enumerated in the plaint. As such, I find that to depart from the parties' pleadings offends the provisions of Order 6 rule 7.

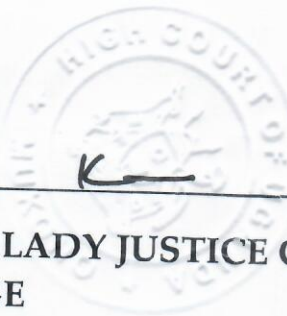
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17. There is some jurisprudence to the effect that where a departure from pleadings is revealed in the course of the trial and both parties submit on unpleaded points, then it is proper to deal with such an irregularity while dealing with one of the issues framed (*see. Lukyamuzi versus House & Tenants Agencies Ltd (1983) HCB 74; Ajok Agnes versus Centenary Rural Development Bank Ltd HCCS No. 722 of 2014*). This is however, not the case herein as earlier elucidated. In the case of *Ms. Fang Min versus Belex Tours & Travel Ltd. versus Belex Tours & Travel Ltd*, the Supreme Court, at Page 27, underscored the importance of the pleadings to describe precisely the respective cases of the parties and to define the issue in dispute for resolution by the Court.
18. This Court is of the view that where issues of both law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed in issues of the law only, it shall try those issues first, and for that purpose may, if it thinks, postpone the settlement of the issues of fact until after the issues of law have been determined. See Order 15 rule 2 of the Civil Procedure Rules.
19. Since the issue on departure of pleadings in my view, disposes of the whole appeal this Court will not delve into consideration of the other grounds of appeal.

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20. The Appeal is therefore dismissed with costs to the Respondent.

Dated at Mukono this ^{18th}.....day of January.....2023.



HON. LADY JUSTICE CHRISTINE KAAHWA
JUDGE