The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 32 of 2022

(Arising from the Chief Magistrate's Court of Kumi at Kumi Civil Suit No. 001 of 2022)

Obukan John :: Appellant

Versus

Ekwenare Michael ::: Respondent

(Appeal from the Judgement and Orders of the Magistrate Grade 1's Court of the Chief Magistrate's Court of Kumi at Kumi delivered on 14th July 2022 by HW Maloba Ivan)

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Background:

The plaintiff (now appellant) instituted claim No. 001of 2022 against the defendant (now respondent) for recovery of approximately two acres of land situated at Olupe village, Olupe parish, Kumi sub-county, Kumi district, a permanent injunction, an order for vacant possession and an order for general damages.

The appellant claims that he was gifted ***inter vivos*** eleven gardens by his late father, Isa Martin, in 2005.

That from the time when he was gifted, the said eleven gardens by his father, there was no dispute until 2020 when the respondent trespassed on the boundary, which comprises the suit land measuring approximately two acres, by illegally planting trees, and he even constructed a pit latrine on the same land. the respondent was summoned by the appellant's clan of Irarak Isimokoka on 12 September 2021; he apologised by kneeling down and sought forgiveness for trespassing on the appellant's land. The appellant stated that the actions of the respondent jeopardised his development plans and caused him mental anguish, for which he sought general damages.

On the other hand, the respondent objected to the appellant's claim for recovery of the suit land, contending that he was the rightful owner of the suit land, having bought it on 15 November 2013 from Okwerede Kokas.

The respondent contends that he was summoned by the appellant's clan of Irarak Isimokoka for the alleged trespass on the boundary but not the suit land as alleged by the appellant. The respondent avers that his actions of utilising and occupying his own land do not jeopardise the appellant's development, wherefore he also prayed for a declaration that he is the rightful owner of the suit-land, a permanent injunction restraining the appellant, his agents and assignees from further actions on the suit land, an order of quiet possession of the suit land, general damages and costs of the suit.

The issues that the trial court determined were;

a) Who is the rightful owner of the suit land?
b) Whether the defendant is a trespasser on the suit land?
c) What are the available remedies to the parties?

The trial magistrate discussed proof of ownership and unlawful entry to prove trespass.

The trial magistrate observed and found at the locus in quo that there was no sign of trespass whatsoever, that the boundary between the respondent's and appellant's land was still in existence, and that the appellant's land was not trespassed upon as alleged.

The trial magistrate, having found that the appellant failed to prove ownership of the suit land (two gardens) and the unlawful entry by the respondent, entered judgment in favour of the respondent, hence this appeal by the appellant.

According to the memorandum of appeal, the appellant raised four grounds of appeal as follows; that,

a) The learned trial magistrate erred in law and fact when he found for the respondent against the weight of evidence.
b) The learned trial magistrate erred in law and fact when he evaluated the respondent's evidence in isolation of the appellant.
c) The trial magistrate erred in law and fact when he declared that the respondent was not a trespasser.
d) The decision of the trial magistrate occasioned a miscarriage of justice on the appellant.

The appellant proposed the following orders;

a) That this appeal is allowed.
b) That the Judgement and Orders of the Grade 1 Magistrate Court be set aside.
c) Costs be borne by the respondent.

2. Duty of the first appellate court

This is the first appeal from the decision of the learned magistrate. The duty of the first appellate court is to scrutinise and re-evaluate all the evidence on record in order to arrive at a fair and just decision.

This duty was well laid down in the case of **Kifamunte Henry vs Uganda SCCA No. 10 of 1997,** where it was pointed out that;

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the material before the trial judge. The appellate court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it."***

Furthermore, in the case **Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236,** the obligation of a first appellate court was pointed as being;

> ***"...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 also: Baguma Fred vs Uganda SCCA No. 7 of 2004.

3. Power of the Appellate Court:

Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

The above legal position in regard to the duty and legal obligation of the first appellate court is considered while resolving this appeal.

4. Representation:

According to the pleadings filed in this appeal, the appellant was represented by M/s Opio & Company Advocates, while the respondent was represented by M/s Isodo & Co. Advocates. Counsel representing the parties argued this appeal by way of written submissions. The submissions and the whole record of the lower court, including pleadings, proceedings, judgement, and orders, are considered while resolving this appeal.

5. Determination:

Counsel for the appellant, in his submissions, chose to argue grounds one and two concurrently and the rest consecutively, I shall also follow that order in resolving this appeal.

a. *Grounds One and Two:*
   - *The learned trial magistrate erred in law and fact when he found for the respondent against the weight of evidence.*
   - *The learned trial magistrate erred in law and fact when he evaluated the respondent's evidence in isolation of the appellant.*

Counsel for the appellant submits that his portion of the evidence was unchallenged during cross-examination that the land that the respondent bought from his cousin brother, DW2, is not in dispute, but in 2016, upon the demise of his father, that the respondent encroached on his land in 2020 which is on page 5 of the proceedings. That PW1 requested the defendant to plant a boundary where he believed the boundary was, which was done, however again in 2021, the respondent again left that particular part and moved to the next garden, trespassed on it by planting trees, and the respondent in the second meeting

acknowledged his mistake and that the disputed gardens are two which the appellant inherited from his father Isa Martin, which evidence was to counsel corroborated by the testimony of PW2, and PW3 under paragraph 7 of the proceedings who testified that the defendant's wife and son remarked that indeed his father had made a mistake. Counsel for the appellant contends that the foregoing evidence was ignored by the trial magistrate who erred in law and, in fact, when he found for the respondent against the weight of evidence.

Furthermore, counsel for the appellant avers that the trial magistrate erred in law and, in fact, when he evaluated the respondent's evidence in isolation of that of the appellant, as it is clear from the testimonies of all the parties that the dispute arose when the defendant encroached the plaintiff's land by approximately 6 meters by 170 meters which claim the appellant told the court and that the suit would not have been filed had the respondent not built a toilet onto the appellant's land and also had he not cleared thicket shrubs locally known as *etekwa*, *epeduru* which all constituted trespass for which counsel for the appellant faulted the trial magistrate for not considering such evidence.

Counsel for the appellant also contends that the trial magistrate observed that there was no sign of trespass whatsoever during his locus visit on 4 July 2022 as the boundary between the defendant's land and the plaintiff's land was still in existence, however, to counsel for the appellant, the observation of the trial magistrate at locus was at variance with DW2's testimony at locus where counsel submitted that DW2 on page 20 of the record admitted that the problem is where the latrine as built by the defendant yet initially when DW2 was cultivating, he left some space while cultivating not beyond the big trees. Counsel contends that the foregoing evidence of DW2 at the locus and the appellant's evidence that had the respondent not built a toilet onto the appellant's land and also cleared his

tress and also the admission by the respondent before the clan chairperson by kneeling down and praying and telling him to pay 30,000. To that end, counsel for the appellant contends that the trial magistrate ought to have considered the fact that the respondent built the latrine and also where the respondent's cultivation went beyond where DW2, the one who sold to him the adjoining two gardens, used to end, all evidence constituting trespass onto the appellant's land by the respondent.

On the other hand, counsel for the respondent contends that, as PW1, the appellant set the tone of claiming his two gardens and the subsequent appellant witnesses supported his evidence. However, PW4 Ikotot Jarrie and PW5 Opio Ben told the court on page 12, line 9 and page 13, line 16 of the record of proceedings that the land trespassed upon was only about 2-3 meters. The respondent testified that upon purchasing two gardens from one Kokas Okwerede, he has maintained his limits and has not trespassed on the appellant's adjacent land. All the respondent's witnesses denied the alleged trespass and asked the court to visit the locus.

Counsel for the respondent contends that during locus, the court clearly found that the appellant could not show the two gardens he had sued for and instead narrowed everything down to a boundary dispute that was about 2-3 meters wide, which dimension was stated by the appellant himself during locus on page 19, line 19 of the record of proceedings.

Counsel contends that according to the record, it was clearly observed at locus that the parties own land adjacent to each other and are separated by an existing boundary that is clearly defined by trees and shrubs. Counsel for the appellant contends that the respondent has a home on the two gardens earlier claimed but later acknowledged by the appellant to belong to the respondent, having

purchased them from Okwerede Kokas and that neither party has encroached on the other's land, although both parties have insignificantly encroached on the boundary from either side.

That the respondent constructed a pit latrine near the boundary but not into the appellant's land.

In ***Obitre v Abdu Matua Civil Appeal No. 0024 of 2011 [2017] UGHCLD 16,*** Mubiru, J held that;

> ***"At the trial, the burden of proof lay with the appellant. To decide in favour of the appellant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondent such that the choice between his version and that of the appellant would not be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondent, might hold that the more probable conclusion was that for which the appellant contended. That is the balance of probability/preponderance of evidence standard applied in civil trials".***

In ***Justine E. M. N. Lutaaya vs. Stirling Civil Eng. Civil Appeal No. 11 of 2002,*** the Supreme Court held that trespass to land occurs when a person makes an unauthorised entry upon another's land, thereby interfering with another person's lawful possession of the land.

Thus for one to claim trespass, it is trite that he has to adduce evidence that the land trespassed upon belongs to him and that the alleged trespasser did not have authorisation or permission.

The appellant relied on the evidence of five witnesses, namely Obukan John (the appellant) as PW1, Okwalinga Kalori as PW2, Lawrence Ariong as PW3, Ikotot James as PW4, and Opio Ben as PW5. The respondent relied on the evidence of three witnesses, namely Ekwenare Michael (the respondent) as DW1, Okwerede Kokas as DW2 and Odeke Sois as DW3.

The appellant tendered in the trial court minutes of the Ateso and English versions of the third meeting for correcting the planting of the boundary between the appellant and the defendant dated 3rd October 2021 marked as PEX1; Minutes of the meeting of the Irarak Isimokoka on matters of looking for the way forward concerning the family issues of the late Isa Martin dated 2nd August 2016 marked as PEX2. On the other hand, the respondent tendered in court both the Ateso and English translated versions of the sale agreement of the suit land between himself and Okwerede Kokas dated 15th November 2013 and a letter dated 3rd November 2021 from the clan of Irarak Isimokoka as DEX1 and DEX2 respectively.

The respondent, on page 4 of the record of proceedings, acknowledges that the respondent is his neighbour who purchased land from his cousin brother, DW2, in 2013 and went ahead to construct a house thereon. The court admitted the sale agreement between DW1 and DW2 as DEX1. The trial magistrate noted in his judgement that DW2, in his testimony, confirmed that he was the one who sold the two gardens to the respondent. That the two gardens border the appellant's land and that there was a boundary between the appellant and the respondent's land. DW2 stated that he showed the respondent his boundary at the time he sold the two gardens to him.

DW2 stated at the locus in quo that the boundary separating the respondent and appellant's land is still intact. DW2 further observed that the respondent had not

trespassed upon the appellant's land save for both parties encroaching on the boundary from either side, which had reduced the boundary from initially five meters to two to one meter. That the trees that separated the appellant's land and DW2's land, now DW1's land, were still in existence. He also stated that the latrine built by DW1 was in the boundary separating either land. this foregoing is the major point of contention. The question for this court to answer is whether the boundary was part and parcel of the appellant's land or it belonged to neither, and it was just a mere separation of the appellant's land from the respondent's land.

It is worth noting that DW1's testimony is in harmony with PW1's that DW1 purchased the suit land in 2013 and enjoyed quiet possession thereof for nine years till 2020 when the appellant claims that DW1 trespassed on his land.

It also should be noted that DW2's testimony in court was not tested through cross-examination at the appellant's option, nor was his testimony controverted at the locus. Also, DW2, who sold the land to the respondent, was neither called nor involved in the meetings meant to solve the dispute the appellant had lodged against the respondent with the clan, to which all the plaintiff witnesses testified.

Counsel for the appellant avers that the trial magistrate evaluated the respondent's evidence in isolation of the appellant's evidence.

However, under section 133 of the Evidence Act, subject to the provisions of any other law in force, no particular number of witnesses in any case is required for the proof of any fact.

Evidence is not to be counted but only weighed; it is not the quantity of evidence but the quality that matters.

Consequently, even in a case like this, the appellant, in his testimony on page 5 of the record, does make references to the clan inspecting the land and that the wife of the respondent and his son making admissions in regard to the trespass, but unfortunately, those two were never called as witnesses to be cross-examined and support this contention.

That inadequacy rendered the weight of the evidence of PW1 to attract minimal consideration.

In addition, it is my observation that PW1's evidence in regard to DW1 acknowledging that he admitted his mistake and trespass, asked for forgiveness and was asked to pay 300,000/, is contradictory to PW2's testimony as PW2 testified that he was asked to pay 50,000 at page 7 of the record instead of the 300,000.

PW2 testified that the wife of the respondent and the son made statements that the respondent trespassed but then further testified that after the boundary mark was planted on 3/10/21, the defendant's wife and son uprooted everything. Also, I found contradictions and inconsistencies regarding the area or size claimed to have been trespassed upon. Such contradictions are material.

During cross-examination, PW2 testified that DW2 was aware of the boundary since he sold the land to DW1 and that at the time the boundary was planted by the plaintiff on 3/10/2021, the clan leaders of the respondent were not present, and no authorities of the defendant's village were present too.

PW3, the vice clan chairperson, testified on page 10 that when they went with the chairman of the clan, PW2, to see the boundary that the defendant had trespassed upon, they did not find the respondent and that they left but later went back but could not resolve the dispute but interestingly later testified that

what he wanted the court to do was to help them compel the defendant to leave the suit land and pay costs and damages incurred by the appellant.

During cross-examination, PW3 testified that the land of the respondent that he bought from DW2 belongs to the people he failed to live in harmony with whom he is chairperson and that DW1 was not his subject.

PW4, the then LCII defence of Olupe village, testified on page 11 that when they went to resolve the boundary dispute on 16th September 2021, DW1 was present and that they established that DW1 had actually trespassed on the plaintiff's land and removed the boundary marks but he asked for forgiveness and they told him that they were going to plant the boundary back.

Interestingly, PW4 later changes his testimony and avers that DW1 bought the two gardens neighbouring the land of plaintiff from DW2 and had even built a home therein. This later statement contradicted his former statement of trespass.

Since it is the appellant who bears the burden of proof and that burden is on a balance of probabilities, the question I ask thus is why it that if indeed it is true that DW2 was the person who sold the suit land to DW1 and knew all the boundaries of the suit land which he sold to DW1 why was he never called by the plaintiff or his clan leaders in any of the boundary verification meetings?

This is because while PW4 testified that the defendant, according to their visit to the suit land had trespassed the plaintiff's land by approximately three meters, he acknowledged that DW2 who sold the land to DW1 did not attend because he had committed no offence.

Also PW5 testified that on 16th September 2021 when he was called as a member of the clan committee of the land to see the disputed boundary, the defendant was not around, but when they went back on 26/09/2021, they told the respondent to pay UGX 250,000 to enable the processing of planting the boundary but the defendant refused to pay and that the disputed boundary that the respondent trespassed upon is 2-3 meters. The amount of UGX 250,000 contradicted the amount testified to by PW1's who stated that DW1 acknowledged his mistake and trespass, asked for forgiveness and was asked to pay 300,000 while PW2 state that it was 50,000 at page 7 of the record instead of the 300,000.

Also while PW2, the clan chairperson, testified on page 7 of the record that it was a dispute concerning the boundary between the plaintiff and the defendant, on the other hand, DW1 testified that he had spent nine years cultivating the disputed land without anybody complaining that he had trespassed on the suit land and that he had been the plaintiff's neighbour for 10 years without him complaining about trespass.

DW1 also testified that he was shown the boundary by DW2 who sold to him the land and that PW2 okayed the sale of the land to him.

DW1 further testified that the place where he constructed the toilet is where DW2 sold to him and that the neighbours were present when the land was being sold to him and that other clan members were present on that day and even moved with him around so as ensure that he was buying the right thing. DW1 also, in his testimony, wondered why the appellant's late father had never disputed the boundaries.

DW2, who sold the land to the respondent, confirmed the sale and stated that he had never again visited the suit land to check or see where the dispute had arisen from.

He also testified that the appellant is his cousin-brother, that the two gardens of DW1 neighbour the appellant's land, that there is a boundary in-between the gardens of the appellant and the respondent and that he showed the defendant his boundary at the time of the sale of the two gardens to him.

DW2's testimony was not challenged by the appellant either during the court hearing or even at the locus visit.

DW3, formerly an LCII councilor testified that he witnessed the selling and buying of the land by DW1 from DW2 and that since then he saw DW1 shifting his original home to build in the two gardens.

DW3 further testified that at the time that DW1 bought the two gardens, DW1 was shown the boundary where his gardens pass and that he had never gone back to the land since 2013 and he did not know what was transpiring.

During locus, DW2 testified that the toilet is a bit in the boundary but has not encroached on the other land and that both parties encroached on the boundary because the boundary is a bit bigger than it was.

Counsel for the appellant argued that the trial magistrate ought to have considered the fact that where the latrine was built by the respondent and his cultivation went beyond where DW2 sold him the adjoining two gardens used to end and that that constituted a trespass to the appellant's land.

However, according to the evidence on record, DW2 during the locus visit, observed that the problem was where the latrine was built and that when he was

cultivating, he left some space not beyond the big trees and whereas the defendant's toilet is a bit in the boundary, he has not encroached on the appellant's land but that both parties encroached on the boundary.

Arising from all these I would find that the encroachment, contrary to what counsel for the appellant insinuates, was on the boundary between the land of the appellant and the land of the defendant and that it was caused by both the parties according to DW2, and it was not on the land of the plaintiff but on the boundary separating both lands.

Furthermore, it is my finding that the trial magistrate, contrary to the submissions of counsel for the appellant that he did not consider the allegation that the respondent trespassed his latrine into the appellant's land, the trial magistrate actually noted in his observations in his judgment on page 6 that:

> ***"DW2 confirmed that the boundary separating the respondent and appellant's land is still intact at the locus in quo. His observation was that the respondent had not trespassed upon the appellant's land save for both parties encroaching on the boundary from either side, which had reduced the boundary from initially five meters to two to one meter. That the trees that separated the appellant's land and DW2's land, now DW1's land, were still in existence."***

Invariably, therefore, it is my finding that the land on which the respondent built his toilet, according to the adduced evidence, was on the space left by DW2 when he was still the owner of the land before he sold it to the respondent, which is the boundary that separates the appellant's land from the respondent's land.

Accordingly, I find that the trial magistrate considered all the evidence on the record, evaluated it well, attached the right weight and arrived at the correct

position and on a balance of probabilities, the appellant failed to prove his claims. On the contrary, the respondent's evidence was not only consistent as with those of his witness, but all his witnesses laid credence to his ownership of the suit land. the respondent could, therefore, not have trespassed on his own land. Having found as I have, Gounds 1 and 2 fail.

b. *Ground Three:*

- *The trial magistrate erred in law and fact when he declared that the respondent was not a trespasser.*

Having resolved grounds one and two as I have, I reiterate that the respondent could not have trespassed on his own land.

c. *Ground four:*

- *The decision of the trial magistrate occasioned a miscarriage of justice.*

Since grounds 1, 2 and 3 have failed, the trial magistrate's decision did not occasion a miscarriage of justice. This ground fails.

6. Conclusion:

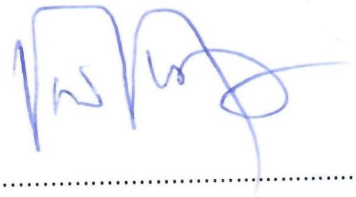
Counsel for the respondent prayed that the court disallow/reject this appeal with costs as under Sec.27 of the Civil Procedure Act, costs follow the event.

The case of ***Primchand Raichand Ltd & Another vs. Quarry Services of East Africa & 6 Others [1972] EA 162*** is applicable here for in that case it was held that, ***"a successful litigant ought to be fairly reimbursed for costs he had incurred ...."***

Arising from my conclusions above, this appeal is found to lack merits and would thus fail and as such it is dismissed with costs to the respondent.

7. Orders:

- This appeal lacks merits and is thus dismissed with costs to the respondent in this court and the court below.
- The judgment and orders of the trial magistrate vide Civil Suit No. 001 of 2022 filed in the Chief Magistrate's Court of Kumi at Kumi delivered on 14th July 2022 is upheld.



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Hon. Justice Dr Henry Peter Adonyo

Judge

25th August 2023