THE REPUBLIC OF UGANDA

IN THE HIGH COURTOF UGANDA AT MBARARA

CIVIL APPEAL NO 060 OF 2018

(Arising from MBR-00-CV-CS 535 of 2009)

TUSIINGWIRWE FAITH.....APPELLANT

VERSUS

KASINGYE SIMON.....RESPONDENTS

BEFORE HON. JUSTICE TADEO ASIIMWE

JUDGEMENT

BACKGROUND

This appeal arises from the judgement and orders of **His Worship TWAKYIRE SAMUEL** (The Chief Magistrate Mbarara) where the respondent sued the appellant for a declaration of right, permanent injunction, general damages and costs.

The respondent's claim at trial is that that he purchased the suit land from a one JB Garubanda on 17/05/2009 as per the sale agreement exhibited as EP4 and that the said JB Garubanda bought the suit land from the appellant/faith Tusingwire as per agreement dated 28/08/2008 and exhibited as EP2 and later formalized by a lawyer as per EP3.That

in 12/08/2009 without any right and consent of the respondent, the appellant entered the suit land ,asserted ownership and evicted tenants of the respondent.

On the other hand, the appellants denied the respondent's claims and stated that she is the owner of the suit land having bought it from a one Ndabirebire Dezi vide EP1/ED2, and that she had never sold it arguing that the agreements between her and are forgeries.

At the conclusion of the hearing, the learned trial Magistrate found for the respondent.

The appellant being dissatisfied by the decision of the trial chief magistrate appealed the whole decision on the following grounds.

1. That the trial magistrate erred in law and in fact for failure to adequately or at all to evaluate the evidence on record as a whole which led him to arrive at an absurd discussion to the prejudice of the appellant.
2. That the learned chief magistrate having stated the principle of proof in civil cases on a balance of probabilities erred in fact and in law to ignore the glaring evidence and inconsistencies that tilt the case in favor of the appellant.

   a). inconsistencies in the document relied on by the respondents for his case.

   b.) the importance of the lawyer's agreement in a saga that was the transaction.

c.) the dramatic manner of purchase of the subject matter that was not in consonance of sale and purchase of immovable property.

d.) the patently false evidence of pw3 who was central in the purchase of the subject matter.

e.) the casual observation by the learned chief magistrate, the chairperson of the area, a person of authority and should be trusted.

3. That the learned trial chief magistrate erred in fact and in law for concluding without basis that the appellant trespassed on the subject matter when the available evidence demonstrated that the subject matter belonged to her therefore she could not be a trespasser.

4. The learned trial chief magistrate erred in law to ignore the binding authorities cited for him rendering the decision per in curium.

5. The learned trial chief magistrate erred in fact and in law to award general damages which were not proved.

At the hearing, the appellant was represented by Nasaasira Bridget while the respondent was respondent was represented by Collins Nuwagaba. Both parties filled written submissions as per the directions of court.

Before I proceed to deal with the merits of this appeal, I wish to state that the memorandum of appeal [illegible] for

formulation of grounds of appeal under **0.43r (2) of the Civil Procedure Rules CAP 71** which is to the effect that

*"the memorandum **shall** set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any Argument or narrative and the grounds **shall** be numbered consecutively."*

In courts view, the use of the word "shall" makes the above rule mandatory.

Therefore. the errors in the above ground of appeal being narrative, would have an effect of making the entire memorandum of appeal incurably defective and would be struck out by court with the attendant costs. However, since the objection was never raised by the respondent and this being an old appeal, I am constrained to deal with the appeal on its merits.

Duty of Appellate court

This being a first appeal, Court is 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. This duty is well explained in ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236.**

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make

due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly, the view of the trial court as to where credibility lies is entitled to great weight.

RESOLUTION

Ground 1 and 2 were argued together and 3,4,5 separately. For consistency, I shall therefore resolve these grounds in the same order.

GROUNDS 1 and 2

1. That the trial magistrate erred in law and in fact for failure to adequately or at all to evaluate the evidence on record as a whole which led him to arrive at an absurd discussion to the prejudice of the appellant.

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e.) the casual observation by the learned chief magistrate, the chairperson of the area, a person of authority and should be trusted.

On these 2 grounds, the appellant's counsel in her written submissions argued on the basis of inconsistencies on record regarding PE1 and

DE2 sale agreements for both parties. she argued that the name of the seller in one agreement reads Ndibarema Dezi which is a forgery in her view instead of a correct one Ndabirebire Dezi. She further submitted that the testimony of pw3, the LC1 chair person who signed on both documents was an after though and a mere concoction. She faulted the trial magistrate's reliance on the purchase agreement that was executed by a lawyer who did not testify in court. She further faulted the respondent for not doing due diligence before purchase of the suit land.

In reply, counsel for the respondent submitted denying any inconsistence in the respondent's evidence since the documents being compared (PE1&ED2) are not evidence of the respondent. He argued that PE1 belongs to the plaintiff /respondent while ED2 belongs to the defendants/appellant and cannot be evaluated as evidence of the plaintiff/respondent. He also relied on the evidence of pw3 who was recalled by court to explain the alleged inconsistencies and he did so satisfactorily by denying the name Ndibarema Dezi and confirmed Ndabirebire Dezi as a true seller of the land.

I have considered the submissions of both counsel as regards the inconsistencies in the respondent's evidence.

Law on inconsistencies has been expounded in several authorities, in the case of **Constantino Okwel VS Uganda SCCA No. 12 of 1990,** the Supreme court laid down the law as to contradictions and inconsistencies. Court stated that: - *"In accessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explain, will usually, but not necessarily result in the evidence of the witness*

being rejected. Minor inconsistencies will not usually have the same effect unless the trial magistrate thinks they point to deliberate untruthfulness.

In the instant case it is clear that documents which give rise to the alleged inconsistencies originated from different parties; - one came from the plaintiff/respondent another from the defendant/ appellant (EP1 and ED2 respectively). Therefore, their evidential value is for both parties and any inconsistency cannot be blamed on the respondent because each parties case is different as per the pleadings and evidence on record. Besides both documents being challenged relate to how the appellant acquired her interest in the suit land, an issue which is not disputed by the parties. It is therefore immaterial and wastage of court's time to investigate documents that relate to an issue which is not disputed by both parties.

What was/is in dispute is transaction between the appellant and a one J.B Garubanda and indeed this was the appellant's case at trial that she never sold her land at all to anyone. In any case, any defect in the questioned agreements EP1&DE2 would negatively affect the appellant's rights. In addition, the misdiscription of the seller's name appearing in the two documents were fully explained by the pw3 (LC1 chairman) who witnessed both agreements and was recalled by court to explain the discrepancies at page 15 of the lower court record proceedings. I therefore find that the said inconsistencies in the two agreements as regards the name of the seller were satisfactorily

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explained and are immaterial to the determination of the issues between the parties before court.

As regards the issue of not calling the advocate who witnessed/executed EP3, an agreement between the appellant and Garubanda J.B, this court holds the view that the omission is not fatal to the plaintiff/respondent's case since there were other witnesses to the agreement who testified in court asPW1(buyer, Garubanda J.B) and pw3 the chairman LC1(Kakooza Joseph). In addition, EP2 the original agreement dated 28/08/2008 in a local language is on court record to prove the transaction and the contents there in are similar to the questioned agreement (EP3).

On the issue of failure to carry out due diligence, I agree with the appellant's submission and the cited case that land purchase transactions require parties to carry out due diligence before purchase. In this case, the suit land was not registered and the due diligence that was expected of the respondent was limited to confirming the actual owner and boundaries. This he did by obtaining the original agreements from the seller, inviting the chairman LC1 PW3 to confirm and witness the agreements and visiting the suit land as per his evidence on record. In his evidence as PW1, the respondent confirmed to have transacted with JB Garubanda as a rightful owner of the suit land after the chairman confirmed having been a witness when JB was acquiring his interest in the suit land from the appellant. In court view, the respondent carried out the required due diligence before purchase of the suit property in the absence of contrary evidence.

In conclusion, I find no merit in grounds 1& 2 and both are answered in the negative.

GROUND 3

That the learned trial chief magistrate erred in fact and in law for concluding without basis that the appellant trespassed on the subject matter when the available evidence demonstrated that the subject matter belonged to her therefore she could not be a trespasser.

On this ground the appellants counsel submitted at length arguing that the appellant is the owner of the property and never sold it to anyone. she attacked the agreement between the appellant and the said JB Garubanda as a forgery. she attacked the handwriting expert report which validated the sale agreement between the parties. she further argued that the only transaction between the appellant and Garubanda JB was a loan transaction and not a sale.

On the other hand, the respondents counsel submitted that the trial magistrate having found that the respondent had rightfully purchased the suit land, then he was right to conclude that the appellant/defendant was a trespasser.

It is provided in the constitution of Uganda that enjoyment of one's property is one of the fundamental rights (God given). It is therefore an offence of trespass to interfere with one's right to property. Trespass to land consists of any unjustifiable intrusion upon or interference with the land in possession of another and can be one of the following:

1. Entering upon a land in possession of another without permission.
2. Remaining on land entered with permission after request to move has been made (e.g. being sent away by a landlord and you refuse to go away, it is trespass to land).
3. Placing or throwing away any object upon it without any lawful justification.

The supreme Court in the case of Justine E.M.N Lutaaya vs. Stirling Civil Eng. Civ.Appeal No. 11 of 2002 9, held that:-

"trespass *to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land".*

In the instant case, there is evidence on record to the effect that the suit land was purchased the by the respondent from JB who had acquired it from the appellant. Although the appellants claim that she never sold the land in question to a one JB and that the agreements to that effect are forgeries, she never produced evidence at trial to prove the said forgery. To the contrary, the respondent tendered in court exhibit PE6 a handwriting expert report which was not objected to at trial and it showed that the appellants signature which was similar appeared on both agreements while acquiring the property (DE2) and PE2/3 while selling to JB Garubanda. On the basis of the evidence on record, there is no proof of forgeries as was alleged by the appellant.

In addition, the submission by the appellant about a loan transaction is not born out of the evidence on record apart from the assertion from

counsel and the appellant. One would have expected the appellant to lead evidence at trial about the loan transaction by producing the loan agreements or evidence about her protest against the chairperson who allegedly retained her documents or evidence to the effect that he (chairman) was the usual custodian of her documents.

Besides one wonders why the appellant never took any action against JB Garubanda who took her land and sold it to the respondent. That inaction speaks volumes. On the basis of the above, I find no reason to fault the trial magistrate for finding that the appellant was a trespasser on the suit property since she entered the suit land without the appellant's consent. Therefore, ground 3 fails.

GROUNDS 4 &5

The appellants counsel never submitted on these two grounds but instead introduced and argued new grounds relating to courts failure to visit locus and attacked expert evidence EP6 without leave of court. This is outright departure from the appellant's pleadings which is contrary to the law and this court will not consider the arguments on the new grounds of appeal introduced by the appellant.

I will therefore proceed to resolve grounds 4&5 as framed without submissions.

GROUND 4

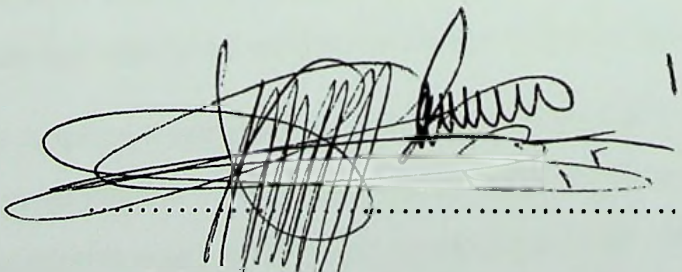
The learned trial chief magistrate erred in law to ignore the binding authorities cited for him rendering the decision per in curium

In the instant case, the respondent proved that he has been denied use of his land from 2009. The suit land was rented premises by two tenants who were evicted by the appellant. He certainly suffered loss and inconvenience for which general damages accrue. The respondent was further denied an opportunity to do any investment in his property due to the appellant's continued occupation. I therefore find that the award of general damages of 20,000,000= (twenty million) was justified. I therefore find no justifiable reason to fault the decision of the trial chief magistrate on the above award. Ground 5 also fails.

In conclusion, I find no merit in the appeal and the same stands dismissed with the following orders;

1. The suit land belongs to the respondent.
2. The respondent is entitled to vacant possession of the land.
3. Costs of this appeal are awarded to the respondent.

I so order



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DEPUTY REGISTRAR - MBARARA
DATE: 23/9/2020

TADEO ASIIMWE.

JUDGE

4/09/2020