

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL APPEAL NO.33 OF 2009
(Arising from Luweero Chief Magistrates' Court Civil Suit No. 008 of 2003)**

KAKEETO JACKSON APPELLANT

VERSUS

SEGUJJA GODFREY RESPONDENT

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an appeal from the judgment and decree of His Worship G.A.Okongo Japyem Magistrate Grade 1 of Luweero Chief Magistrates Court delivered on the 17th day of August 2009.

Background

The facts as accepted by the trial court are briefly that the respondent (as administrator of the estate of his late father Stanley Kakembo) sued the appellant seeking a declaration that he is the bonafide occupant and owner of a kibanja interest found on land comprised in Bulemezi Block 366 Plot Nos. 104 & 106 that he had inherited from his late father. He conceded that the appellant is the registered proprietor of the suit land but had refused to recognize his kibanja interest and had trespassed on it. In addition, the respondent sought orders for a permanent injunction, andeviction, or in alternative, compensation in the event that he vacates the land, general, special and exemplary damages.

In defence to the claim, the appellant claimed to have purchased the suit land from one Onesimu Kawesa Sesanga the registered proprietor sometime in 1997, and was registered as proprietor thereof in July 1998. That at the time he purchased the suit land he ascertained that it had neither encumbrances nor occupants and remained unoccupied and unutilized until the boundaries thereof were opened and a title duly obtained. He claimed that the appellant had laid a fraudulent claim and possession of the suit land, and in counterclaim, sought his eviction as a trespasser, a permanent injunction and costs.

The Trial Magistrate believed the testimonies of the respondent and his witness and found him to be a bonafide occupant of the said land.

The appellant being dissatisfied with the judgment filed an appeal on the following grounds:-

1. The Learned trial Magistrate failed to properly evaluate the evidence adduced thereby arriving at a wrong conclusion that the respondent is a bonafide occupant/kibanja holder on the appellant's land comprised in Block 366 Plot 104 and 106 at Bulemezi Ssabagabo.
2. The Learned Trial Magistrate erred in law and in fact when he relied on an unsworn testimony at the locus in quo to make a finding that the respondent was cultivating crops on the appellant's land by the time it was fenced off thus occasioning a miscarriage of justice.
3. The Learned trial Magistrate erred in law and in fact when he awarded the respondent "compensation for damages" under Sec. 178 of the Registration of titles Act Cap 230.
4. The Learned trial Magistrate erred in law and fact when he awarded the respondent special damages which were neither particularized nor proved OR in the alternative, the trial Magistrate erred in law and in fact in arriving at the amount awarded as special damages.

RESOLUTION OF THE GROUNDS

Ground 1

The Learned trial Magistrate failed to properly evaluate the evidence adduced thereby arriving at a wrong conclusion that the respondent is a bonafide occupant/kibanja holder on the appellants land comprised in Block 366 Plot 104 and 106 at Bulemezi Ssabagabo.

In his judgment, the Learned magistrate considered the evidence of the respondent's witness that the bibanja on the suit land first belonged to the late Kakembo (father to the respondent), and that the respondent was Kakambo's successor in title. He went on to find that by the time the appellant purchased his interest in the suit land, the respondent had settled on the land way back in 1950 and in 1986 respectively, and that such occupation went on uninterrupted by the former registered proprietor. He then found that the respondent's occupation of the suit land could not be challenged as he enjoys security of tenancy of a lawful bonafide occupant under Sec 31 (9) of the Land Act (as amended) (hereinafter called the Act). Therefore, that when the

appellant purchased the registered interest in the suit land, he was expected to take on the respondent as a kibanja holder.

In arriving to the above decision, the Learned magistrate relied on several authorities which basically provide that that a purchaser of a legal estate is bound by any previous equitable interest, and that it is incumbent upon such purchaser to make inquiries of any unregistered interest otherwise the property purchased would be subject to that of the previous occupant. I do agree with that position of the law but with due respect in my opinion, the question placed before the Learned Magistrate was not whether the appellant purchased the land with notice of a previous owner in equity, but the question was whether the respondent had a legal interest in the land which merits protection.

Under S. 1 of the Land Act, a bonafide occupant has the meaning assigned to them under S. 29 (2) of the Act. A bona fide occupant means a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more. Also according to S.29 (5), a person who has purchased or otherwise acquired the interest of one qualified to be a bona fide occupant is also deemed to be a bona fide occupant under the Act.

In support of his assertion that he is the owner of two kibanja on the suit land, the plaintiff presented four witnesses. In his own testimony as PW1, the respondent stated that his father the late Stanley Kamembo (hereinafter called deceased) had been in occupation of the kibanja found on plot 104 since 1986 when he allegedly bought it from Onesimu Ssesanga the former registered owner through a written agreement which could not be located. That this kibanja was originally just over 4 acres and it is on this kibanja that he built his house and has a variety of crops. That the appellant fenced off an acre leaving 3 acres. That of the 5 acres about 2½ acres was fenced off by the appellant. It is on the second kibanja that the respondent was born and brought up. In cross examination he stressed that he was only concerned about the area over which the respondent had trespassed. He did not dispute the fact that his plants were to be found on the suit land which was registered in the names of the appellant. However he agreed that both the deceased and the appellant had purchased their respective interests from the same person, i.e. Onesimu Ssesanga, the latter who never disputed the respondent's interests. Also that the deceased used the land between 1987 and 1989 to grow a variety of food and cash crop,

and succeeding him, the respondent took over use of the suit land and continued with cultivation and even built a house on it between 1996 to 1997 which is still standing. It was his testimony that when the appellant fenced off his kibanja he left the house. He further stated that his mother stayed and cultivated on the kibanja until her death in 2004. I note that in cross-examination the respondent first came to know of the alleged trespass by the appellant in 2002 after the later fenced off the suit land. He then stated that he is not aware of the plot numbers on which the two kibanja in dispute stood but that in total, they exist on five acres.

PW2 Morodokayi Kasi supported the respondent by stating that he knew the land in dispute very well and the fact that the respondent had utilized it for a long time for cultivating only. He was able to tell that the respondent obtained one kibanja from his father but could not recall his name. He also testified that the deceased resided on another kibanja that he had obtained long ago. PW3 Samuel Muwuya testified that he was part of the panel of the LC2 Court that adjudicated a dispute between the respondent and Ssesanga the original owner, the later who was ordered to recognize the respondent as his tenant. However, during cross-examination, tendering of the ruling of court was contested since it was not signed by PW3 who admitted not having been part of the proceedings or a signatory to them. However, the ruling of the magistrate with respect to that objection is missing from the record.

In defence to the claim, the appellant stated that by the time he purchased plots 104 and 106 from the late Onesemu Ssesanga in 1997, the land was vacant and this continued to be the status of the land right to about four to five years thereafter. He claimed to have inspected the land and ascertained that there was no activity on it and that he began clearing the bush on it around 2002. He admitted that he is related to the respondent through a common maternal uncle and that he was aware that the respondent's parents occupied some other land within the vicinity of the suit land. That after clearing the land, the respondent entered upon it and collected some wood and even planted some crops. He then made a decision to fence off the land which sparked off the dispute. He further argued that the respondent's interest is to be found on Block 366 Plots 105 and 107 on which his developments are found and that the commissioned survey clearly supported his evidence.

Onyait Emmanuel was presented as the second defendant's witness. He is a qualified land surveyor who testified that he received instructions from the appellant to open boundaries of Plots 104, 105, 106 and 107 which he did. In addition to his oral evidence he presented a report which in brief showed that Plot 104 borders with 105 and that the respondent's house is on Plot 105. Also that Plot 106 borders with Pot 107 and that the late Kakembo's house is on Plot 107. It is evident in the report that plots 104 and 106 are vacant without any development. He confirmed that Plot 105 and 107 belong to Onesemu Ssesanga Kawesa and that Plot 104 and 106 belong to the appellant.

Interestingly in his submissions, counsel for the respondent admitted that the plaintiff's interest was to be found only on plots 105 and 107. This would seriously contradict the claims in the plaint in which the respondent claimed to have an interest on plots 104 and 106. It would then lend credence to the appellant's arguments that the respondent had no legal claim to his registered land at all.

The above notwithstanding, in finding that the respondent is a bonafide occupant on the suit land the trial magistrate stated at page 88 of the record thus;

"... Evidence on record reveals that the plaintiff and his parents lived on the land since 1986. And this is well over twenty years. There is no indication of interruption to them until the defendant started to open up the boundary of the land I find that the plaintiff has lawful interest in the suit land and is declared a bonafide occupant on the suit land."

With due respect, this was an erroneous observation. S. 29(2) of the Land Act is clear. Only persons who have resided on land uninterrupted for 12 years preceeding the coming into force of the 1995 Constitution can in law be categorized as bonafide occupants. PW1 testified that his late father acquired the kibanja interest on Block 366 Plot 104 in 1986 which would only be 9 years preceeding the Constitution. And with regard to Block 366 Plot 106, the respondent conceded that he was not sure when his late grandfather obtained an interest therein since it was also an inheritance from his late father Erias Mugulu. He could only tell that his mother resided there until 2004. By his testimony, the respondent even appeared unsure about his alleged interest. This is because he kept changing his testimony with regard to its size and what was actually wrongfully taken over by the appellant. He claimed for example that the total size of the two bibanja was 5 acres. However for plot 104, he stated in examination in chief that it is 3 acres

and he resided on it. Conversely during cross examination he claimed it was 4 acres and yet in re-examination reverted back to three acres. The same pertained to plot 106 which he claimed to be 5 acres out of which the appellant allegedly took 2 or 2 ½ acres. If the court was to go by that evidence, his interest would cover an estimated 9 acres. This would be over and above the 5 acres that he first stated to be total size of both kibanja. Therefore it is apparent that the respondent was unsure about the size of the two kibanja before and after they were allegedly encroached upon by the appellant. He was clearly even not sure on which particular registered plot each kibanja fell. Further, with lack of any evidence on the part of the respondent to show that his late father had at one time actually purchased the interest in plot 104, and how long him or his predecessor had lived and cultivated on Plot 106, the trial magistrate had no reliable evidence to support the respondent's assertion of the date his predecessors entered upon that particular land.

I hasten to add that the trial magistrate did give an extensive exposition of S.3 and 31 of the Land Act which generally offered security of tenure to lawful and bonafide occupants. He also did consider the several authorities presented that require a purchaser of title to recognize equities of those already in occupation. I do agree with his observations. However, S.31 must be read together with S.29 of the Land Act. Any such claimant should first satisfy the tenents of legal or bonafide occupancy. I have held that the respondent's occupancy on the suit land only dated up to 1986 (for Plot 106). The photographs produced by PW4 could not have been helpful because from them alone one cannot discern the period the crops were first grown on the suit land. Therefore, whether or not he had crops thereon, he did not qualify to be a bonafide occupant in order to claim the protection under those specific provisions.

DW2 who appeared as an expert witnesses showed that he opened boundaries of Plots 104 and 106. He confirmed that Plot 106 bordered with Plot 107 (also owned by the late Onesemu Ssessanga). He confirmed that there were no developments or crops on Plot 104 but that there was some activity of farming on Plots 106 and 107. That evidence would be level with the testimony of PW2 who stated that the respondent was only cultivating on the land. Further, that evidence would thus seriously dispute the respondent's testimony that he had a house on Plot 104. The surveyor's report was corroborated by the observation the Magistrate when he visited the locus.

Counsel for the respondent argued that the trial magistrate was correct in disregarding the report since it was made on the orders of the appellant and carried out in the absence of the respondent. I disagree. There is evidence to show that the respondent voluntarily excluded himself from the survey exercise. Therefore, it is surprising that the trial magistrate chose to completely ignore the evidence of that expert. He was certainly not bound by it but according to the authority of **Kimami Vs Republic (2002) EA 417** he was bound to consider it alongside all the other evidence and if he choose not to do so, he should have given reasons for not doing so.

It is evident that the trial magistrate appeared to rely heavily on the fact that the respondent had growing crops on both Plots 104 and 106 at the time the respondent acquired it. It appears even that some crops still existed at the time a visit to the locus was made in March 2008. That evidence should have been weighed against the appellant's uncontroverted evidence that at the time he acquired the land, it was busy but that he did at one time allow the respondent to grow some crops on the suit land until he made the decision to fence it. Since there was tangible evidence that the respondent resided in a house on Plot 105 which borders Plot 104, he could have carried out farming activity on Plot 104. However his activity if any still had to date back 12 years before the Constitution which evidence was never put before the court.

I concur with counsel for the appellant that the trial magistrate made an erroneous interpretation of the evidence of PW3. That witness did admit in cross-examination that although he presided over the hearing before the LCII court, he did not sign the ruling. None of the signatories to that ruling were ever called to testify which would strongly weaken the alleged findings of that court on the matter. That notwithstanding in my view, that was only an error in judgment by the trial magistrate and not bias as claimed by counsel for the appellant.

In conclusion I find that the Trial Magistrate failed to properly evaluate the evidence on record and thus came to a wrong finding that the respondent is a bonafide occupant on the appellants land comprised in Block 366 Plot 104 and 106. Therefore Ground 1 of this appeal succeeds.

Ground 2

The Learned Trial Magistrate erred in law and in fact when he relied on unsworn testimony at the locus in quo to make a finding that the respondent was cultivating crops on the appellant's land by the time it was fenced off thus occasioning a miscarriage of justice.

Counsel for the appellant contended that during the visit to the *locus in quo*, the trial magistrate wrongly accepted and relied on the evidence of a one Edward Seruga, the Chairman LC 1 Kiteredde village, Nakaseke Sub County. It is not in dispute that this witness did not testify during the trial and his evidence at the locus was not given under oath. Citing the case of **Yeseri Waibi Vs Eisa Lusi Byandala (1982) HCB and David Acar & 3 Others Vs Alfred Acar Aliro (1982) HCB 60** counsel submitted that the Learned Magistrate erred in law when he relied on the evidence of Edward Seruga to find that the respondent was cultivating crops on the appellants land. This he argued would tantamount to the trial magistrate becoming a witness for the respondent which was a grave miscarriage of justice against the appellant.

In response, counsel for the respondent submitted that much as the trial magistrate considered the evidence of Edward Seruga, he did not form his decision basing solely on his evidence. He considered the evidence of all the witnesses at trial and consequently delivered his judgment on the total evaluation of the evidence presented both by the witnesses on record and the observations he made at the *locus in quo*. He did admit that considering the evidence of Edward Seruga was an irregularity, but it can be cured under S. 98 of the CPA Cap 71 and Article 126 (2) (e) of the 1995 Constitution.

There are established procedures and principles for guidance when conducting a visit to the *locus in quo*. Practice Direction No. 1 of 2007 states that during hearing of land disputes, the Court should take interest in visiting the *locus* at which, the following guidelines should pertain:-

- a) Ensure that all the parties, their witnesses, and advocates, if any, are present.
- b) Allow the parties and their witnesses to adduce evidence at the *locus in quo*.
- c) Allow cross examination by either party, or his/her counsel.
- d) Record all the proceedings at the *locus in quo*.
- e) Record any observation, view, opinion, or conclusion of the Court, including drawing a sketch map, if necessary.

In the case of **David Acar & 3 Others Vs Alfred Acar Aliro (Supra)**, Karokora Ag. J(as he then was) observed inter alia that “...*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..... Any observation by the trial Magistrate must form part of the proceedings.*”

At page 85 of the record of appeal the Learned magistrate had this to say;

“The court visited the locus in quo and evidence of Edward Seruga Chairman LC1 was that he had no knowledge when the land was being surveyed. But plaintiff used the land for cultivation of maize and other crops by the time it was fenced by the defendant. Observation by court is that some plants of bananas, jackfruits, coffee still appear in the fenced area. And stumps of banana which were cut off during survey still appear on site in both fields of plot 104 and plot 106 He continued on page 86 that “The visit to the locus in quo, the photos also revealed that the mentioned crops were fenced and this makes it not possible to believe the defendant when he said the land was bushy without cultivation...”

Mr. Edward Seruga the chairman who testified at the *locus in quo* was not among the witnesses called by either party at the trial. Such evidence should not have been relied on by the trial magistrate. That was a serious error and not a mere technicality that can be cured under S. 98 of the CPA and Article 126 (2) (e) of the Constitution. It is clear that the learned magistrate relied on this witness’ evidence to believe that remnants of some food crops were evident on the suit land. It was partly this evidence that he relied on to dismiss the appellant’s evidence that the suit land was bushy when he acquired it. Therefore Ground 2 also succeeds.

Ground 3:

The Learned Trial Magistrate erred in law and in fact when he awarded the respondent “compensation for damages” under Section 178 of the Registration of Titles Act Cap 230.

S. 178 of the Registration of Titles Act provides that;

“Any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing of the land under the operation of this Act or by the registration of any other person as proprietor of the land, estate or interest or in consequence of any error or misdescription in any registered certificate of title or in any entry or memorial in the Register Book may bring and prosecute an action for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the estate or interest through fraud, error or description”. (emphasis added)

The trial magistrate at page 89 of the record of appeal found that; *“The defendant demarcated land belonging to the plaintiff. Under Section 178 of the Registration of Titles Act Cap 230. A*

person deprived of land is entitled to compensation for damages. The portion of plaintiff's land deprived of in plot 104 and plot 106 suffice compensation."

Counsel for the respondent argued that the damages to be considered were merely general damages that the respondent did claim in paragraphs 3 and 8(v) of his plaint. That by relying on the RTA, the trial magistrate only misquoted the law which error would not amount to a miscarriage of justice. In making this award, the trial magistrate considered the fact that the appellant demarcated land belonging to the respondent that was on plots 104 and 106. He admitted that the respondent did not give an estimation of his costs which was then left to his discretion, using which, he made an award of Shs.6 million. My understanding of S.178 RTA is that it is restricted only to those who are entitled to registerable interests in land that fall under the ambit of the RTA. This would exclude claimants like that of the respondent who are otherwise protected under the Constitution and Land Act Cap.229. Further, the Trial magistrate then proceeded to base the award of damages on the value of the suit land which was wrong. The interests portrayed by the respondent, are not in the land but by virtue of his occupation and agricultural activities.

Conversely, even if I was to re-evaluate the evidence, to find that the respondent would be entitled to general damages, it has been my holding that the respondent is not a bonafide occupant on the suit land and therefore had no legal interest to protect. Although the appellant did testify that he did at one time allow the respondent to collect wood and plant bananas on a portion of the suit land, that authorization reasonably ceased when the parties developed a disagreement and the respondent declined when requested, to make a formal application to continue using the land.

Thereby ground 3 also succeeds.

Ground 4

The Learned Trial Magistrate erred in law and fact when he awarded the respondent special damages which were neither particularized nor proved OR in the alternative the Trial Magistrate erred in law and in fact in arriving at the amount awarded as special damages.

Counsel for the appellant submitted that no evidence was led by the respondent at the trial as to the quantity and/ or value of the crops destroyed. That the only evidence adduced by the respondent in relation to his claim for crops destroyed were four copies of photographs which were admitted in evidence as Exhibit P2. Indeed, the magistrate acknowledged that fact when at

page 9 of his judgment he states that “...*The crops destroyed were not valued by Agricultural office, matter is left to the court to decide...*” Counsel thereby argued that the plaintiff did not specifically plead, particularize and prove the special damages he claimed to the required standard and therefore, the trial magistrate erred in law in awarding the said head of damages to the respondent.

Counsel for the respondent did not seriously challenge the above principles his only argument being that such proof does not in all cases require the support of documentary evidence. On this, he quoted the authority of **Kyambadde Vs Mpigi District Administration [1983] HCB 44**. He further argued that in a claim for special damages, there is no specific rule that requires the fixing of a monetary value. That what is of essence is to adduce the relevant material to prove the special damages alleged and then put to the court’s discretion to award a reasonable amount. In his view, **the** respondent diligently discharged this duty by adducing all the particulars that necessitated the award of the special damages sought.

With respect, I disagree with the submissions of counsel for the respondent. There is strong and well grounded authority that, in law, special damages must be specifically pleaded and strictly proved. For example in the case of **Uganda Telecom Limited Vs Tazanite Corporation SCCA No 17 of 2004** it was held that special damages cannot be recovered unless they have been specifically claimed, particularized and proved or unless the best available particulars or details have before trial been communicated to the party against whom it is claimed. The respondent in the instant case pleaded special damages in paragraph 4 (e) of the plaint. However, he did not quantify the value of the loss and his evidence in support was only given in the form of photographs of the alleged destroyed banana plantation and other crops. No further oral or documentary evidence was adduced at the trial on which the magistrate formed his opinion on the quantum that he granted. Therefore, the trial magistrate erred when he awarded special damages that were not strictly proved. Ground 4 is also accordingly allowed.

Conclusion

The appellant has substantially succeeded on all the grounds as presented and therefore this appeal is allowed and the judgment of the lower court is set aside. The appellant is also allowed costs here and in the court below.

I so order.

EVA K. LUSWATA
JUDGE
20th August 2014