

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-CA-0001-2013
(ARISING FROM TORORO CIVIL SUIT NO. 0063-2012)**

**ODOI BENARD.....APPELLANT
VERSUS
ANYANGO MARY.....RESPONDENT**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This appeal was brought against the judgment and orders of His Worship **Simon Ocen** Magistrate Grade I Tororo of Tororo Civil Suit No. 0063 of 2012 between the above parties.

The memorandum of appeal listed 9 grounds of appeal, which appellant attempted to address in the submissions.

I will follow the memorandum and arguments raised on each ground, and responses thereto and make findings as herebelow.

Ground 1:

This ground was incoherently presented; and was abandoned as no argument was raised in support of it by appellant.

It is accordingly overruled.

Ground 2:

That the trial Magistrate failed to evaluate the evidence on record and thereby reached a wrong decision, occasioning a miscarriage of justice.

As a first appellate court, this court has the duty to subject the evidence to a fresh scrutiny and to reach its own conclusions; aware that it did not have a chance to listen to the witnesses. (Refer to **PANDYA V. R (1957) E.A. 336**, followed in **BAGUMA FRED V. UGANDA SCA 7/of 2004**).

I have gone the lower court record. Appellant claims that on page 3 of the Judgment of court, Magistrate points out parties in the earlier suit are different from the instant suit. He therefore said this raised the issue of *res-judicata*. He however raised nothing specifically to support this ground.

Going by the reasoning of the court in the lower court, and Respondent's submissions, I do agree that this Magistrate carefully evaluated all evidence on record. Actually in ground 2 where appellant raises the issue of *res-judicata*, the lower court exhaustively considered this matter and on paper No.2 of the typed judgment, the Magistrate considered section 7 of the CPA, and considered the case of **Ismal Karshe v. Uganda T.L, Semaku v. Magala & Others 1979 HCB 90, Kamure v. Pioneer Assurance Ltd (1971) EA. 263**, to conclude that the parties before the Nagongera case were different, and the case was not covered by section 7 of the Civil Procedure Act.

This was a proper assessment of the law and the facts and this ground has no merit, it fails.

Ground 3: Res Judicata

This ground was argued together with ground 2 above, and is found above, the trial Court reached a right conclusion that the matter was not *res judicata*, for reasons articulated by the trial court. This ground fails.

Ground 4:

That the trial Magistrate relied on insufficient evidence as the Respondent failed to produce one **Stanley Oburu** the person who sold the land to her husband and the witnesses on the agreement who are aware of the boundary to the disputed land.

According to the Judgment on papers No.4 the Magistrate considered all evidence, including that of plaintiff and defendant's exhibits on record, visit on locus, which he based a conclusion that the suit lands belongs to the plaintiff. He believed the evidence as it is.

Proof in civil matters is on a balance of probabilities- this is an assessment the court reaches independently. It's not necessary that a particular witness must be compelled by court to testify to prove a fact. He who alleges is the one who proves. If court believes him, as it did believe, the plaintiff even without the evidence of the said **Stanley Oburu**, or other witnesses, mentioned by the appellant, court believed the witnesses on record, and I do not find any reason to disagree. This ground also fails.

Ground 5:

That the dispute was over boundary marks planted in 2005 by the local council court and witnessed by 19 people.

This is not a ground of appeal because it is a mere statement of fact; with nothing to point out what appellant is complainant about in the stated ground.

However in his submission, appellant casually states that this dispute was about boundary marks, and court at locus surveyed the whole land including that of appellant, carrying a miscarriage of justice. I do not seem to understand what appellant means here. A visit at locus entails a total survey of the disputed land by the court to determine what is on the ground. This includes boundaries, neighbours, chattels on land etc.

If court did that, (as it clearly did). It was not fatal.

Ground 6:

The proceedings and order of planting the boundary marks was put on record by LCs and copies of the said proceedings attached on the memorandum as annexure 'C'.

This is not coherent as a ground of appeal. It is not clear what appellant was intending to bring to the attention of court as a ground of appeal. However if he was complaining that the court was wrong to reject the record of LC boundary marks as he states in his submissions, this is not borne out as a right complaint. Court noted on paper 6 of the court's judgment that at the locus,

“the plaintiff was able to accurately identify the boundaries and even show remains of boundary marks. The defendant on the hand unable....”

The evidence on record was assessed as a whole and court believed the plaintiff not the defendant. Ground 6 is therefore not supported by any concrete evidence on record.

This ground is not proved and fails.

Ground 7: Award of costs and damages.

The award of costs is a discretion of the court. The law as to costs under section 27 of the Civil Procedure Act, is clear what the court followed in awarding the costs. There is no justification in the complaint and the ground fails as it had been argued by Appellant in his submission.

However the memorandum of appeal and counsel for Respondents referred to damages. The award of damages was considered by the lower court, correctly and the trial court referred to the case of *Hadley v. Baxendale (1854) 9th Edition 43* to assess the amount of loss which is connected to the breach and came to a figure of 1,000,000/=. Court found the defendant (appellant) to be a trespasser and hence was liable to compensate plaintiff in the amount of damages as stated.

I find that given the time spent in trespass and loss suffered from non use of his land that the amount of 1,000,000/= is reasonable. This ground fails.

Ground 8 and 9

The two grounds were abandoned. Court therefore finds them not proved.

In conclusion this appeal has failed on all grounds raised. It is dismissed with costs to Respondent. I so order.

Henry I. Kawesa

JUDGE

29.08.2014