THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL No. 87 OF 2011

(Arising from the judgment of Her Worship E. L. Nakadama Mubiru, Magistrate G.1, in Civil Suit No. 11 of 2008 of Mwanga II Road Court, Mengo Chief Magistrate's Court.)

1. AIDA NAMPIIMA NALONGO CHRISTINE
2. LIVINGSTONE KAWERE :::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

KIBIRANGO MEREKIZADDEKI :::::::::::::::::::::::::::: RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

This appeal arises from the decision of the Her Worship E.L. Nakadama Mubiru Magistrate Grade 1, Mwanga II Road Court, of Mengo Chief Magistrate's Court, in the head–suit herein. The facts of the case as it was presented before the trial Court are that the Plaintiff and 1st Defendant are children of one man (now deceased) from whom, under his will, they acquired property in the Lungujja area of Kampala. It is part of this land, which was left behind by their deceased father, which the 1st Defendant sold to the 2nd Defendant. The Plaintiff's case is that the 1st Defendant sold land that was left exclusively for use by the entire family of the deceased as a graveyard. The 1st Defendant however countered that the suit land was part of the land bequeathed to her by their late father under his will.

After a full trial, the learned Magistrate passed judgment for the Plaintiff (Respondent herein), after finding that the 1st Defendant (1st Appellant herein) had

no authority to sell the suit land to the 2nd Defendant (2nd Defendant herein); and so no tile passed to the purchaser. The learned trial Magistrate issued a permanent injunction against the Defendants with regard to the suit land, and awarded general damages and costs of the suit against them. The Defendants were dissatisfied and aggrieved by this decision; and have preferred this appeal whose memorandum of appeal, as amended, state as follows: –

1. The learned trial Magistrate generally failed to assess the evidence before her and arrived at a manifestly wrong decision.
2. The learned trial Magistrate misdirected herself when she failed to find that the 2nd Appellant was a bona fide purchaser for value.
3. The learned trial Magistrate misdirected herself when she relied on the unrecorded evidence of an alleged visit to the locus in quo by Court.
4. The learned trial Magistrate erred in law and fact when she held that the Appellants were trespassers on the suit land.

The Appellants thus urged this Court to allow the appeal; and make the following orders; namely that: –

(i) The judgment and orders of the trial Court be set aside.

(ii) The Appellants are entitled to judgment in the head–suit herein.

(iii) The Appellants be awarded costs of the appeal, and of the lower Court.

Counsels on both sides have filed written submissions in support of the respective parties' case. It is now trite law that as a first Appellant Court, it is my duty to reassess the evidence given at the trial afresh; and come to my own findings thereon. However, in the exercise of my independent appraisal as a first appellate Court, I have to bear in mind at all times that I never had the benefit of observing any of the witnesses testify at the trial; and so, I cannot involve myself in the appraisal of, or even comment on, any of these respective witnesses' demeanour.

The first ground of appeal is that the trial Magistrate failed to properly evaluate the evidence before her. The third ground of appeal faults her for placing reliance on evidence allegedly from a visit to the locus in quo by Court; whereas there is no such evidence on record. I think, these two grounds can comfortably be handled together albeit that they are seemingly presenting contrary positions. Regarding the contested reliance on evidence obtained purportedly from a visit to the locus in quo, the certified record of the proceedings shows that the Court adjourned the hearing to be conducted at the locus in quo. There is however nothing on record showing that the Court conducted such a visit; although in her judgment, the learned trial Magistrate makes a finding of having seen construction close to the graves.

This conduct is in violation to the well laid down rule that a Court that decides to visit the locus must physically be there and recall the witnesses who had testified in Court, to verify what they had attested to in Court. The record of the proceedings at the locus forms part of the trial record together with the proceedings that take place in the Court room. Where, as here, there is no such record, it is wrong for the trial Magistrate to rely on her recollections or reconstruction of what allegedly transpired at the locus; even if such visit took place. Furthermore, Even if the trial Magistrate's recollections of the proceedings at the locus were correct, and admissible, it would serve as proof only of developments close to, but not on, the suit graveyard. This would be contrary to the Plaintiff's claim.

The Plaintiff's claim was not that the Defendants had constructed a building close to, but on, the suit graveyard. Accordingly, the trial Magistrate erred in referring to and relying on the alleged visit to the locus in quo, when there is no record of the proceedings thereat on record. I therefore allow this ground of appeal. As for the general evaluation of evidence adduced before her, it was incumbent on the trial Magistrate to properly evaluate the evidence presented before her, with a view to resolving the issues framed for determination. The parties agreed that the Plaintiff,

the 1st Defendant, and others, had been bequeathed equal pieces of land by their father through his will; and the Plaintiff distributed these pieces of land, but adjusted the sizes of the pieces of land to the benefit of each of the beneficiaries.

This generous adjustment of the sizes of the several pieces of land bequeathed to individual beneficiaries, naturally had the adverse effect of reducing on the size of the residual land their father had set aside for the family graveyard. The Plaintiff's own evidence was that, unlike with the seven pieces of land bequeathed to individuals, including the 1st Defendant and himself, whose sizes had been determined, he did not establish the size of the residual piece of land that was meant for the family graveyard. He merely estimated the size of the graveyard. A proper evaluation of the evidence therefore, would have brought out the uncontroverted fact that the residual land intended in the will for the family graveyard was reduced in size, by the generous increase in the sizes of the individual pieces of land.

The 1st Defendant's evidence was that she had earlier sold part of her inheritance under the will; then the remainder of which she sold to the 2nd Defendant. Her sisters, who testified as defence witnesses, corroborated this. The learned trial Magistrate ought to have noted that there was no cogent evidence of destruction of graves; contrary to what was alleged by the Plaintiff. The evidence that came out quite clearly, and was worthy of note, was that the Plaintiff had not measured the size of the land meant for the graveyard. Furthermore, this residual land had been reduced in size, from what had been intended in their father's will, when the Plaintiff divided the seven people's inheritance in contravention of the specification spelt out in the will. From this, the balance of probability clearly favoured the Defendants.

The other matter, which merits attention, is the alleged trespass on the suit land by the Defendants. In the case of ***Justine Lutaya vs. Stirling Civil Engineering Co.***

Ltd. SCCA No. 11 of 2002, Mulenga J.S.C. stated what amounts to trespass as follows: –

> *"Trespass to land occurs when a person makes an unauthorized entry upon land, and therefore interferes, or portends to interfere, with another person's lawful possession of that land. needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a land owner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage. …"*

On the evidence, I doubt whether the proper suit against the 1st Defendant, even if she had encroached onto the graveyard as alleged, would be founded in trespass. She has an equal claim to the land constituting the family graveyard with the other members of the family; including the Plaintiff. As a joint owner to the suit land, she cannot commit the tort of trespass onto that land. The proper suit against her, in the event that she took the land for herself, would be for recovery of the land; but not under a claim of trespass. As for the 2nd Defendant, as purchaser of the land from the 1st Defendant, the suit against him could only be that he had acquired no better title than what the vendor had in the suit land. In the result, I find that the claim of trespass against either of the Defendants fails.

Accordingly then, I find that the appeal has merit and it is hereby allowed; and therefore I make the following orders: –

(i) The judgment and orders of the trial Court is set aside, and substituted by this judgment on appeal.

(ii) The Appellants are awarded costs of the appeal, and of the lower Court.

Alfonse Chigamoy Owiny – Dollo
JUDGE

02 – 06 – 2015