

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-CA-LD-033-2013

[ARISING FROM FPT-00-CV-LD-CS-122 OF 2011]

1. JOAN KABASOMI

2. KIIZA JOHN.....APPELLANTS

VS

BRUHAN GARUPAPURA.....RESPONDENT

BEFORE: HON MR. JUSTICE OYUKO. ANTHONY OJOK

JUDGMENT

INTRODUCTION

This is an appeal against the judgment and orders of Her Worship Sarah Mponye Chief Magistrate Fort Portal.

Background

The plaintiff sued the defendant for recovery of land situate at Kyebando L.C I, Kibuye Parish, Kyegegwa Sub-County in Kyegegwa District, a declaration that the plaintiffs are the rightful owners of the suit land. General damages, Mesne profit, permanent Injunction, an eviction order, order for Vacant possession and costs of the suit.

The plaintiffs are mother and son respectively and are widow and son of the late Muhuma Benedict and they inherited the suit land for decades. In 2010, the defendant who occupies the neighbouring land crossed his boundary and entered the suit land. Efforts to have him evicted proved futile.

The defendant on the other hand denied trespassing on the suit land stating that he inherited it from his late father Hajji Sulait Kalyegira in 1980. The defendant has been in occupation and use of the suit land to date. The defendant prays the plaintiff's suit be dismissed with costs.

During the scheduling memorandum, the party agreed on 3 issues to wit;

1. Whether the plaintiff is the rightful owner of the suit land.
2. Whether the defendant is a trespasser on the suit land.
3. Remedies available to the parties.

Upon listening to both parties, witnesses and visiting the locus in quo and evaluating all evidence, the learned trial Chief Magistrate Her worship Sarah Mponye stated that the plaintiff had failed to prove ownership of the disputed part but defendant had proved ownership and as such declared that the defendant was not a trespasser and dismissed the suit without costs.

Both the appellant and the respondent being dissatisfied appealed on the following grounds.

I will begin with the Respondent appeal in Civil Appeal No. **HCT-01-CV-CA-LD-03 OF 2013** that the learned trial Chief Magistrate was wrong to deny the Respondent costs of the suit without any justifiable reason for that order.

On the other hand, the appellant in Civil Appeal No. **HCT-01-CV-CA-LD-033 OF 2013** raised nine grounds of appeal in the memorandum of appeal as follows;

1. The trial Chief Magistrate did not properly evaluate the evidence on the record otherwise she ought to have held for the appellants.
2. The trial Chief Magistrate when coming to her decision and Judgment did not consider the old and long established boundaries vis-a-vis the disputed land, otherwise she ought have come to a different decision in favour of the appellants.
3. The trial Chief Magistrate in evaluating the evidence did not take into cognisance of the law of limitation otherwise she ought to have heard in favour of the Appellants.
4. The trial Chief Magistrate erred in law when she called the evidence of Specioza Bakwasibwe and relied on the said evidence on coming to her decision and Judgment and yet she did not call the evidence of Mrs. Mulimire for the appellants and this caused a miscarriage of justice.
5. The proceedings at the locus were not properly recorded which caused a miscarriage of justice and the irregularities at the locus in quo fatally vitiated the whole trial.
6. The trial Chief Magistrate erred in law and fact when she based her decision and judgment on observation at the locus in quo, when such observations are not recorded in the proceedings.

7. The trial Chief Magistrate did not note what took place at the locus and both parties were not given chance to point out their respective boundaries and this caused a miscarriage of justice.
8. The trial Chief Magistrate erred in law when she based her decision and Judgement on the sayings, at locus of almost all the residents which caused a miscarriage of justice.
9. The Judgment of the learned Magistrate contravenes the provisions of order 21 r 4 of the Civil Procedure Rules.

Mr. Ahabwe James appeared for the Appellant while Bwiruka Richard represented the respondents and both parties agreed to file written submissions.

The duty of the first appellate court has been vested in many cases and the case of **Banco Arab Espanol Vs Bank of Uganda S.C.C.A No. 8/1998** quoted with approval of the case of **Kifamute Henry Vs Uganda S.C.C.A No. 10/1997** (unreported) where it was stated thus;

“We agree that on first appeal, the appellant is entitled to have the appellant’s own consideration and views of the evidence as a whole and its own decision as a whole. The first appellate court has a duty to rehear the case and to reconsider the materials 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. When the question arises which witness is to be believed rather than another, and the question turns on the manner and demeanour, the appellate court must be guided by the impression made on the Judge who saw the witness.”

This is so in the case of **Watt Vs Thomas (1947) Ac,484** and **Peters Vs Sunday Post (1958) S.A 404**.

This court is duly bound to rehear the case and to reconsider all the evidence before the trial Chief Magistrate bearing in mind that this court neither heard, saw witness testify nor visited the locus in quo.

Respondent’s ground 1 of appeal.

“That the learned trial Chief Magistrate was wrong to deny the respondent the costs of the suit without any justifiable reason for the order”.

According to the Respondent, that where as it is true that the learned trial Chief Magistrate found that the Respondent is not a trespasser and she dismissed the suit and ordered each party to bear its own costs. She did not give any reasons for her order and there is no justification whatsoever for this order denying the respondent costs of the suit.

He went ahead and cited several authorities to back up his argument such as S. 27 (1) of the CPA, S. 27 (2), the case of **J.K Peter Vs Spear Motors Ltd S.C.C.A 4/1991**, reported in **(1993) KALR 145. .**

The appellant was supposed to have filed a reply within 2 weeks ending 1st/09/2016 but failed. However the court has a wide discretion to either award costs or not.

Whereas under S. 27 (2) court has to give reasons for not awarding costs, it is not mandatory but discretionary.

Having internalised and looked at the different authorities cited by counsel, it is my considered opinion that S. 27 (1) of the Civil Procedure Act; states that costs of and incidental to all suits shall have full power to determine by whom and out of what property and to what extent these costs are to be paid and to give all necessary direction for the purpose aforesaid.

S. 27 (2) thereof provides that costs of any action shall follow the event unless the court shall for good reason otherwise order.

In **J.K Peter Vs Spear Motors Ltd S.C.C.A No. 4/1991** held *that though a Judge has discretion not to award costs to the successful party or at all, his discretion must be exercised judiciously and the reasons given in his judgment for his refusal to award costs to the successful party.*

Whereas I agree that the learned Chief Magistrate did not award costs to the successful party and never gave reasons to justify it, I believe she exercised her discretion but not judiciously. It does not necessarily mean that reasons in writing must always accompany why costs are not awarded and its not mandatory but discretionally.

The fact that the Respondent obtained the services of an advocate not for free, the case took over a year, witnesses were called, fed and accommodated, I see no reasons why the appellants should not be condemned in costs, Ground I of the Respondent therefore succeeds.

Allow me to comment on the 8 grounds put by the appellants are merely 3 grounds.

1. On evaluation of evidence.
2. On the locus in quo.
3. Limitation which the appellant never submitted anything in his submission; so I take it that it was abandoned.

The memorandum shall set forth, concisely and under distinct heads, the grounds of objection of the decision appealed from without any argument or narrative and the grounds shall be numbered consecutively.

Be it as it may, for avoidance of doubt I will look at the grounds as mentioned in the memorandum of appeal.

Ground 1

That the trial Chief Magistrate did not properly evaluate the evidence on the record otherwise she ought have held for the appellants.

This ground of appeal is too general, in concise and it offends O. 43 R (1) & 2 of the Civil Procedure Rules and lacks merit. Unless the appellant is on a fishing expedition and wants court to do his work, unfortunately Court has no time, this ground therefore fails; **See Fort Portal Municipal Council Vs Rev. Richard Mutazindwa Amooti HCT-01-CV-CA-019/2009 (unreported).**

Ground 2:

The trial Chief Magistrate when coming to her decision and Judgment did not consider the old and long established boundaries vis-a-vis the disputed land, otherwise she ought have come to a different decision in favour of the appellants.

In the instant case the boundaries between the appellant's land and the defendant was very clear. Parties visited the locus to ascertain the real boundary issue in the presence of all the residents in the area including the parties.

According to PW3 on cross-examination, he told court that PIDA is not on the disputed part, while PW4 said him and plaintiff used to cultivate the disputed part planting potatoes on it and is the very PW4 who fenced this disputed land in 1997 and says there

was no dispute and he himself planted boundary marks which was inside his land (PW4 is the guardian and paternal uncle of the plaintiff).

It should be noted that the plaintiff NO. 2 by the time his father died, he was only 2 years old and therefore he could not know the boundaries apart from being told by people.

DW 2 went further and demarcated the boundary very well stretching from the eucalyptus trees down to the other side of the top and PIDA. To the right was Kyeka (DW) and to the left was PIDA and PIDA borders Muhuma (Plaintiff No. 2 father) land. DW3 confirms the same and knew the land in question very well since he had lived there and cultivated and clearly stating that this land stretches up to PIDA land on the left and along the road.

In fact on entire analysis how the defendant obtained the land was brought to the attention of court and at the locus very clearly by PW4, DW2, DW3 and a one called Specioza Bakwasibwe and all the residents of the area.

I therefore see no fault in blaming the Chief Magistrate that she did not evaluate evidence on boundary issues very well. Ground No. 2 also fails.

Ground No. 3

The trial Chief Magistrate in evaluating the evidence did not take into cognisance of the law of limitation otherwise she ought to have heard in favour of the Appellants.

It is amazing that it is the Appellant raising this ground. Ordinarily, it would have been the Respondent/Defendant to raise it. No wonder the appellant never submitted on it. This ground too fails.

Ground No. 4

The trial Chief Magistrate erred in law when she called the evidence of Specioza Bakwasibwe and relied on the said evidence on coming to her decision and Judgment and yet she did not call the evidence of Mrs. Mulimire for the appellants and this caused a miscarriage of justice.

Upon reading the submission of both counsel on ground 4, I do respond as follows; that Court can summon any witness(s) any time either as a friend of court or any person knowledgeable with the facts of the case to assist court arrive at a just decision. By

calling Specioza Bakwasibwe to testify at the locus in quo was not unlawful and by not summoning Mrs. Mulimira was not also unlawful. In fact court has wide discretion to determine its own witness(s) at any time during the proceeding not limited to summoning them during visiting the locus in quo.

Even if the witness was in court, still court can summon him or her to testify. See the case of **Semande James Vs Uganda S.C.C.A 99** which clearly stated that where a person is present in court when other witness are testifying and that person is eventually called to testify, such person's evidence is admissible but the weight attached to the evidence is a matter of the trial Court. This is also in line with S. 116 of the Evidence Act Cap 6, O. 16 R.7 CPR. Ground 4 also fails. .

Grounds 5,6,7 & 8 all talks about or relate to the conduct of locus in quo proceeding and the exercise.

Having perused both submission, looked at the proceedings and locus visit at Kyebando Village, Kyegegwa Sub-County, Kyegegwa District and the sketch map and the Judgment and all the authorities it is my considered opinion that the purpose of visiting the locus is;

1. Allow each party to indicate what he/she is claiming, each party must testify on oath and be cross-examined by the opposite party.
2. Witnesses who have already testified in court to indicate the facts or boundary marks if any.
3. Make observation made or marked by the trial Magistrate/Judge at the locus in quo must be noted and recorded and must form part of the record.
4. Unless it is requested or intimated in advance the court should not allow fresh witness to be called at locus in quo.
5. Sketch map drawn showing the features.

The principle was well laid down in the case of **Badiri Kabalega Vs Sipirian Mugangu C.S No. 7/1987**, and the case of **J.W Onenge V Okanga (1986) HCB 63**.

In the instant case was the above principles followed, according to the records, the trial Chief Magistrate complied and I therefore do not fault her in any way hence grounds 5,6,7 & 8 fails.

Ground 9.

The Judgment of the learned Magistrate contravenes the provisions of order 21 r 4 of the Civil Procedure Rules

O. 21 R. 4 CPR states that Judgments in defended suits shall contain a concise statement of the case the points for determination, decision on the case and the reason for the decision.

This was a defended suit between the plaintiff and the defendant, judgment was determined and contained the heading, brief facts, issues, analysis of the evidence, evaluation of evidence, reasons for the decision, right of appeal, name of the trial Magistrate and signature.

In my considered view the judgment of the trial Magistrate does not contravene the provisions of O. 21 R 4 of the CPR hence this ground also fails.

In nutshell therefore Civil Appeal NO. HCT-01-CV-CA-LD-03 OF 2016 is granted and Civil Appeal No. HCT-01-CV-CA-LD-033 OF 2013 is dismissed with costs.

Right of appeal explained.

Dated this 2nd day of October, 2016

Delivered in the presence of;

James Ahabwe Counsel for the Appellants.

Richard Bwiruka Counsel for the Respondent.

All parties present

James clerk.

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OYUKO. ANTHONY OJOK
JUDGE