

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 08 OF 2014

**(Arising from the judgment and orders of His Worship Elias Kakooza Magistrate
Grade 1 sitting at Kyenjojo dated 6th February, 2014 in Civil Suit No. 41 of 2011)**

KASANGAKI KUMALIRWAKI }
KATUURA ZEDEKIA }**APPELLANTS**

VERSUS

GEORGE SAMAANKI }
JANUARY AUGUSTINE }**RESPONDENTS**

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Judgment

This is an Appeal against the Judgement and orders of His Worship Elias Kakooza Magistrate Grade 1 sitting at Kyenjojo dated 6th February, 2014 in Civil Suit No. 41 of 2011.

Brief facts

The Appellants instituted a Civil Suit against the Respondents jointly for trespass, seeking for an eviction order, a permanent injunction, general damages and costs. The Appellants claimed to be lawful owners of 8 acres at Mihikiro Village. That in 1977 the Respondents settled in the Appellant’s neighbourhood and in 1993 George Samaaki after becoming LC1 chairperson extended the boundaries of his land into the Appellants’ land and started utilizing the same amidst protests from the Appellants. That effort to settle the dispute has been futile. George Sammaki has sold off part of the suit land to January Augustine.

On the other hand the Respondents in their Written Statement of Defence stated that George Samaaki had been on the suit land since 12th March 1977 when he bought his land from Tamuteo Kitembo and therefore the Appellants were not entitled to any remedies whereas, January Augustine was not anywhere on the suit land but rather owns land elsewhere. That the Respondents have therefore never trespassed on the Appellants’ land but rather are occupying their respective pieces of land.

Court found that the Respondents were the lawful owners of the suit land and therefore not trespassers and the Appellants’ case was dismissed with costs.

The Appellants being dissatisfied with the decision of the trial Magistrate lodged this appeal whose grounds are as follows;

1. That the learned trial Magistrate erred in law and fact when he found that the Respondents and or any of them had not trespassed on the suit land, thereby dismissing the suit.
2. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby coming to wrong conclusions.

Counsel Wetaka Andrew Wobugwe appeared for the Appellants and Kesiime Miriam for the Respondents. Both parties agreed to file written submissions.

Ground 1: That the learned trial Magistrate erred in law and fact when he found that the Respondents and or any of them had not trespassed on the suit land, thereby dismissing the suit.

The duty of the first Appellant Court is to evaluate the evidence on record as a whole and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses at trial. The guiding principle was well stated by Law J. A. (as he then was) in the case of **Karanja Kago vs Karioki Njenga and Edward James Mungai, Civil Appeal No. 1 of 1979 (K-CA)** where he held that;

“A first appeal is by way of re-trial and the Appellate Court is in as good a position as the Trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact.”

Action for trespass relates to an unlawful entry on the land of another person. In **Justine Lutaya v Sterling Civil Engineering Company Limited, SCCA No. 11 of 2002** the Supreme Court held as follows:

“Trespass to land occurs when another person makes an unauthorized entry upon land and thereby interferes or pretends to interfere with other person’s lawful possession of the land....It is trite law that in the absence of any person having lawful possession, a person holding a certificate of title to that land has sufficient legal possession of the land to support an action of trespass against a trespasser wrongly on the land.”

Also in **Busiro Coffee Farmers & Dealers Limited v Tom Kayongo & 2 Others, HCCS No. 532 of 1992, Byamugisha J** (as she then was) stated as follows:-

“...trespass to land is unlawful interference with another person’s right to land, the person bringing the action must be in actual possession or entitled to its possession, at the time of filing the action. Possession in primary sense is the visible possibility of exercising physical control coupled with intention of doing so either against the entire world or against all except perhaps certain people.”

Counsel for the Appellant submitted that the Appellants in the instant case had inherited the suit land from their father Zedekia. That sometime in 1977 George Samaaki came and peacefully settled in their neighbourhood on land he purchased from Tamuteo Kisembo. That in 1993 after acquiring the position of LC1 Chairperson George Samaaki started trespassing

on the Appellants' land measuring about 8 acres. George Samaaki, however, denied ever trespassing on the suit land.

January Augustine on his side stated that he bought land from Bagonza. Counsel for the Appellant noted that January Augustine in his testimony stated that a sale agreement had been executed between him and Bagonza which Bagonza denied but rather stated that they had mutually agreed on the sale of the piece of land since he had a patient and needed the money. In the circumstances DW3 Bagonza does not deny selling land to January therefore, corroborating his evidence as far as the purchase of the land is concerned.

As regards the measurements of the suit land, January stated that the land he bought was 27 x 150ft where as DW3 Bagonza stated that the land he sold was 30ft x 150ft. In my opinion Court should not base itself on these contradictions as far as the measurements of the suit land are concerned because what matters is the fact that the seller being DW3 Bagonza does not deny selling land to January. The minor contradictions as to measurements could be borne out of ignorance or mere estimations.

Counsel for the Respondent also noted that the Appellants in their testimony stated that they had inherited approximately 8 acres of land. Kasangaki Kumalirwaki told court that the land the Respondents had encroached on was 8.5 acres meaning that the Appellants were left with no land. However, Katuura Zedekia told Court that they had more than 10 acres that they were occupying. That with the above controversies the trial Magistrate could not just close his eyes and conclude that the Respondents trespassed on the suit land. Further, that the trial Magistrate was right to reach a decision that January Augustine was not a trespasser because he bought his land from DW3 Bagonza who also testified to the same before court.

In my opinion the trial Magistrate was right in finding that the Respondents were not trespassers because they sufficiently proved the ownership of their respective pieces of land and this was corroborated by the prosecution witnesses and the locus visit.

Counsel for the Appellant also noted that DW5 in his testimony told Court that he had seen all the parties being born on the suit land but later contradicted himself and stated that he had seen the Appellants being brought by their father onto the suit land. That this witness was applauded by court as being consistent yet he had majorly contradicted himself as to how January had acquired his piece of land.

Counsel for the Respondent on the other hand submitted that the trial Magistrate did not only rely on the oral evidence of DW4 and DW5 but this evidence was supported by documentary evidence on which Counsel for the Appellants even cross-examined upon.

In my opinion the trial Magistrate did not only rely on the oral evidence of DW4 and DW5 but on all the evidence both oral and documentary as was adduced in court and at locus-in-quo.

Counsel for the Appellant further submitted that the sketch drawn by Court at locus showed the description of the suit land by the Appellants. That the land for the Appellants is on the upper side, the temple being on the right hand side, the forest being on the lower side and Samaaki being on the left hand side of the suit land and further the sketch shows that January's portion was in the middle of the suit land. That Court was also shown the old

mitooma trees which, constituted the original boundaries before the encroachment by Samaaki.

That the Respondents, and their witnesses were describing some different land and not the suit land. That consequently, it is surprising that the lower Court held that the Appellants had difficulty in showing Court the boundaries and that it appeared that they were either not staying in that area or had stayed for so long without visiting the area or were not telling the truth.

In my opinion as per the sketch plan on record Samaaki's piece of land is shown and this is across the road as started by the prosecution witnesses, then a portion is also marked as being the land belonging to January and the boundaries/neighbours are as stated by the Respondents. I do not see any where on the sketch where the land belonging to the Appellants is marked. The Mitoma is also on the Sketch but very far from the land that is supposedly for Samaaki. Therefore, it was not possible that Samaaki had trespassed on the Appellants' land. The trial Magistrate was therefore, right in holding that the Respondents were the owners of the suit land.

Counsel for the Respondent submitted that the trial Magistrate was right to hold that the Respondents were not trespassers on the suit land, and even the Appellants stated that George Samaaki had been their neighbour since 1977 and had grabbed their land in 1993. That although the Appellants knew that this was unlawful, they only sought court's intervention after 18 years and much as the issue of limitation was raised in Goerge Samaaki's submissions, it was never considered by the trial Magistrate. Counsel went on to cite the case of **Uganda Railways Corporation Vs Ekwaru D.O and 5204 others [2008] HCB 61**, where the Court of Appeal held that;

"It is settled law that higher Appellate Courts would not allow an illegality that escaped the eye of the trial Court to linger and cause undesirable consequences."

In my opinion Counsel for the Respondent need not have brought in new issues not pleaded and therefore, the trial Magistrate was right not to put into consideration the issue of limitation that Counsel only brought out in her submissions.

Order 6 Rule 7 of the Civil Procedure Rules provides that;

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

In the case of **James Kahigiriza Vs Sezi Busasi (1982) HCB 148**, it was stated that;

"Departure from pleadings in a plaint is not permissible; thus where Counsel departed from his original pleadings was not permissible."

Counsel for the Appellants quoted **Section 91** of the Evidence Act which provides that when terms of a contract or any disposition of property has been reduced to writing, no other evidence except the document itself can be admitted to add to, vary or contradict the writing and also cited the case of **Semakula Vs Mulindo (1985) H.C.B 29**.

Counsel for the Respondent on the other hand submitted that when documentary evidence is not primary it should not be considered by court as not being true. That **Section 60** of the Evidence Act provides that documentary evidence can be both primary and secondary evidence, that even **Section 91** of the Evidence Act which the Appellants' Counsel referred to also provides for exceptions that secondary evidence is admissible. That Counsel for the Appellants did not object to the admissibility of this evidence at trial and therefore cannot turn around and say that the copies of the agreements adduced at trial had contradictions.

In my opinion **Sections 60, 61, 62, 63 and 64** of the Evidence Act make provision for secondary evidence to be adduced in the absence of better evidence which the law requires to be given first. Therefore, the documents as produced by the Respondents were admissible and even the Appellants' Counsel did not object during trial.

In the case of **Karmali Vs Shah (2000) 2 E.A 342**, it was held that;

“The documents produced by the Plaintiff were not challenged by the Defendant and as such, these documents can form a basis for judgment in the Plaintiff's favour.”

Ground 2: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby coming to wrong conclusions.

This ground lacks merit, is too general and inconcise thereof offending the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules and should therefore be dismissed. (See: **Arajab Bossa Vs Bingi, HCT – 01 – LD – CA – 0015 of 2012 Pg. 2**)

In a nutshell therefore, all the grounds have failed and this appeal is dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

18/10/2016

Delivered in open Court the presence of;

1. Both parties
2. Counsel for the Appellant
3. Counsel for the Respondent
4. Court clerk