THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0026 OF 2014

(Arising from KAS – 00 – CV –LD – 003 of 2013)

MUNINA GODFREY .....APPELLANT

VERSUS

MUREKATEETE BUDESIANO.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Mfitundinda George Magistrate Grade 1 at Kasese delivered on the 28/4/2014.

Brief facts

The Respondent instituted a Civil Suit against the Appellant for a declaration that the suit land belongs to the Respondent, a declaration that the Appellant is a trespasser, permanent injunction, an eviction order, damages and costs. That the suit land is approximately $1^{1}/_{2}$ acres situated at Kivengenyi Village, Karusandara Sub-County, Kasese District and was purchased by the Respondent from Paul Rwarinda in 1995and an agreement executed to that effect. That upon purchase the Respondent took possession of the suit land unchallenged though some people later encroached the suit land who, were successfully evicted when the matter was handled by the LC11 Court. However, the Appellant has remained adamant and refuses to vacate the suit land.

The Appellant in his written statement of defence denied the contents of the plaint and averred that the sale agreement as alluded to by the Respondent was a forgery. That, the alleged seller of the suit land, had never owned the suit land because it is owned communally and could not be sold off. That the Appellant has been in occupation of the suit land since 1970 and has been using it for cultivation.

The trial Magistrate found in favour of the Respondent as the owner of the suit land, the Appellant was declared a trespasser, an eviction order issued, a permanent injunction was also issued, and costs were awarded against the Appellant.

The Appellant being dissatisfied with the decision of the trial Magistrate lodged this appeal whose grounds are:

1. That the learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence thus arriving at a wrong decision, that the land belongs to the Respondent.
2. That the learned trial Magistrate erred in law and fact when he failed to pronounce himself on a preliminary objection hence occasioned a miscarriage of justice.
3. That the trial Magistrate erred in law and fact when he ruled that the suit land belongs to the Respondent.
4. That the trial Magistrate erred in law and fact when he totally ignored the locus-in-quo evidence hence arriving at a wrong conclusion.

Justice Centres Uganda appeared for the Appellant and M/s Legal Aid Project of Uganda Law Society represented the Respondent. Both parties agreed to file written submissions.

Counsel for the Appellant abandoned Ground 1 and only submitted on Grounds 2, 3 and 4.

Ground 2: That the learned trial Magistrate erred in law and fact when he failed to pronounce himself on a preliminary objection hence occasioned a miscarriage of justice.

First, it is trite law that the duty of a first Appellate Court is to reconsider all material evidence that was before the trial court, while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. [**See: Pandya versus R (1957) EA 336, Ruwala versus R (1957) EA 570, Bogere Moses versus Uganda Cr. App. No.1/97(SC), and Okethi Okale versus Republic (1965) EA 555.]**

Order 6 Rule 28 of the Civil Procedure Rules, which provides that;

"Any party shall be entitled to raise by his or her pleadings any point of law, so raised shall be disposed of by the Court at or after the hearing; except that by consent of the parties, or by order of the Court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."

A preliminary object is in substance an objection in point of law. The nature of a preliminary objection was discussed in the Court of Appeal decision of **Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd [1969] EA 696**, where Sir Charles Newbold (President of the Court as he then was) at P. 701, held that;

"...A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion ..."

In the case of **Attorney General versus Major General David Tinyefuza, Constitutional Appeal No. 1/1997** gave elaborate guidelines on the procedure for preliminary objections, Justice J. N. Mulenga (JSC) while referring to Order 6 rule 28 of The Civil Procedure Rules held that;

"Clearly under these provisions, the Court has options. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after the hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a Court to be in error, which opts to hear a preliminary objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party, or that the decision was reached at un-judicially."

Counsel for the Appellant submitted that DW1, DW2 and DW3 all testified to the fact that the Appellant had been using the suit land for grazing from 1970 and in 2000 he started cultivating on the same with the permission of the Chairperson of the pastoralists. That the trial Magistrate did not pronounce himself on this and yet it was the evidence of the defence that the Appellant had used the suit land as a pastoralist for 30 years from 1970 to 2000 and from the year 2000 to 2013 when the Respondent sued the Appellant. That the preliminary objection has a great bearing on the suit and it can operate to dispose of the suit.

Counsel for the Respondent on the other hand submitted that while it is true that the trial Magistrate did not pronounce himself on the preliminary objection, this did not cause a miscarriage of justice.

Section 5 of the Limitation Act provides that;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some person through whom he or she claims, to that person."

Section 6(1) Limitation Act provides that;

"Where the person bringing an action to recover land or some person through whom he or she claims has been in possession of the land, and has while entitled to it been dispossessed or discontinued his or her possession the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

In the case of **Justine Emiru Lutaya versus Sterling Civil Engineering Co. LTD, SCCA No. 11 of 2002 at page 4** trespass was defined as;

"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or pretends to interfere with another person's lawful possession to that land."

Justice Mulenga in the same case in regard to trespass as a continuing tort had this to say;

"...in continuing torts that date (the date of commencement) is of little significance. If it is outside the time limit, such part of the continuing tort as is within the time limit is severed and actionable alone. Trespass to land is a continuing tort, when an unlawful entry on the land is followed by continuous occupation or exploitation. Proof of such continuous, unlawful occupation is sufficient proof of trespass, even if the date of commencement is not proved."

In the instant case the Appellant testified that he had been using the suit land since 1970 for grazing but in 2000 with the permission of the pastoralists started cultivating on it. However,

the Respondent told Court that it is at the time that the Appellant started trespassing on the suit land that she instituted the suit after the Appellant had persisted on trespassing on the suit land.

Counsel for the Respondent submitted that the Appellant was a trespasser given the fact that he started using the suit land in 2000 and continued doing so until the time of the suit. That, the issue of limitation, could not arise because trespass is a continuing tort. Therefore, though the trial Magistrate did not pronounce himself on the issue of limitation, his failure to do so did not cause a miscarriage of justice.

I do concur with the submissions of Counsel for the Respondent; the failure of the trial Magistrate to pronounce himself on the preliminary objection did not occasion a miscarriage of justice. Trespass is a continuous tort and the Respondent was able to sufficiently prove her case which led to the trial Magistrate's findings that the Appellant was a trespasser.

Ground 3: That the trial Magistrate erred in law and fact when he ruled that the suit land belongs to the Respondent.

Counsel for the Appellant submitted that the trial Magistrate in finding that the Appellant was a trespasser relied on the sale agreement of the Respondent, which was never tendered nor admitted in Court as an exhibit. That DW3 testified to the effect that the land the Respondent bought is different from that which the Appellant was using. That DW2 also told Court that the suit land neither, belongs to the Appellant nor the Respondent and was formally prison's land that was given to the pastoralists in 1992.

Further that DW2 told Court that the suit land formed part of the communal land that was registered under Kabukero Farmers Co-operative Society Limited. That in the circumstances where the land is communally owned there cannot arise individual claims of ownership and the evidence of the Appellant is to the effect that the land is owned communally by pastoralists.

Furthermore, that the certificate of registration of the Co-operative was admitted in Court as Exhibit DE1 and this evidence was never challenged in cross-examination by the Respondent. That, the trial Magistrate in holding that the land belonged to the Respondent was reached without evaluating the Appellant's overwhelming evidence on record.

Counsel for the Respondent on the other hand submitted that the Respondent told Court that she had purchased the suit land in 1995 from Paul Rwarinda which was corroborated by PW2 and DW3 also confirmed that the suit land was purchased by the Respondent. That much as the sale agreement was not produced in Court, there was oral evidence to support her claim from PW2 and DW3. That PW3 and PW4 also told Court that they used to hire land from the Respondent for cultivation that is in 2007 and 2008 respectively at the same time as that which the Appellant claimed to have also been using the suit land yet he did not in any way challenge their occupation of the suit land.

Counsel for the Appellant in rejoinder submitted that **Section 91** of the Evidence Act, is to the effect that;

"When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document and in all case in which any matter is required by law to be reduced to form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of the property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible."

Therefore, the oral evidence as given by the witnesses in favour of the Respondent can only be submitted as secondary evidence.

Further Counsel for the Respondent submitted that, the Appellant in his evidence told Court that the suit land does not belong to him but rather to Kabukero Farmers Co-operative Society Limited which according to Counsel for the Appellant is registered and can sue or be sued. That the Chairperson of the Co-operative was in Court and gave evidence in favour of the Appellant and **Order 1 Rule 10** of the Civil Procedure Rules allows the addition or substitution of a party to a suit. That, in the circumstances if the suit land did indeed belong to the Co-operative it should have applied to be added or substituted to protect it interest if any. That the Respondent because he is the one that was trespassing on the suit land.

It is my humble opinion that the suit land belongs to the Respondent and the trial Magistrate was right in holding so. The Respondent testified to the effect that she purchased the suit land and this was corroborated by the evidence of PW2 and DW3. PW3 and PW4 also told Court that they used to hire the Respondents land for cultivation without interference. The Appellant on the other hand told Court that the land did not belong to him but rather to the Co-operative. However, DW2 told Court that he allocated the land to the Appellant in 2000 for cultivation and yet he was elected as Chairperson of the Co-operative in 2007. The evidence of DW2 is not credible and has major loopholes. Am inclined to believe that indeed the Appellant trespassed on the suit land otherwise the Respondent would not have sued him.

Ground 4: That the trial Magistrate erred in law and fact when he totally ignored the locus-in-quo evidence hence arriving at a wrong conclusion.

Counsel for the Appellant submitted that the trial Magistrate totally disregarded the evidence at locus and thus reached a wrong decision that the Appellant was a trespasser.

In the case of **Siyasi Wamalisya versus Birali Kirya & Another, HCT-04-CV-CA-005/2009** (Unreported) it was held that;

"Visiting locus-in-quo is an extension of the proceedings of the trial like in open Court whatever transpires and any observations at the visit must be recorded because such a visit is intended to clarify what witnesses have told Court in open Court."

Counsel for the Respondent submitted that much as it is true that the trial Magistrate did visit locus but did not make reference to the evidence obtained therefrom the case of Siyasi (Supra) as cited by Counsel for the Appellant is distinguishable from the case at hand. That in the instant case is one of trespass and for declaration of ownership of the suit land and not a boundary dispute as was the case in Siyasi (Supra) and that a just a fair decision could be

made without a locus-in-quo visit. Rather, that there was enough evidence gathered in Court to prove that the suit land did belong to the Respondent and the trial Magistrate's omission of the evidence collected at locus did not prejudice the Appellant in any way.

It is my considered opinion, that the trial Magistrate not making reference to the evidence obtained at the locus-in-quo did not occasion any injustice to the Appellant. The trial Magistrate visited the locus-in-quo and had it on record and I believe was guided by the evidence as adduced in Court and obtained at locus in reaching his decision.

In a nutshell therefore I find no merit in this appeal, all grounds fail and as such the appeal is dismissed with costs.

Right of appeal is explained.

Dated this.6th Day of September 2016.

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OYUKO. ANTHONY OJOK

JUDGE

Delivered in the presence of;

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