THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0015 0F 2014

(Arising from KAS – 00 – CV – CS – LD – 060 of 2008)

BALUKU ERINEST MUHANUKA.....APPELLANT

VERSUS

MUHINDO SEBASTIANO.....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 18/03/14.

Background

The Respondent's claim against the Appellant was in tort of trespass and conversion inter alia arising from his unlawful illegal entry on the Suit land without the consent of the Respondent, seeking a declaration that the Respondent was the rightful owner, an eviction order, a permanent injunction, general and special damages, mense profits and costs.

The Appellant on the other hand denied all the allegations and averred that he was a bonafide purchaser for value without notice and made a counterclaim that it was the Respondent that had trespassed onto his land and uprooted his cassava and beans. He sought special and general damages.

Issues raised for determination were?

1. Whether or not the land in dispute belongs to the Plaintiff?
2. What remedies are available to the parties?

The counter claim was dismissed with costs for failure to pay Court Fees. The trial Magistrate after assessing the evidence passed judgment in favour of the Respondent and the Appellant

was declared a trespasser, a permanent injunction was issued, an eviction order was also issued, general damages to a tune of UGX 1,000,000/= were awarded and costs in favour of the Respondent.

The Appellant being dissatisfied with the above decision lodged this appeal whose grounds are;

1. That the learned trial Magistrate erred in law and fact when he held that the defence evidence was full of inconsistencies.
2. That the learned Magistrate erred in law and fact when he held that the suit land belongs to the Plaintiff/Respondent.
3. That the learned trial Magistrate erred in law and fact when he failed to consider the fact that the Appellant had been on the suit land for over twelve years unchallenged.
4. That the learned trial Magistrate erred in law and fact when he held that the Appellant is a trespasser on the suit land.
5. That the learned trial Magistrate erred in law and fact when after visiting the locus – in – quo, failed to make a proper record thereof and also relay on the findings thereof.
6. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence and thereby came to a wrong decision.

Counsel Geoffrey Bigogo Sibendire appeared for the Appellant and Chan Masereka for the Respondent. By consent both parties agreed to file written submissions.

Resolution of the Grounds:

Counsel for the Appellant abandoned ground 6 without any valid explanation. All the same the ground lacked merit, was too general and inconcise thereof offending the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules. (**See: Arajab Bossa Vs Bingi, HCT – 01 – LD – CA – 0015 of 2012 Pg. 2**)

It is the duty of the first Appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the appellate court may re-appreciate the evidence and reach its own conclusion. (**See: Pandya versus Republic [1957] EA 336, Kifamunte Henry versus Uganda Criminal Appeal No.10 of 1997, Page 5. (Supreme Court).**

Ground 1: That the learned trial Magistrate erred in law and fact when he held that the defence evidence was full of inconsistencies.

Counsel for the Appellant submitted that the trial Magistrate in his evidence noted that the Appellant's witnesses contradicted themselves however that this contradiction was the Magistrate's own creation as the evidence of all the three witnesses was clear and consistent. That the trial Magistrate in the record of proceedings made errors of the years and that to be particular, DW2 stated that he sold the suit land to the Appellant in 1986 having been allowed to use it in 1970.

Secondly that DW1 was very clear when he told Court that he bought the suit land from Modesto Ngangasi Bwambale DW2 in 1985 and a sale agreement was executed to that effect. That he also told Court that he got the suit land in 1970 and paid for it in 1985 after it was given to him by Alfred Kabwami DW3 who was caretaking it on behalf of DW2.

That the error in the proceedings and the confusion in the years were created by the Magistrate himself otherwise there was no contradiction by the witnesses.

Finally that the Appellant's evidence was corroborated by PW1, PW2, PW3 and PW5 who all stated that the Appellant bought the suit land in 1986.

Counsel for the Respondent on the other hand submitted that the Appellant told Court that he bought the suit land from Modesto Ngangasi Bwambale and later said that the land was given to him by Alfred Kabwemi in 1970 and paid for the same in 1985 and the sale agreement exhibited in Court did not even indicate the size of the land that was bought. That the said agreement was also not signed by the parties and their witnesses. That there were also inconsistencies as to the size of the land that the Appellant bought, the neighbours and how he acquired the same.

Counsel for the Respondent stated that on the other hand the Respondent clearly told Court that he acquired the suit land from his father who acquired the same from the Village elder and the same was corroborated by all his witnesses.

In the case of Uganda versus Abdallah Nassur [1982] HCB, it was held that where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

In my view from the above submissions, I find that the contradictions and the inconsistencies by either party were not major and did not touch the root of the case. What is clear is that the suit land belonged to the Respondent and the Appellant also purchased a piece of land neighbouring with the Respondent in 1985.

I note that there were errors in the years on the record of proceedings and these cannot be imputed on the Appellant and his witnesses. If there were any inconsistencies, they were minor. Thus, the learned trial Magistrate therefore did err in law and fact when he held that the defence evidence was full of inconsistencies.

Ground 2: That the learned Magistrate erred in law and fact when he held that the suit land belongs to the Plaintiff/Respondent.

Counsel for the Appellant submitted that the Appellant tendered in Court a sale agreement as proof of the fact that he purchased land and the same was not disputed by any of the parties. He went on to note that PW4 told Court that the two parties were separated by a ridge, omukoha and omurami trees.

Counsel eliminated the fact that the witness went on to say that the trees had been destroyed by the Appellant meaning the same were no longer in existence so there is now way Court would have established their existence at the locus –in – quo well knowing they are no longer there. And sometimes it is hard to find tree trunks as evidence of a former tree.

Sibendire went on to submit that there were many contradictions in the Respondent's witnesses which were ignored by the trial Magistrate. That there were also contradictions as to the boundary marks. That the sale agreement stated that there was a path on the lower side, and there was an attempt to place the path under the ridge and that is when the Respondent grabbed the Appellant's land. That PW1 told Court that the suit land is separated by a road below and a contour ridge and this confirmed what the sale agreement stated. However, PW4 stated that the path was after the ridge meaning that there was land between the ridge and the path.

Further that from the evidence of PW2, PW3 and PW4 it is clear that the Respondent was trying to shift the path in order to grab the Appellant's land.

Counsel for the Respondent on the other hand submitted that the Respondent and all his witnesses testified to the effect that he was the owner of the suit land unlike the Appellant

and his witnesses which made it difficult to determine whether he bought the suit land or acquired it from the Village elder.

I totally disagree with Sibendire's submissions. From the evidence of all the Respondent's witnesses it evident and clear not to mention consistent that the boundary mark between the two parties is a ridge, and a path. The sketch plan from the locus – in – quo visit corroborates the same. It is only logical that it is the Appellant that trespassed on the Respondent's land. The cassava for the Appellant is also growing on the land that goes over the ridge and the foot path which is the boundary mark.

This ground therefore fails and the trial Magistrate was right to hold that the suit land belonged to the Respondent.

Ground 3: That the learned trial Magistrate erred in law and fact when he failed to consider the fact that the Appellant had been on the suit land for over twelve years unchallenged.

Counsel for the Appellant submitted that it was the evidence of PW3 and PW4 that the Appellant had been on the land since 1985 meaning that the Appellant had been on the suit land for more than 22 years unchallenged. Therefore, the suit is barred by limitation.

Counsel for the Respondent in this regard submitted that it was the evidence of PW1, PW4, PW5 and PW6 that the Appellant trespassed on the suit land in 2004 and the suit was filed in 2008 therefore the issue of limitation does not arise. And besides the issue arose on only the part that the Appellant had trespassed on and not the Appellant's entire land.

Justine E.M.N Lutaya versus Sterling Civil Engineering Company Ltd. SCCA 11 of 2002; it was held, inter alia, that;

"…where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended…in a suit for tort, the date when the cause of action arose is particularly material in determining if the suit was instituted in time. The commencement date is also material…in other continuing torts that date is of little significance…trespass to land is a continuing tort…"

In my view I do not think the issue of limitation arises in the instant case given the fact the Respondent told Court that the Appellant started trespassing on the suit land in 2004. During the second locus visit both parties confirmed that the cassava that was on the suit land was 8 years old. The suit was instituted in 2008 and the second locus visit was in 2016 making it 8 years. Needless to say, even if the Appellant had been on the suit land for over twelve years trespass is a continuous tort.

This ground therefore fails.

Ground 4: That the learned trial Magistrate erred in law and fact when he held that the Appellant is a trespasser on the suit land.

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."

Counsel for the Appellant submitted that from the 3 grounds it is clear that the suit land belongs to the Appellant and trespass only arises when there is an unauthorised entry, on land belonging to another person without that person's consent or authorization. And that from PW5's evidence it was said that the Appellant occupied the suit land in 1985 after purchasing it from Modesto Ngangasi Bwambale.

I disagree with the above submission because there is sufficient proof indicating that the Appellant was indeed a trespasser on the suit land. The learned trial Magistrate therefore did not err in law and fact when he held that the Appellant is a trespasser on the suit land.

This ground fails.

Ground 5: That the learned trial Magistrate erred in law and fact when after visiting the locus – in – quo, failed to make a proper record thereof and also relay on the findings thereof.

Counsel for the Appellant submitted that it is now mandatory to visit the Locus – in – quo and in the instant case there was need to visit locus. That the Court did visit the locus but did not make any recording of the findings at locus.

Counsel for the Respondent however, submitted that the Appellant through his Counsel did not submit that the failure to have the locus proceedings caused a miscarriage of justice to him.

Further, that it is trite law that judgment be delivered basing on the weight of evidence brought by the parties. That Counsel for the Appellant cannot therefore zero down on a mere omission not to type the proceedings and then appeals to quash the whole judgment. That though it is true that it is now a rule of law to visit locus, the rule is however, silent whether the findings and observations at locus must appear in judgment.

Guideline 3 of the Practice Direction provides as follows as regards visits to locus in quo;

"During the hearing of land disputes the court should take interest in visiting locus in quo, and while there:

a) Ensure that all parties, their witnesses, and advocates (if any) are present.
b) Allow the parties, their witnesses, to adduce evidence at the locus in quo.
c) Allow cross-examination by either party or his/her counsel.
d) Record all the proceedings at the locus in quo.
e) Record any observation, view, opinion, or conclusion of the court, including drawing a sketch plan, if necessary.

Guidelines 3 (a), (b), and (c) would appear to provide for persons that have already testified at trial to substantiate their evidence at locus in quo and be subjected to cross examination.

Guidelines 3(e) of Practice Direction No.1 of 2007, on the other hand, mandates courts to form their own opinions or conclusions from observation made and/or additional evidence adduced by trial witnesses.

In the case of **Yeseri Waiki versus Edisa Luni Byandala [1982] HCB 28**, it was held that;

"The usual practice of visiting locus-in-quo is to check on the evidence given by the witnesses and not to fill the gaps, for then the trial Magistrate may run the risk of making himself a witness in the case and the trial Magistrate should make note of what takes place at the

locus-in-quo and if a witness points out any place or demonstrates any movement to the Court, then this witness should be recalled by the Court and give evidence of what occurred."

It was also aptly held by Sir Udo Udoma CJ. (R.I.P) in **Mukasa v. Uganda (1964) EA 698 at page 700** that:

"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence."

In the instant case the Appellate Court found it necessary to visit the locus – in – quo to make its own findings since there were no records from the trial Court.

In a nut shell from the re-evaluation of the evidence on record and the locus – in – quo visit, I find that the Appellant is indeed the trespasser. This was clearly laid out during the locus visit where Court found the boundary of the ridge and the path and these were in a straight line with no land in between. And even if it were true that the Respondent had intentions of grabbing the Appellant's land Court would not have found the path on the lower part of the boundary but rather covering the upper part where there was the ridge too.

This appeal therefore lacks merit, is a waste of Court's time and is intended to deprive the Respondent the fruits of his judgment. It is therefore dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

9/12/2016

Delivered in open Court in the presence of:

1. Victor A. Businge holding brief for Chan Masereka.
2. Court Clerk – Clovis

In the absence of;

1. Appellant
2. Counsel for the Appellant

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OYUKO. ANTHONY OJOK

JUDGE

9/12/2016