

THE REPUBLIC OF UGANDA
IN THE REPUBLIC OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – 0032 OF 2016
(Arising from Civil FPT – 008 – CV – CS – LD – 32 OF 2013)

AKUGIZIBWE FRANCIS

LUBANGA STEPHENAPPELLANTS

VERSUS

NYAMAHUNGE KOTIDO.....RESPONDENT

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

Judgment

This is an appeal against the decision of his Worship Natwijuka Aloysius Magistrate Grade one at Kyegegwa delivered on the 19th May 2016.

Background

The Respondent instituted a Civil Suit against the Appellants for;

1. A declaratory order that the Appellants are trespassers on the suit land.
2. A declaratory order that the Respondent is the rightful owner of the suit land.
3. An order for vacant possession.
4. Costs.

The facts constituting the cause of action are that the Respondent alleged that she had been given the suit land in 2006 by her mother and began utilizing the same until 2009 when the 2nd Appellant sold to the 1st Appellant without the Respondent's consent. The matter was reported to the Local Authorities but the Appellants refused to vacate the suit land.

The Appellants on the other hand denied the allegations and averred that the 1st Appellant was the owner of the suit land having inherited the same from his father and had been on the suit land since birth and thus cannot be said to be a trespasser.

Issues for determination were;

1. Whether or not the Plaintiff/Respondent is the owner of the suit land?
2. Whether or not the 2nd Defendant/2nd Appellant sold the suit land?
3. Whether or not the 1st Defendant/1st Appellant lawfully purchased the suit land from the beneficiary of late Aligabya Eriya?

4. What are the remedies available to the parties?

Judgment was passed in favour of the Respondent. The trial Magistrate found that the Respondent was a beneficiary on the suit land, that the 2nd Appellant sold the suit land, the 1st Appellant did not lawfully purchase the suit land, the sale of the suit land was null and void, the 1st Appellant was found a trespasser and ordered to vacate the suit land. A permanent injunction was issued, general damages to a tune of UGX 3,000,000/= were awarded and costs.

The Appellants being dissatisfied with the above decision lodged the instant appeal whose grounds as per the Memorandum of appeal are;

1. That the learned trial Magistrate misdirected himself when he held that the 2nd Appellant Mr. Rubanga Stephen is the one who sold the suit land to the 1st Appellant Mr. Akugizibwe Francis.
2. That the learned trial Magistrate misdirected himself when he awarded general damages of Shs. 3,000,000/= which was not pleaded by the Respondent and were excessive in the circumstances.
3. That the learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the 1st Appellant a trespasser.
4. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on court record especially the evidence of Rubanga Stephen, Peteronia Tibahwerwa, Mpabasi and came to the wrong decision.
5. That the locus proceedings were not conducted in accordance with the rules and were irregular.

Representation:

Counsel Ahabwe James appeared for the Appellants and Counsel Kizito Deo of M/s Legal Aid Project of Uganda Law Society represented the Respondent. Both Counsel consented to filing written submissions.

The duty of the first Appellate Court:

The duty of the first Appellant Court is to evaluate the evidence on record a fresh 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 versus 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.”

Resolution of the Grounds:

Grounds 1 and 3 are discussed jointly and Grounds 2, 4 and 5 separately.

Grounds 1 and 3:

1. That the learned trial Magistrate misdirected himself when he held that the 2nd Appellant Mr. Rubanga Stephen is the one who sold the suit land to the 1st Appellant Mr. Akugizibwe Francis.

3. That the learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the 1st Appellant a trespasser.

Counsel for the Appellants submitted that DW1 Peteronia Tibahwerwa clearly told Court that they, the daughters of the Late Eriya Aligabwa sold the suit land to the 1st Appellant and it is not the 2nd Appellant that sold the suit land. That the trial Magistrate disregarded all the Appellants' evidence proving the fact that the suit land did not belong to the Respondent and that the 2nd Appellant is not the one that sold the suit land. Thus, it was wrong for the trial Magistrate to declare the 1st Appellant a trespasser.

Counsel for the Appellants cited the case of **Derideriyo Ssekyembe & Others versus Hassan Mbogo, Civil Suit No. 500 of 2012**, where it was held that trespass on land is committed when a person occupies land without the consent of a person in actual or constructive possession of same. Thus, the 1st Appellant lawfully occupied the same as a purchaser and not at a trespasser.

Counsel for the Respondent on the other hand submitted that the 1st Appellant himself told Court that it was the 2nd Appellant that sold to him the suit land and not the aunties to the Respondent. That the entire Appellants' evidence is just a pack of lies and DW1 was evasive while answering questions. That the entire Appellants' evidence was also full of contradictions and hearsay.

In the case of **Constantino Okwel Alias Magendo versus Uganda, SCCA No. 12 of 1990** the Supreme Court laid down the law as to contradictions and inconsistencies. Court stated that;

“In assessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected, minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness. Moreover, it is open to a trial judge to find out that a witness has been substantially truthful even though he lied in some particular respect.”

In the instant appeal the 2nd Appellant sold the suit land to the 1st Appellant and not the aunties to the Respondent as alleged by Counsel for the Appellants. The same was stated in Court by the 1st Appellant who bought from the 2nd Appellant. The 2nd Appellant however denied being the one that sold the suit land and told Court that it was his aunties that sold to the 1st Appellant. DW1 who was said to have sold the suit land could not tell who was present as the transaction was being executed. I find that the evidence as adduced by the Appellants and their witnesses was full of contradictions and inconsistencies that touched the root of the

matter. The Respondent was a beneficiary on the suit land and her consent ought to have been sought when selling it thus the 1st Appellant is unlawfully occupying the suit land because the sale was null and void. The evidence of the Appellants could not be relied upon because of the grave inconsistencies and the 1st Appellant is indeed a trespasser.

These grounds therefore fail.

Ground 2: That the learned trial Magistrate misdirected himself when he awarded general damages of Shs. 3,000,000/= which was not pleaded by the Respondent and were excessive in the circumstances.

Counsel for the Appellants submitted that the Respondent in her pleadings did not pray for general damages as a relief she sought from Court nor did she pray for the same during her testimony before Court.

Counsel for the Appellants cited the case of **Jack Businge & 2 Others versus TMK, Civil Suit No. 15 of 1990** where Court held that although general damages are awarded at Court's discretion, Counsel must always address Court on the same. Further that because Court was never addressed on the issue of general, damages, none of them would be awarded.

Counsel for the Appellants went on to submit that in the above case the general damages had been pleaded but the same were not awarded because Court was never addressed on the reasons as to why they should be awarded while in the instant case general damages were neither pleaded nor was Court addressed on the same.

Counsel for the Respondent on the other hand submitted that the essence of awarding general damages is to put the Plaintiff in the position he would have been in had the breach not occurred.

In the case of **Hadley versus Baxendale (1854)** it was stated that damages would only be awarded to compensate the claimant for and to the extent of losses that arise and flow naturally from the breach of contract, which damages were or ought to have been within the contemplation of the party in default.

The Appellate Court can only interfere with the quantum of damages awarded if in assessing the damages, took into account an irrelevant factor, or left out an account of a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (See: **Ilanga versus Manyoka, [1961] EA 705, 709, 713 (CA-T), Lukenya Ranching and farming Co-operative Society Ltd versus Kavoloto, [1979] EA 414, 418, 419 (CA-K).**

Counsel for the Respondent submitted that the award of the general damages in the instant case was justified by the trial Magistrate.

In my view much as general damages are awarded to put a given party in the position they would have been in had the breach not occurred the same are not meant to enrich the party to whom they are being awarded to reinstate. General damages are awarded at the discretion of

Court, however, the same ought to have been pleaded and proved before the trial Court. The Appellate Court has the power to interfere with the award of general damages if the same were awarded basing on a wrong principle.

In the instant case I find that the Respondent never pleaded nor prayed for general damages and no evidence was led showing Court the inconvenience that she had suffered. All, the Respondent prayed for was the recovery of the suit land and costs and the Magistrate erroneously awarded UGX 3,000,000/= which were even excessive in the circumstances.

This ground succeeds.

Ground 4: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on court record especially the evidence of Rubanga Stephen, Peteronia Tibahwerwa, Mpabasi and came to the wrong decision.

Counsel for the Appellants submitted that the suit land did not belong to the Respondent's mother but rather to her and her siblings who are the ones that sold the suit land and the proceeds shared amongst all the beneficiaries. The 2nd Appellant clearly told Court that when the suit land was sold he was given UGX 200,000/= as the share of his mother who is also the Respondent's mother that he used to buy another piece of land for him and his siblings. Thus, the suit land did not belong to the Respondent but rather to her mother and her siblings (aunties to the Respondent).

Counsel for the Respondent submitted that the Respondent's evidence was consistent as to how she acquired the suit land and how it got to the hands of the 1st Appellant.

I find that the trial Magistrate did properly evaluate the evidence on record and came to the right decision and I reiterate my finding on Grounds 1 and 3.

This ground therefore fails.

Ground 5: That the locus proceedings were not conducted in accordance with the rules and were irregular.

Counsel for the Appellants submitted that there was no sketch map for the suit land, and the suit land was actually not inspected. Thus, the locus in quo was not properly conducted. Counsel cited the case of **JW Ononge versus Okallange, HCCA No. 34 of 1977**, where it was held that at the locus in quo, a witness must be sworn, be cross examined, each party, must show what he/she is claiming, Court must draw a sketch map and must also note its observations.

Counsel for the Respondent quoted on the other hand the case of **Yeseri Waibi versus Lusi Byandala [1982] HCB 28**, it was held that;

“The practice for visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap, for then the trial Magistrate may run the risk of making a witness in the case.”

Also in the case of **Safina Bakulimya & Another versus Yusufu Musa Wamala, Civil Appeal No. 68 of 2007**, it was held that;

“Visits to the locus in quo are also provided for by Practice Direction No. 1 of 2007, where guideline 3 provides that during the hearing of land disputes the Court should take interest in visiting the locus in quo, and lays down what should happen when it does so. However, a visit to the land in dispute is not mandatory. The Court moves to the locus in quo in deserving cases where it needs to verify the evidence that has been given in Court, on the ground. It is my view that such visits are necessary to enable the Court to determine boundaries of the land in dispute or the special features thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in Court.”

Counsel for the Respondent submitted that it is not in dispute that the trial Magistrate visited locus in the presence of Counsel and the Appellants. That the issue was not for determination of a boundary that it needed a sketch map to show the demarcations and the specific neighbours.

In the instant case locus was visited in the presence of both parties and Counsel for the Appellants and observations were recorded by the trial Magistrate save for the sketch map. I find that failure to draw a sketch map in the instant was not fatal to either party as this is not a matter regarding boundaries but rather on ownership of the suit land that actually did not necessitate a locus visit if anything. There was no injustice occasioned to either party for failure by the trial Magistrate to draw a sketch map.

This ground also fails.

In a nutshell, this appeal lacks merit and is dismissed with costs. The lower Court decision is upheld save for the award of general damages that is set aside.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

20/09/2017