

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – CA – 0. 49 OF 2016
(Arising from KAS – 00 – CV – LD – 021 OF 2015)

MATHE BILHWANGERO ENOSIAPPELLANT

VERSUS

MUHINDO ONIZ.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Matenga Dawa Francis Chief Magistrate at Kasese.

Background:

The Respondent instituted a Civil Suit against the Appellant seeking the following orders;

1. A declaration that the suit ½ Plot is the Plaintiff’s/Respondent’s property.
2. A permanent injunction against the Defendant restraining, preventing and prohibiting him, his agents, workmen and assignees from carrying further activities on the suit plot.
3. An eviction order against the Defendant his agents, workmen and assignees from the suit plot.
4. An order for vacant possession of the suit plot.
5. General damages.
6. Mesne profits.
7. Interest.
8. Costs.

The Respondent contended that he had been in occupation of the suit land since 1985 when he acquired it with 6 others who got similar plots situate at Kinyamaseke Trading Centre measuring 50ftx50ft and developed the same. That the Appellant then started trespassing on the suit land after purchasing it from Muhindo Jafali and any effort to have him vacate the suit land has been futile. The Respondent averred that the Appellant’s actions were unlawful, forceful and high handed for which he claimed punitive and exemplary damages.

The Appellant on the other hand averred that he is no longer the owner of the suit land having sold the same to Kamalha Bilhwangero on the 20th/07/2006. Thus, the suit is frivolous since no cause of action was disclosed. That the Respondent did not disclose how he acquired the

suit land, whether he had stayed on the same and there was no documentary evidence to support his claim. The Appellant also denied trespassing on the suit land. He prayed that the suit be dismissed.

Issues for determination in the lower Court were:

1. Who is the rightful owner of the suit land?
2. Whether the Defendant's trespassed on the land?
3. Whether the suit land is barred by limitation?
4. What are the remedies available to the parties?

Judgment was passed in favour of the Respondent. The trial Magistrate found that the suit land belonged to the Respondent, the Appellant had trespassed on the same, an eviction order was issued, and general damages to a tune of UGX 2,000,000/= and costs were awarded.

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

1. That the trial Magistrate erred in law and fact when he failed to determine the issue of ownership of the suit land and suing a wrong party.
2. That the trial Magistrate erred in law and fact when he failed to take into account the provisions of **Section 5** of the Limitation Act, Cap. 80 that bars a person from bringing a claim for recovery of land after 12 years.
3. That the learned trial Magistrate erred in law and fact by disregarding the Appellant's preliminary points of law, which among them was to the effect that the Appellant bought the suit land in 1997 and the Respondent herein signed as witness No. 2 on the sale agreement dated on the 18th/05/1997.
4. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence as a whole and thereby coming to a wrong conclusion.

Representation:

M/s Guma & Co. Advocates represented the Appellant and Counsel Masereka Chan appeared for the Respondent. By consent both Counsel agreed to file written submissions.

Duty of the first Appellate Court:

The duty of the first Appellate has been outlined in many cases and in the case of **J. W. Ononge versus Okalanga [1986] HCB 63** and **Williamson Diamonds Ltd & Another versus Brown [1970] E.A at Page12 & 16**, it was stated that the first Appellate Court is entitled to subject the evidence as adduced in the lower Court to fresh and exhaustive scrutiny and come to its own conclusion. It must also be taken into account that it never heard the witnesses in order to assess their demeanours which is left to the trial Court.

In resolving this appeal therefore I will keep in mind the duty of this Court as the first Appellate Court in the instant case.

Resolution of Grounds:

Ground 1:

That the trial Magistrate erred in law and fact when he failed to determine the issue of ownership of the suit land and suing a wrong party.

Counsel for the Appellant submitted that the trial Magistrate failed to consider the fact that the suit land did not belong to the Respondent but rather to Kamalha Bilhangero since the 20th/07/2005 and is in occupation of the same. That the trial Magistrate should have ordered the Respondent to amend his pleadings and sue the right party since he had no cause of action against the Appellant. (**See: Auto garage versus Motokov (No. 3) [1971] E.A 514**). That in the circumstances if the judgment of the lower Court is upheld it will occasion a miscarriage of justice to the Appellant.

Counsel for the Respondent on the other hand submitted that the suit land belonged to the Respondent having acquired it in 1985.

In regard to suing the wrong party Counsel cited the case of **Kalemera and others versus Uniliver (U) Limited [2008] HCB 137**, where Court held that a Plaintiff is at liberty to sue anybody he or she thinks that he or she has a claim against and cannot be forced to sue somebody else.

That the Respondent in suing the Appellant was because he trespassed on land that he did not purchase from Muhindo Jafali. That neither the Appellant nor his Counsel raised the issue of suing a wrong party at trial and therefore this should be disregarded.

I have addressed my mind to both submissions and my considered view is that the Appellant in his pleadings stated that he was not the owner of the suit land and thus was the wrong party to be sued since the Respondent had no cause of action against him. The same was stated in the Appellant's witness statement and submissions in the lower Court.

True, a person can sue anyone they feel they can get a remedy against however; in the instant case the Appellant maintains that he is not the owner of the suit land but rather Kamalha Bilhangero since the 20th/07/2005. However, it is not enough to just sue anyone just because you feel you have a claim against them and cannot be forced to sue any other person. This encourages frivolous suits and wastage of Courts time.

It is therefore my finding that the trial Magistrate as the person with the power to hear the case and having seen the pleadings and evidence before him, should have guided the parties on the proper way to proceed and clarify the issue of who the Respondent should have actually sued and not to proceed generally with all due respect.

In the instant case the Appellant having pleaded that he was not the owner of the suit land, the trial Magistrate should therefore have ordered the Respondent to amend his pleadings and sue the person in occupation of the suit land. I therefore, find that the trial Magistrate erred in

law and fact when he failed to determine the issue of ownership of the suit land and suing a wrong party.

The trial Magistrate acted on an illegality and in the case of **Makula International ltd versus His Eminence Cardinal Nsubuga and another (1982) HCB P. 11** is on spot on that once an illegality is brought to the attention of court, court shall not sanction it. This therefore means that the suit in the lower court was incompetent and as such this appeal is incompetent since the appellant is a wrong party to have been sued.

This ground therefore succeeds.

Ground 2:

That the trial Magistrate erred in law and fact when he failed to take into account the provisions of Section 5 of the Limitation Act, Cap. 80 that bars a person from bringing a claim for recovery of land after 12 years.

Counsel for the Appellant submitted that it was the evidence of the Appellant that he bought the suit land in 1997 and even the Respondent witnessed the same. That the Appellant stayed on the land from 1997 to 2006 when he sold to Kamalha Bilhangero with all the boundaries intact. That even the time if computed to when the suit was instituted it is over 12 years from when the alleged trespass arose. Thus, the trial Magistrate misdirected himself when he failed to take into consideration the law on limitation and the suit was statute barred with no cause of action against the Appellant.

Counsel for the Respondent submitted that the Appellant was said to have trespassed in 2009 and this piece of evidence was not challenged and in the case of **URA versus Stephen Mabosi, SSCA No. 29 of 1995 reported in (1996) KALR 153**, Court held that unchallenged evidence during cross examination should be taken to be the truth. Therefore, the evidence of PW1 should be believed as the truth.

I have looked at not submissions and I find that the suit land is not time barred since the trespass occurred in 2009. And even if the trespass had occurred earlier trespass in law is a continue tort that is not affected by limitation.

In the case of **Abraham Kitumba versus Uganda Telecommunication Corporation 1994 KALR ii 126**, it was held that the action in trespass was not time barred because trespass was a continuing tort for which the injured party can sue from the date of the cessation of the wrong.

The trial Magistrate was therefore correct in not applying the law on limitation in the instant case.

This ground therefore fails.

Ground 3:

That the learned trial Magistrate erred in law and fact by disregarding the Appellant's preliminary points of law, which among them was to the effect that the Appellant bought the suit land in 1997 and the Respondent herein signed as witness No. 2 on the sale agreement dated on the 18th/05/1997.

Counsel for the Appellant submitted that there is no way the Respondent would have accepted to sign on sale agreement as a witness well knowing that the land belonged to him. That the Appellant has a defence of Estoppel. (See: **Central London Property Trusts Ltd versus High Trees House (1947) K.B 130**). That the Respondent cannot therefore come to challenge the sale agreement 18 years later.

Counsel for the Respondent on the other submitted that there were no preliminary objections raised at trial and this can be witnessed on the record of proceedings. That the Respondent and his witnesses told Court that initially the suit the land purchased by the Respondent used to share a boundary with Kasomoro road in the South. That they later agreed as residents of the place that to avoid accidents, the road be shifted and indeed the road was shifted to avoid cars knocking their children. That after shifting the road, the Appellant and Respondent then shared a boundary. That then the Appellant trespassed on the Respondent's land in 2009 after the shifting of the road. This was even observed during the locus visit.

I have read both submissions and carefully perused the record of proceedings. There were no preliminary objections raised by the Appellant in the lower Court. Thus, there is no preliminary objection that was disregarded by the trial Magistrate.

This ground therefore fails.

Ground 4:

That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence as a whole and thereby coming to a wrong conclusion.

In as far as ground four is concerned, the ground is inconcise, too general, vague and devoid of merit as it offends **Order 43 Rules 1 and 2** of the Civil Procedure Rules S.1 71-1. Therefore, this ground is struck out. (See: **Arajab Bossa Vs Bingi, HCT – 01 – LD – CA – 0015 of 2012 Pg. 2**)

The above ground takes one on a fishing expedition and this Court has no time to waste as this is also an abuse of Court.

In a nut shell, having found that the suit in the lower court was incompetent and as such this appeal is also incompetent since the Respondent sued the wrong party, this appeal is allowed with costs herein and the lower Court. The lower Court decision is also set aside.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

20/09/2017