THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – LD – CA – 032 OF 2015

(Arising from FPT – 21 – CV – CS – 17 of 2012)

STEPHEN KADODOBA.....APPELLANT

VERSUS

DAVID NYABONGO.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Opio Belmos Ogwang, Magistrate Grade one at Kyenjojo delivered on 17/06/2015.

Background

The Appellant's claim against the Respondent was for recovery of land and he instituted a civil suit for the following remedies; a declaration that the suit land encroached on by the Respondent is the property of the Appellant; the original main boundary marks be recognised by the Respondent; permanent injunction be issued against the Respondent to refrain him from any act of trespass on the suit land and costs of the suit.

The Appellant alleged that he had been a bonafide occupant of the suit land for over 200 years and the land belonged to Swithen Kaijamurubi as a mailo owner. That the Respondent purported to have bought land from the mailo owner in 1981 and 10 years later a dispute arose when he started encroaching and forcefully clearing the Appellant's land for cultivation.

The Respondent on the other hand in his Written Statement of Defence averred that he was the rightful owner of the suit land having acquired it from his late father Nyabongo Edward who bought it from Swithen Kaijamurubu in 1981 equivalent to 100 acres. That he however started using the suit land in 2007and in 2009, when the dispute arose, the Respondent stopped using the same and never removed any boundary marks. But rather it is the Appellant that was using the suit land and planting tea on the same.

Issues for determination were;

1. Whether the Defendant trespassed on the Plaintiff's land?
2. What Remedies are available to both parties?

The trial Magistrate dismissed the Appellant's suit with costs and found that the Respondent was not a trespasser.

The Appellant being dissatisfied with the above findings lodged the instant appeal whose grounds are;

1. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence of PW1, PW2, PW3 , PW4 and the inconsistencies in the evidence and came to a wrong decision.
2. That the learned trial Magistrate did not properly conduct locus proceedings hence causing a miscarriage of justice.

Counsel Ahabwe James appeared for the Appellant and Counsel Bwiruka Richard for the Respondent. By consent both parties agreed to file written submissions.

The duty of a first Appellate Court is to review the evidence afresh, make conclusions therefrom and reach its own conclusions thereon. The Court must caution itself that it is progressing from a disadvantaged position since it did not have a chance to hear the witnesses; and observe them. (**See: Pandya versus R (1957) E.A. 336.)**

Resolution of the Grounds:

Ground 1: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence of PW1, PW2, PW3 , PW4 and the inconsistencies in the evidence and came to a wrong decision.

In the instant case the Appellant alleged that the Respondent had trespassed on the suit land by crossing over the boundary mark.

The Respondent on the other hand told Court the suit land originally belonged to his late father Nyabongo Edward who bought it from Swithen Kaijamurubi in 1981. He tendered in Court a sale agreement which was marked DE1.

The Appellant brought 4 witnesses in a bid to prove his case and the Respondent brought 3 witnesses. The trial Magistrate did point out that PW2 was inconsistent in his testimony when he contradicted all the other Appellant's witnesses by stating that the Respondent had not trespassed on the suit land and therefore the Appellant's claim was baseless.

Counsel for the Appellant submitted that all the witnesses of the Appellant were consistent in their testimonies and maintained that the Respondent had trespassed on the Appellant's land in 2007 whereas the Respondent's evidence was full of loopholes. Further that none of the Respondent's witnesses knew the boundaries of the suit land and the inconsistencies in the Respondent's witnesses' testimonies if had been taken note of, then the trial Magistrate would have found in favour of the Appellant.

Counsel for the Respondent on the other hand noted that this ground is too general and inconcise and offends the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules and

cited the case of **Fort Portal Municipal Council versus Rev. Richard Mutazindwa Amooti, HCCA No. 19 of 2009** where it was held that such a ground should be struck out.

In my view, though this Court would ordinarily have struck out this ground for contravening **Order 43 Rule 1(2)** of the Civil Procedure Rules, I am also mindful of the provisions of **Article 126 (2) (e)** of the Constitution of the Republic of Uganda, 1995.

I find the above to be just a mere technicality envisaged under **Article 126 (2) (e)** of the Constitution of the Republic of Uganda, 1995 and not prejudicial or causing any miscarriage of justice to either of the parties.

Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995, provides that;

"Substantive justice shall be administered without undue regard to the technicalities".

The essence of the above provision is to enjoin courts to disregard irregularities or errors unless they have caused substantial failure to justice.

This ground will be resolved and not struck out.

I find that the trial Magistrate did evaluate all the evidence on record, and the inconsistencies if any were minor. I am inclined to uphold the trial Magistrate's findings in this regard as per the evidence of both parties and the locus visit which indicated that there was no trespass committed by the Respondent. The boundary of the suit land was found as was stated in Court, during the locus visit and the Respondent was not in occupation of the same or found to have trespassed over it. The trial Magistrate therefore properly evaluated the evidence on record and came to a correct decision.

This ground therefore fails.

Ground 2: That the learned trial Magistrate did not properly conduct locus proceedings hence causing a miscarriage of justice.

Counsel for the Appellant submitted that in the instant case the locus visit should have been recorded on the last page of the proceedings, but there is no such information which shows that the witnesses were never sworn and examined at the locus nor were the other requirements complied with. That there is also doubt as to whether the locus visit was conducted at all because the trial Magistrate in his judgment referred to Kyabaranga where as the suit land is situate at Kabirizi Village.

Counsel for the Respondent on the other hand submitted that Court did visit the locus – in – quo and it is on record that indeed the locus visit was conducted. That the issue of non-compliance with the procedure of carrying locus – in – quo proceedings was simply a technicality.

Further, that the mention of a different Village by the trial Magistrate in his judgement was a mere error and that the Appellant only contests the name of the Village and not the

description of the boundaries as mentioned in the judgment. That, the mis-description of the Village does not occasion the Appellant a miscarriage of justice.

Furthermore, that the visit to the locus – in – quo is not mandatory, there was no prejudice suffered by the Appellant over non-compliance with the procedure during the locus visit. And besides there was a sketch map drawn that clearly indicated what was observed by Court during the locus visit.

In my opinion, locus – in – quo visits are vital in matters to do with boundary disputes which was not the case in the instant matter. However, Court did conduct a locus visit and it is on record and a sketch map was drawn from the same visit. Therefore the allegation of Counsel for the Appellant that there was no sketch plan drawn with all due respect is unfounded.

In regard to the failure to record the locus proceedings is a mere technicality and the same did not occasion a miscarriage to either party.

Bakaluba Peter Mukasa versus Nambooze Betty Bakireke SCEP Appeal NO. 04 of 2009: Justice Katurebe J.S.C, held that:-

"Rules of procedure are very important but they are not an end themselves, they are often referred to as the hand maidens of justice but are not justice themselves. Rules form the procedural frame work within which a fair hearing is conducted".

I also concur with the submission of Counsel for the Respondent that the mis-description of the Village where the suit land is situate was a mere error and did not occasion any miscarriage of justice to the Appellant.

This ground also fails.

This appeal lacks merit and is dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

23/03/2017

Judgment read and delivered in the presence of;

1. Counsel Bwiruka Richard for the Respondent.

2. Counsel Ahabwe James for the Appellant.
3. James – Court Clerk.
4. Both parties.

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OYUKO. ANTHONY OJOK

JUDGE

23/03/2017