

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-LD-CV-CA-0034/2014
(Arising from CIVIL SUIT NO. 27/2003)

MUGASA ANTHONY.....APPELLANT

VS

1. BAMUTURAKI YOWASI

2. BARYAGENDA

3. OLANYA JOHNRESPONDENTS

BEFORE: HON. MR. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

JUDGMENT

This is an appeal against the decision of His Worship Kakooza Elias Magistrate Grade one at Kyenjojo delivered on the 18/06/2014.

Background

The plaintiff alleges that he bought 3 pieces of land from 3 different people, he bought one from Onega Micheal in 2002, Peter Okongo in 2001 and Nyeko Alex in 2001. The 3 defendants started encroaching on his land around 2002 from their respective lands. He called PW2 who said that he was the chairman L.C I in 1986 and in 1988. The plaintiff sued the 1st, 2nd and 3rd defendants for trespass on his land. The defendant/Respondent on the other hand denied having trespassed or encroached on the Appellant's land and prayed that this suit be dismissed with costs.

Issues raised for determination were;

1. Who owns the disputed land?
2. Whether the defendants are trespassers on the disputed land.
3. Remedies to the parties.

The trial magistrate having listened to both sides, visited the locus, analyzed evidence and passed judgment in favour of the Respondents and dismissed the suit with costs.

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 failed to properly evaluate the evidence of PW1, PW2, PW3, PW4 and PW5.
2. That the learned trial Magistrate misdirected himself when he held that the Appellant sued a wrong party.
3. That the learned trial Magistrate misdirected himself when he only made Judgment for one disputed piece of land which the Appellant bought from Onega Michael but he did not pronounce himself on the disputed pieces of land which the Appellant bought from Okonga Peter and Nyeko Alex.
4. That the learned trial Magistrate did not properly conduct locus proceedings which caused a miscarriage of Justice.

Ms Ahabwe James & Co. Advocates represented the appellant while Kensiime Miriam represented the Respondents. By consent both parties agreed to file written submissions. However the appellant never complied with the time frame set by Court which was very unfortunate and Court shall not entertain this again.

Duty of the 1st Appellant Court is 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).**)

Resolution of the grounds

Ground 1,2 and 3 shall be argued together and ground 4 separately.

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 PW5.

Counsel for the Appellant submitted that the Appellant led evidence to the effect that he bought three piece of land and made them one. The witness testified that he purchased the first piece of land on 12/3/2001 from Okongo Peter at Shs 270,000/=, the second piece of 9/1/2002 from Michael Onega at Shs 600,000/=, and the third in 2003 from Alex Nyeko at Shs 300,000/= that PW3 testified confirming this fact. The witness (Appellant) tendered in Court the sale agreements for three respective pieces of land which were admitted in evidence as exhibit P1, exhibit P2 and Exhibit P3 respectively.

The appellant went ahead and described how trespass was committed on his respective pieces of land and stated that in around 2002, the 2nd defendant uprooted and extended Miramura trees to his land bought from Okongo, that in 2003 Bamuturaki also entered the same land the appellant bought from Onega claiming he (2nd defendant) bought it from Ocaya. That on the same piece Olanya (3rd defendant) also encroached the eastern side.

That the appellant's testimony was supported by that of his witnesses briefly as follows;

First was the testimony of Pastor Basiima George PW1 who testified that Mugasa bought three different pieces of land that neighbours him. That the first one was from Okongo Peter at Shs 280,000/=, 2nd one from Onega Micheal at Shs 600,000/= and the 3rd one from Alex Nyeko at Shs 300,000/=. The witness testified that the 1st piece of land which the Appellant bought from Okongo Peter was bordered by Okidi in the East who later sold his land to Baryagyenda (herein the 2nd Respondent).

The witness further described the boundaries of the 2nd piece of land the Appellant bought from Onega Michael as being boarded by Omony in the East and Nyeko Alex in the West. The 3rd piece which Musaga bought from Nyeko Alex according o further testimony of the witness was bordered by Onega in the East who sold to Mugasa and Lucia Namba in the West.

PW2 Mr. Pio Babara confirmed ownership of the suit land by Mugasa Anthony (Appellant). He stated that the Appellant completed payment for the land he bought from Onega in 2002. Being the chairperson of the area, the witness testified that he was called to show the boundaries of the land.

PW3 Mr. Nyeko Alex testified that the plaintiff purchased the 3rd piece of land from him (Nyeko Alex). He further testified that he know the two pieces of land of Mugasa that has been encroached on by the defendants. That he knows the one the Appellant bought from Nyeko and another piece he bought from Onega.

This witness clarified what has been referred to as an inconsistency by the trial Magistrate on the part of PW2 to the effect that PW2 first gave land to Santo (a father to Nyeko) and later after the death of Santo, Nyeko (his son) started using it and later sold it to Musaga Anthony (the Appellant).

PW5 Omuhereza Kabajungu was also consistent on the fact that the appellant is the only person who bought land in their area in 2002 from Onega and paid Shs 600,000/= and the agreement was made to that effect. That it was in 2003 when the Apellant informed him of the trespass which trespass he went and confirmed.

He submitted that the trial Magistrate diverted from all the above evidence and applied the first time in right rule in favour of Bamuturaki Yowasi (1st Defendant) who in his own testimony as DW1 testified he bought the suit land in 2003 and tendered in an agreement reflecting that year to this effect. With due respect, the appellant and all his witnesses had testified that the piece of land the Appellant bought from Onega was bought in 2002 and therefore the Trial Magistrate's decreeing of the piece of land the appellant purchased in 2002 from Onega in favour of Bamuturaki who claims bought it in 2003 was due to failure to evaluate the evidence of PW1, PW2, PW3, PW4 and PW5.

On the other hand, counsel for the respondents in reply to ground one submitted that counsel for the Appellant submitted that the Appellant bought his three pieces of land on 13/03/2001, 09/01/2002 and in 2003 respectively and that Appellant described how trespass was

committed on his respective pieces of land, Counsel did not look into the Appellant's testimony who already had told the Land Tribunal that he bought three pieces of land and made them one. This is in paragraph 2 of proceedings at page 2.

Still on Ground 1 Appellant's Counsel submitted that PW1 Pastor Basiima George testified that the Appellant Mugasa bought three different pieces of land that neighbour him, however in cross-examination by the 2nd Respondent, the same witness told the Tribunal that he was never a neighbour to any of the three pieces of land.

Furthermore on ground 1 Appellant's Counsel submitted that PW2 Mr. Opio Babara confirmed ownership of the suit land by Mugasa Anthony (Appellant), that he stated that the Appellant completed payment for the land he bought from Onega in 2002 and that being the land, however. In cross-examination, PW2 in the lower court's proceedings at Page 8 paragraph 1 told the Land Tribunal that he stopped being the chairman in 1999, this was confirmed by the testimony of PW3 Nyeko Alex who testified that Basiima was a village mate.

PW3 further testified that when he visited the land in issue, he found out that the 2nd Respondent was the one who encroached on the Appellant's land thus excluding 1st and 3rd Respondents from encroaching on the Appellant's land but in cross-examination by the 2nd Respondent PW3 told the Land tribunal that 2nd Respondent bought land from his mother and that PW3 sold his land to the Appellant when the 2nd Respondent was not present.

Whereas PW3 testified that it was only the 2nd Respondent who encroached on the Appellant's land, PW1, PW2 and PW5 testified that all the Respondents encroached on the Appellant's land, PW4 testified that he knew only two pieces of land of the Appellant that were encroached upon by all the Respondents. In cross-examination of PW5 by 3rd Respondent that why they planted boundary marks without him as a neighbour, PW5 answered at page 15 bullet one that;

"It was right to demarcate without the neighbours because the land was not encroached upon."

In bullet 3 PW5 said

"The LCs were there and some testified like Pius Babona and Katariba Emmanuel" and later in the last bullet at the same page PW5 answered

"I came as a member of the L.C to witness and not to show the boundaries"

She submitted that the effect of contradictions and inconsistencies in evidence of witnesses was considered in the case of **Zakaria Onno vs Olando Difasi and five others, High Court Civil Appeal No. 25 of 2013**, Justice Henry Kawesa quoted the case of **Alfred Tajar Vs Uganda (EACA No. 167/1967)** where the court held that major inconsistencies will lead to the evidence of the witness being rejected. Minor inconsistencies will not have the same result unless they point to deliberate falsehood.

She submitted that the learned trial Magistrate never erred in law and fact during his evaluation of evidence of PW1, PW2, PW3, PW4 and PW5, their evidence was full of contradictions/controversies which would not have skipped the legal sense.

Ground 2: That the learned trial Magistrate misdirected himself when he held that the Appellant sued a wrong party

Counsel for the appellant submitted that in his Judgment, the trial magistrate at page 3 held that the Appellant would have sued Onega. PW1, PW2, PW3, PW4 led evidence to the effect that Baryagyenda (the 2nd defendant) encroached on the suit land claiming that the 1st Respondent bought it from Ocaya before Onega selling it to the Appellant which fact, our submissions above have proved was wrong. The Appellant and PW1 further led evidence to prove the fact that Bamuturaki the 1st Respondent also entered the suit land, started digging and building thereon and claiming that he bought it from Ocaya.

The purported sale of land between Oneka and Ocaya is false and based on a forged sale agreement. There is purported sale agreement dated 23rd August 1998 as an exhibit on record the agreement is allegedly between Oneka and Ocaya Alex, the agreement it is not translated but we have caused its translation which is hereto attached looking at the agreement is written in form of reported speech and in past tense. The seller is Oneka Malik but not Onega Michael the signature on the agreement appears to be forged and therefore, the sale agreement is forged and unreliable.

It is not true that Ocaya bought the suit land from Onega and even Ocaya did not testify in court and submitted that the suit land belongs to the appellant.

He further submitted that evidence of the Appellant's witnesses that Olanya John 3rd Respondent also entered on the land which the Appellant had purchased from Onega Michael. The witnesses clearly testified that the 3rd defendant encroached on the suit land in the eastern direction and had crossed the valley which was there.

That from the above testimonies, the trial Magistrate ought to have evaluated the above evidence and find that all the Respondents were sued for their respective acts of trespass and none of them was a wrong party.

That after the appellant had purchased different pieces of land from their respective owners, possession changed to his hands and the appellant acquired a right to sue whoever interfered with his possession/ownership of the said piece of land who in this case were the Respondents.

However, counsel for the Respondents on the other hand submitted that the Appellant was not correct as the Appellant's counsel submitted that PW1, PW2, PW3 and PW4 testified that the 1st Respondent's land was first bought by Ocaya before Onega sold it to the Appellant this second sale was fraudulent. It were PW1, PW2, PW3 and PW4's testimonies that were not correct because the 1st Respondent adduced his sale Agreement to court dated 17/04/2003

exhibited as DEXLI and he also adduced the land sale agreement between Oneka and Ocaya dated 23/08/1998, it was admitted in Court as DID 1 and was not rejected by the Appellant/Plaintiff. At that time court had an interpreter called MUNU DENIs who spoke Swahili and Luo and was conversant in English. The interpreter read the agreement that was written in Luo and DW5 Okello Terensio understood it very well, he recognized his name and signature and confirmed to Court that Onega sold his land to Ocaya on 23/08/1998. That very witness further testified that he was present when Ocaya sold the very land to 1st Defendant/1st Respondent, then we wonder how the Appellant's Counsel could in the blink of an eye refer to the sale of land between Oneka and Ocaya as a purported sale and take such a truthful agreement as forged.

Ground 3: That the learned trial Magistrate misdirected himself when he only made Judgment for one disputed piece of land which the Appellant bought from Onega Michael but he did not pronounce himself on the disputed pieces of land which the Appellant bought from Okonga Peter and Nyeko Alex.

Counsel for the Appellant submitted that in his Judgment at page 1 paragraph 3 thereof, the learned trial magistrate clearly stated that the plaintiff (the Appellant herein) was suing all the defendants from trespassing on the land he bought from Onega. That this was not true and observing so was due to the learned trial Magistrate's failure to evaluate the evidence on record.

He further submitted that the appellant through himself and his witnesses testified that he bought three different pieces of land from different people and at different times i.e the first piece was bought from Okongo Peter in 2001 whose agreement was admitted in evidence as exhibit P2 and another piece was purchased from Nyeko Alex in 2001 whose agreement was admitted as Exhibit P3.

He submitted that the witnesses led evidence to the effect that all the three pieces had been encroached on with Baryagyenda encroaching on hte piece of land the appellant purchased from Onega in 2002 claiming Ocaya had sold it to him in 2003, Olanya (the 3rd Respondent) trespassed on the Eastern side of the land the Appellant purchased from Onega also claiming it belonged to his late father Omunyu.

That the above evidence clearly shows that the defendants trespassed at different times on the different pieces of land, the appellant had purchased at different times and had joined them as one but the trial Magistrate pronounced himself on a trespass committed by the defendants on only one piece which the appellant had purchased from Onega Michael in 2002. He therefore did not pronounce himself on the other pieces of land the Appellant bought from Nyeko Alex and Okongo Peter.

Counsel for the Respondent submitted that as stated in the amended memorandum of appeal the learned trial Magistrate did not misdirect himself, instead he considered the entire land as already the Appellant had testified that he emerged the three pieces of land and the Appellant

and all Respondents had earlier agreed that the disputed land originated from Onega, then there was no need of separating that land into three, in any case the 1st Respondent had acquired his land from Ocaya who had bought from Onega. Then Ocaya by the time he sold to the 1st Respondent he remained with another piece part of the land he had bought from Onega which he later left with the 2nd Respondent to take care of which the Appellant claimed to have been encroached on, by the 2nd Respondent, Appellant was claiming the piece of which Onega had encroached on when he (Onega) was selling to Ocaya, this piece belonged to 3rd Respondent's father Omonyi Nelson who even took Onega to L.C I but failed to attend court and the family of Omonyi Nelson remained in occupation of their land. When Onega was selling land to the Appellant in 2002, he even included therein the piece from Omonyi's family of which he had wanted to encroach on in 1998.

In my view the plaintiff bought 3 pieces of land from Okongo Peter in 2001, Onega Michael in 2002 and Nyeko Alex in 2001. All the plaintiff's witnesses were very consistent that they did not put the boundaries immediately because 2nd Defendant was not around but later it was planted using Miramura trees and 2nd defendant witnessed but refused to sign the agreement, secondly PW 1, II, III, IV, V, VI and VII stated that the defendant trespassed on the land in 2003, thirdly 2nd Defendant acknowledges that the plaintiff bought land from Okongo Peter, which corroborates plaintiff's evidence of PW I, II, III IV, V and VI and fourthly all the plaintiff's witnesses were consistent in as far as narrating the neighbouring and features in the disputed land. Even the purported agreement between Ocaya and Onega dated 23/8/1998 appears to be a forgery because the handwriting is the same, does not state the boundary, name of the vendor is not properly spelt and the author signed for all the witnesses and yet the agreement between the plaintiff and Onega looks genuine, the witnesses signed and clearly stated the boundaries.

According to 1st Defendant he states that he bought the land in 2004 from Ocaya, 2nd defendant states that he was a care taker of the disputed land and during cross-examination confirms that the plaintiff bought land from Okongo and Nyeko he was the L.C I chairman by then in 2001. That he was called but he refused to come. He further stated that the disputed land belonged to Ocaya which he bought in 1996 from Onega but never tendered any agreement to that effect nor did he prove ownership of the land a part from himself mention that he was a care taker.

In fact when D2 was called as L.C I and the caretaker, he would have come but he refused because he had interest. I presume.

3rd Defendant states that the land he is occupying was left by his late father and it is their family land, 4th Defendant states that 1st Defendant bought land from Ocaya Alex in 2003 and 5th Defendant says that Onega sold all his land to Ocaya in 1998 but 4th Defendant says that before Onega's death in 2002 he sold his land to the defendant. He goes ahead and says that 3rd Defendant bought land from Okedi 5th Defendant's brother and yet 3rd Defendant says the land belonged to his late father and was their family land.

The contradictions and discrepancies in the plaintiff's case is minor if any compared to the defence case as pointed out. In the case of **Uganda Versus Abdallah Nasser (1983) HCB**, it

was held that where grave inconsistencies occur, the evidence may be rejected unless satisfactory explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

In my view from the above submission, I find that the contradictions and the inconsistencies on the plaintiffs case if any were not major and did not touch the root of the case compared to the defendant's side and I therefore find that the plaintiff is the rightful owner of the disputed land, not trespasser, the appellant sued the right parties and Court pronounced itself on the disputed pieces of land.

Ground 4: That the learned trial Magistrate did not properly conduct locus proceedings which caused a miscarriage of Justice.

Counsel for the Appellant submitted that the rules for proper conduct of the locus were laid down in **Kahwa Stephen & Anor Vs Kaleman Hanington Civil Appeal No. 2 of 2011** as follows;

- (i) Ensure that all parties, their witnesses and their advocates (if any) are present.
- (ii) Allow the parties and their witnesses to adduce evidence at locus in quo.
- (iii) Allow cross-examination by either party or his or her counsel.
- (iv) Record all proceedings at locus in quo.
- (v) Record any observation, view opinion or conclusion of the Court including a sketch map plan if necessary.

He further submitted that information concerning the conduct of the locus does not appear anywhere in the record of proceedings and it is presumed that it might have never been conducted or was conducted in disregard of the above rules.

In reply Counsel for the Respondent submitted that the appellant appealed against the conduct of the learned trial magistrate which he took to have caused a miscarriage of Justice. That the pages of the proceedings are not numbered, probably the page at which the Magistrate recorded his locus visit proceedings was intentionally skipped for Court not to meet ends of Justice because it was on 24/10/2014 when Court visited the locus, that she attended and court's observations were recorded down, second last paragraph referred to the Court's visit to locus.

In my view, locus in quo visits are vital in matter to do with boundary disputes which was not the case in the instant matter. However, Court did conduct a locus visit and the trial Magistrate in his judgment alluded to it. Although he never mentioned the physical features and neighbours, never recorded the locus proceedings and drew the Sketch map which was just a mere technicality and the same did not occasion a miscarriage of Justice to either party since it was not a boundary issue.

In a nutshell therefore I find that the appellant is the rightful owner of the suit land, the defendants are trespassers and I do award costs to the Appellant and set aside the lower Court's decision.

Right of Appeal explained.

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Oyuko Anthony Ojok

Judge

23/3/2017

Delivered in open Court in the presence of

1. Ahabwe James counsel for the Appellant.
2. Appellant present.
3. in the absence of the Respondents and their Counsel.

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Oyuko Anthony Ojok

Judge

23/3/2017