

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 65 OF 2016

(Arising from FPT – 00 – CR – CS – 30 of 2010)

ZABAIRU MUKASA

MARIAM NAMUBIRU

AMINA MUKASA**APPELLANTS**

MRS MUKASA

VERSUS

FRED K. RWABUHORO.....**RESPONDENT**

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

Judgment

This is an appeal against the decision of His Worship Muhumuza Asuman Magistrate Grade one at Kyenjojo delivered on 28th October 2016.

Background

The Respondent instituted a Civil Suit against the Appellants for trespass to land situate at Kyegegwa Town Council. The Respondent prayed for a declaration that the land belonged to him; an eviction order against the Defendants/Appellants, a permanent injunction restraining the Defendants/Respondents their agents/workmen from further trespass into the land; general damages; and costs of the suit.

The Respondent's case was that he purchased the suit land from Mr. Esau & Mrs. Betty Norah Turyagenda in March 2009 who purchased the same from Laurensiyo Banagaija on 12th August 1967. An agreement was executed to that effect. That the Appellants, started ferrying building materials in 2010 and have been utilizing the land since then.

The Appellants denied all the contents of the plaint and made a Counter-Claim to the effect that the 2nd Appellant was a beneficiary of and Administrator of the Estate of Late Kalijja Nabuuso and the deceased was the owner of the unregistered plot of land. That all the Appellants derive their interest in the suit land from the deceased's estate for which they are even seeking to register as freehold.

Issues for determination were;

1. Whether the Turyagenda's passed good title to the Plaintiff?
2. Whether the Defendants are trespassers on the disputed land?

3. Remedies available to the parties.

The trial Magistrate after evaluating the evidence on record and visiting locus found that the suit land did not form part of the Estate of the late Kalijja Nabuso as was claimed by the Appellants. The Appellants were found to be trespassers on the suit land. The trial Magistrate also awarded general damages to a tune of UGX 5,500,000/= and costs to the Respondent. Judgment was passed in favour of the Respondent.

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

1. That the learned Magistrate erred in law and fact when he found that the facts in the Defendant's/Appellant's pleadings needed to be proved in order to determine whether the Appellant had a good case.
2. That the learned Magistrate erred in law and fact when he failed to find that the Appellants are in actual possession of the suit land in contention.
3. That the learned Magistrate erred in law and fact when he failed to evaluate the Appellant's testimony on who had to carry out the transactions on behalf of their family.
4. That the learned Magistrate erred in law and fact when he failed to evaluate and provide the status of what was present at the locus in his judgment.
5. That the learned Magistrate erred in law and fact when he failed to evaluate facts on what was the actual sketch map that had to be relied on when giving his judgment.
6. That the learned Magistrate erred in law and fact when he said that Yunus Mukasa was a care taker of the suit land with no evidence to that effect.
7. That the learned Magistrate erred in law and fact when he failed to consider the sale agreement was in contention.
8. That the learned Magistrate erred in law and fact when he failed to evaluate the true status of Angella Kizza and who was the Chair person at the time to sign on the two purported sale agreements.
9. That the learned Magistrate erred in fact and in law when he failed to evaluate the status of the caveat that was lodged by the Respondent.
10. That the learned Magistrate erred in law and fact that the land was vacant at the time of actual purchase and whether the presence of the Appellants was necessary at the time of purchase.
11. That the learned Magistrate erred in law and fact when he said that the Appellants pay general damages of UGX 5,500,000/= which attract interest at a rate of 18% from the judgment till payment in full.

Counsel Shiela Kagoro Mawanda appeared for the Appellants and Counsel Ahabwe James for the Respondent. By consent, both parties agreed to file written submissions.

First, it is trite law that the duty of a first Appellate Court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence.

Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. [See: **Pandya versus R (1957) EA 336, Ruwala versus R (1957) EA 570, Bogere Moses versus Uganda Criminal Application No.1/97(SC), and Okethi Okale versus Republic (1965) EA 555**].

Resolution of the Grounds:

Each of the Grounds is discussed separately.

Counsel for the Respondent raised a preliminary point of law to that effect that the appeal had been filed out of time, defective and that there was no appeal before this Court as per the provisions of **Section 79(1)(a)** of the Civil Procedure Act and **Order 43 Rule 1(1)** of the Civil Procedure Rules. That the appeal therefore be struck out.

Counsel for the Appellants in reply to the preliminary point of law submitted that it was settled in a ruling during the hearing of the Application for stay of execution when the trial Judge stated that the Notice of appeal had been filed and intention to appeal communicated to all the parties concerned and the Appellants went ahead and requested for the record of proceedings in order to formulate grounds for the appeal. Hence, allowing the Miscellaneous Application with security for costs which were paid within the stated period.

This Preliminary objection is misplaced and intended to derail Court with all due respect to Counsel who was present during the delivery of the ruling of the Miscellaneous Application that also allowed the appeal to be heard after furnishing of the security for costs.

The preliminary objection is therefore overruled.

Ground 1: That the learned Magistrate erred in law and fact when he found that the facts in the Defendant's/Appellant's pleadings needed to be proved in order to determine whether the Appellant had a good case.

Counsel for the Appellants submitted that the trial Magistrate erred and contravened **Section 57** of the Evidence Act when he found that the Appellants needed to prove their facts for them to have a good case.

Section 57 of the Evidence Act provides that;

“No fact need be proved in any proceedings which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

Further that the Magistrate failed to consider the defence witness statements and evidence that was adduced during the trial. That DW5 told Court that the late Kalijja left a will and bequeathed her land to Namubiru Mariam. And that he had been a neighbour to the suit land since birth.

Counsel for the Respondent on the other hand submitted that it is settled law that he who alleges must prove, the Appellants made various allegations in their defence and Counter-Claim claiming ownership of the suit land through their late Grandmother Kalijja Nabuuso and they were beneficiaries, which facts needed proof.

Counsel for the Respondent relied on **Sections 101 and 102** of the Evidence Act. He also noted that **Section 57** as cited by Counsel for the Appellants was inapplicable in the instant case.

Counsel for the Appellants in rejoinder submitted that, indeed the Appellants adduced a lot of evidence for instance the testimony of DW4 who told Court that her late grandmother bequeathed her the suit land and a will was tendered in Court as Exhibit D1 but their surprise the Respondent presented a sale agreement that had different names of Kalijja Nyabwiso as opposed to Kalijja Nabuuso. Thus, the Appellants objection to the agreement. That DW4 further told Court that she was using the suit land at the time she was processing Letters of Administration and called the Respondent for the meetings but he did not turn up.

Further that no one contested the testimony of DW5 who told Court that the Respondent never owned property on the suit land nor did Norah own land in that place.

In my opinion I find no fault in the fact that the trial Magistrate stated that the Appellants needed to prove their case, as it is, the burden of proof is on the one who alleges as per **Sections 101 and 102** of the Evidence Act and the case of **Christopher Sebuliba versus Attorney General SCCA NO. 13/1991**.

Section 103 of the Evidence Act provides that;

“Places the burden of proof in a suit or proceeding as to any particular fact on that person who wishes the court to believe in its existence...”

The Appellants were unable to prove how their grandmother acquired the suit land much as they produced lots of evidence in Court. Merely stating that they were beneficiaries was not sufficient since they claimed to be the owners; they needed to produce more proof than that.

On the other hand the Respondent was able to show Court how he acquired the suit land through the sale agreement that was adduced in Court though contested by the Appellants.

In regard to **Section 57** of the Evidence Act as cited by Counsel for the Appellants, this would have aided the Appellants if there were any agreed facts or documents, however, all I see is the layout of the Appellant’s case and that of the Respondent, witnesses and documents. Further the Section also states that even though there are admissions Court can still call for more proof, the Section is not as restrictive as Counsel for the Appellants chose to quote it.

I find that the Respondent was able to prove his ownership of the suit land through purchase as opposed to the Appellants who claimed to be beneficiaries of Nabuuso’s estate without any idea as to how she acquired the suit land.

This ground therefore fails.

Ground 2: That the learned Magistrate erred in law and fact when he failed to find that the Appellants are in actual possession of the suit land in contention.

Counsel for the Appellants cited the case of **Gilbert Kigozi Mayambala versus Joseph Sentamu & Another (1987) H.C.B 68**, where it was held that once a party is in actual possession of a part of the land and it is proved that he owns some of it, there would be a presumption of ownership of the whole in the absence of proof of the contrary.

Counsel for the Appellants went on to submit that from the above authority, a party in possession of the suit land is presumed the owner.

Counsel for the Respondent on the other hand submitted that the Respondent gave unchallenged evidence in Court that at the time of purchase there were no developments on the suit land, it was not until the Appellants learnt of the sale that they built a house on the land and started claiming ownership of the same. That the Appellant's father Yunus Mukasa was merely a care taker and did even witness on the sale agreement of Norah when she bought the land in 1967. Even the Appellant's grandmother witnesses the sale too. That the Appellants are occupying the suit land as trespassers and not owners.

I disagree with the submission of Counsel for the Appellants with all due respect; ownership in cases of actual possession is only presumed so in the absence of proof of the contrary. It is therefore not automatic. Though the Appellants are in actual possession of the suit land, this does not make them owners of the same but rather trespassers.

In regard to the developments on the suit land, it was the testimony of the Respondent that the house on the suit land was built by the Appellants after he purchased the suit land; this was never contested by the Appellants and would only mean that it is true.

I therefore find that this ground lacks merit and it fails.

Ground 3: That the learned Magistrate erred in law and fact when he failed to evaluate the Appellant's testimony on who had to carry out the transactions on behalf of their family.

Counsel for the Appellants submitted that the trial Magistrate contravened the provision of **Chapter 4** of the Constitution of the Republic of Uganda on the right to a fair hearing when he failed to evaluate and take into consideration the Appellant's testimony and Counter-Claim. That the trial Magistrate made no mention of the Letters of Administration as obtained by DW4 in regard to their authenticity and whether there was any justice dispensed in this regard.

Further Counsel for the Appellants questioned how Norah Betty could send her husband to sell her land yet she could not even come to talk to the people already on the land.

Counsel for the Respondent in this regard submitted that the evidence of the Respondent was unchallenged indicating that the Late Kalijja Nabuuso never owned the suit land therefore it was not part of her estate.

Contrary to what Counsel for the Respondent submitted the Respondent was invited for the family meetings and there is proof of the letters that were admitted as exhibits in Court. However, he was not duty bound to attend the meetings since he is not part of the Appellants' family and this was to do with their grandmother's estate.

I do not see how the issue of DW4 getting Letters of Administration have to do with the dispensation of justice in the instant case not to mention the fact that Norah's husband never denied the fact that he did not receive written authorisation to sell the suit land from his wife but he told Court that there was consent given to sell the suit land on behalf of Norah who was sick must it was not put in writing.

This Ground apart from being vague, I find it lacks merit and is dismissed.

Ground 4: That the learned Magistrate erred in law and fact when he failed to evaluate and provide the status of what was present at the locus in his judgment.

Counsel for the Appellants cited the case of the case of **Mukasa versus Uganda (1964) E.A 698 at 700**, where it was held that;

“A view of a locus –in –quo visit ought to be, I think to check on the evidence already given and where necessary and possible to have evidence already given and where necessary and possible aurally 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 a substitute for the evidence.”

Counsel for the Appellants noted that failure to know the current situation of the map as pictured by the visitor of the locus shows a strong miscarriage of justice hence making the Court blind but rather just assuming. That the trial Magistrate failed to demonstrate and present the evidence of the locus visit as it was before the Court and the current status of the land and thus this led to an erroneous conclusion by the Magistrate.

Counsel for the Respondent however submitted that locus was visited on 30th October 2015 by Her Worship Agnes Nabafu and both parties attended locus and it was properly visited. That His Worship Asuman only wrote the judgments and made a detailed and well reasoned judgment after evaluating the evidence on record. Thus, the trial Magistrate properly considered the evidence at locus.

Counsel for the Appellants in rejoinder submitted that the Appellant's major grievance is the fact that the trial Magistrate at locus did not fulfil her obligations and duties in regard to inspecting the land and interviewing the persons present. And that there was no locus report filed.

I disagree with the submissions of the Appellants with all due respect. The locus visit was conducted in the presence of both parties, the record is also present in the proceedings, a sketch map was drawn and the Magistrate that wrote the judgment did his part in correctly evaluating what was on record. The Appellants if dissatisfied with the way the locus visit was being conducted should have brought the same to the attention of the trial Magistrate at that point in time. I also do not see any sense of dissatisfaction in the Appellants submission in the lower Court meaning they were content at that time only to bring it up on appeal because judgment was not in their favour.

I accordingly dismiss the ground for lack of merit.

Ground 5: That the learned Magistrate erred in law and fact when he failed to evaluate facts on what was the actual sketch map that had to be relied on when giving his judgment.

Counsel for the Appellants submitted that the trial Magistrate relied on a different sketch map from that that was presented by the Appellants but rather relied on that of the Respondent.

Counsel for the Respondent submitted that the trial Magistrate was not bound by the sketch maps as provided by the parties but rather by the evidence on record.

In my opinion and from the perusal of the file, I found only one sketch map that was drawn by the Magistrate that visited the Locus-in-quo. I do not see where the argument of the parties having their own sketch map stems from and besides even if they were there, the Magistrate is bound by their observation made at the locus-in-quo and not what the parties draw for him/her.

This ground is therefore dismissed for lack of merit.

Ground 6: That the learned Magistrate erred in law and fact when he said that Yunus Mukasa was a care taker of the suit land with no evidence to that effect.

Counsel for the Appellants submitted that the question for determination was when the caretaking commenced and between whom since the land was bought before the Turyagenda's got married.

Counsel for the Respondent in my opinion rightly noted that evidence on record shows that the suit land was bought by Norah in 1967 before she got married. And it was also stated that Yunus Mukasa was merely a care taker of the same and this was corroborated by the evidence of PW4.

This ground also fails.

Ground 7: That the learned Magistrate erred in law and fact when he failed to consider the sale agreement was in contention.

Counsel for the Appellants submitted that there was need for a handwriting expert to determine if the signature of Yunusu Mukasa on the sale agreement and Kalijja's thumb print

were genuine but no expert evidence was adduced in this regard. The Appellants had alleged that the sale agreement was a forgery.

Counsel for the Respondent noted that it was the duty of the Appellants to call a handwriting expert to prove their allegations of forgeries. That Court allowed them to call this expert witness but they never came through.

Counsel for the Appellants in rejoinder submitted that evidence was adduced by DW4 to the effect that the handwritings were different indicating that there were forgeries.

The Appellants in the instant case alleged that there were forgeries and prayed to Court to adduce expert evidence in that regard but did not do so. Failure of the Appellants to prove their case cannot be imputed on Court. Court will only work with what is handed down in as far as either party puts forward in evidence to prove their case.

That notwithstanding, the law governing expert opinions was long laid down in common law practices that such opinion is not binding on the court. The duty to assess that evidence is on the Judge / Magistrate. It was thus held in the case of **Davie versus Edinburgh Magistrates (1953) SC 34 at 40** that;

“The duty of expert witness is to furnish the Judge with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their own independent Judgment by application of these criteria to the facts proved in the evidence”.

The import of this common law position is that even if such expert evidence was sought for, it would still be in the discretion of the learned trial Magistrate to weigh its evidential value. **(See: Odewo & Another versus Ofwono, HCT – 04 – CV – CA 177 of 2014)**

The trial Magistrate rightly evaluated the evidence as was adduced before Court and reached a fair decision. This ground is therefore also dismissed.

Ground 8: That the learned Magistrate erred in law and fact when he failed to evaluate the true status of Angella Kizza and who was the Chair person at the time to sign on the two purported sale agreements.

That the sale agreement was signed and stamped by Angella Kizza a sister-in-law to the Respondent, and on Cross – examination Esau was shaken by Counsel when he could not clearly tell the witnesses and neighbours.

Counsel for the Respondent pointed out that in the lower Court the Appellants did not raise any issues as to whether the Turyagenda’s sold the suit land to the Respondent and their Counter-Claim was that the suit land was theirs. It is not disputed that the suit land was bought from the Turyagenda’s.

In my opinion this ground lacks merit, how does the relationship of the person that witnessed as the Chairperson have to do with the sale transaction that is not in dispute save for the agreement that was being contested. This would therefore mean that Chairpersons should

never witness or stamp on agreements for transactions that involve their relations which I find unfathomable.

This ground is dismissed.

Ground 9: That the learned Magistrate erred in fact and in law when he failed to evaluate the status of the caveat that was lodged by the Respondent.

Counsel for the Appellants submitted that court ought to have considered the status of the caveat lodged by the Respondent, which meant that he had interest in the suit land.

She cited the case of **Boyes versus Gathure [1969] E.A 385**, where it was stated that one must have some basis of lodging a caveat; there are some sanctions if you do not have one.

That the trial Magistrate therefore ought to have evaluated the status of the caveat. Counsel also quoted **Section 142** of the Registration of Titles Act that provides;

“Anyone lodging a caveat with the Registrar without reasonable cause shall be liable to pay damages if the Caveat causes loss to the registered proprietor.”

That procedure of acquiring a caveat in the instant case was contravened.

It was the submission of the Respondent that he told Court that he purchased the suit land in 2009 with no developments and upon the Appellants learning of the purchase they started constructing on the suit land.

The Respondent lodged the caveat stopping the land from being brought under the operation of the Registration of Titles Act and the caveat has served its purpose.

In the case of **Sentongo Produce & Coffee Farmers Ltd versus Rose Nakafuma thijusa HCMC 690/99** it was held that for a caveat to be valid, the caveator must have a interest legal or equitable to be protected.

It is my considered opinion that the Respondent had an unregistered interest which is an equitable interest in the suit land which he sought to protect by lodging the said caveat and thus there would be no reason for any sanctions.

This ground is accordingly dismissed for lack of merit.

Ground 10: That the learned Magistrate erred in law and fact that the land was vacant at the time of actual purchase and whether the presence of the Appellants was necessary at the time of purchase.

Counsel for the Appellants noted that before the instant case there had been occupation of the land that resulted into various cases of malicious destruction of property by Kyegegwa Mosque.

Counsel for the Respondent on the other hand submitted that the Appellants never led evidence as to the alleged cases of malicious destruction of property against Kyegegwa Mosque Officials.

The Respondent led evidence to the effect that the Appellants were contacted before the purchase of the suit land but they did not express any interest not until the Respondent bought that they now came and built on the suit land.

In regard to the previous cases of malicious damage to property, I see evidence led in that regard in the lower Court. However, the land being vacant or not at the time of purchase does not touch the root of the case as this is a dispute as to ownership of the suit land. The issue at hand is who owns the suit land and how the land was acquired.

This ground is there dismissed.

Ground 11: That the learned Magistrate erred in law and fact when he said that the Appellants pay general damages of UGX 5,500,000/= which attract interest at a rate of 18% from the judgment till payment in full.

Counsel for the Respondent submitted that there was no evidence adduced by the Respondent to justify the award of general damages.

In the case of **Takiya Kashwahiri & Another versus Kajungu Denis, CACA No. 85 of 2011**, it was held that general damages should be compensatory in nature in that they should restore some satisfaction, as far as money can do it, to the injured Plaintiff. That where no evidence had been furnished to justify what damage or injury a party suffered, there was no basis for awarding the same.

Also, in the case of **James Fredrick Nsubuga versus Attorney General, HCCS No. 13 of 1993**, it was held that the award of general damages is at the discretion of Court and the law always presumes it to be a consequence of the Defendants act or omission.

Counsel for the Appellants submitted that in the instant case all of the Respondent's evidence did not pass the test of balance of convenience since he had never worked or lived on the said piece of land.

Counsel for the Respondent in this regard submitted that the trial Magistrate gave reasons for the award of general damage being the inconvenience the Respondent had suffered since the purchase of the suit land that had been brought about by the acts of the Appellants.

It is a principle of law that damages for which a party is to be compensated must be pleaded and proved with cogent evidence by the party claiming them as being the direct result of the defendant's wrongs. The damages ought to be proved and properly assessed by court. **(See: Eladam Enterprises Ltd versus S.G.S (U) Ltd & Others Civil Appeal No. 20 of 2002.**

Also in the case of **Kampala District Land Board & George Mitala versus Venansio Babweyana, Civil Appeal No. 2 OF 2007** it lays out the well settled law on award of damages by a trial court. It is trite law that damages are the direct probable consequences of

the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

It was submitted for the Respondent that he has suffered loss and cannot use his land for now over 8 years because the Appellants are in physical occupation of the same well knowing the suit land was purchased by the Respondent.

In the case of **Assisst(U) Ltd versus Italian Asphalt & Haulage & Another HCCS No. 1291/1999**, unreported, Kiryabwire J, physical inconvenience was held to be a form of damage. The plaintiff cannot be without remedy of an award of general damages in the given circumstances where he clearly suffered inconveniences trying to remove the caveat and file a suit against the 1st defendant. An award of UGX 15,000,000/= (fifteen million) as general damages in favour of the plaintiff would be appropriate, considering that the land is in the outskirts of Kampala, at Bwebajja.

I therefore, find that the trial Magistrate rightly awarded the general damages to the Respondent and his reason was backed with justification that is reasonable which I will not interfere with since it was not based on a wrong principle of law. Besides award of general damages is discretionary upon proof to the satisfaction of the trial Magistrate or judge which discretion I find was judiciously exercised in the instant case.

This ground is also dismissed.

In a nutshell, this appeal lacks merit on all grounds and is dismissed. The declarations and orders of the Lower Court are upheld. Costs are awarded to the Respondent in this appeal.

No Refund to the Appellants of the money paid as security for costs until the award of general damages and bill of costs are fully paid up. I so order.

Right of appeal explained.

.....

OYUKO. ANTHONY OJOK

JUDGE

10/04/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Sheila Kagoro Mawanda for the Appellants.
2. Counsel James Ahabwe for the Respondent.
3. Appellants
4. Respondent
5. James – Court Clerk

.....

OYUKO. ANTHONY OJOK

JUDGE

10/04/2017