

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – 0005 OF 2017
(Arising from FPT – 00 – CV – LD – CS – 077 OF 2010)

AKORAEBIRUNGI RICHARD..... APPELLANT

VERSUS

KIIZA FRANCIS.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Oji Phillips, Magistrate Grade one at Fort Portal delivered on 18/5/2015.

Background

The Respondent's suit was for recovery of land; a declaration that the suit land belonged to him; a permanent injunction; general damages and costs.

The Respondent claimed that he bought the suit land from Yozefina Bulimarwa the mother of the Appellant in 2008 and a sale agreement was executed to that effect. That the Appellant without any colour of right prevented the Plaintiff from accessing the suit land and forcefully trespassed on the Respondent's land. That the Respondent since purchase has not used the suit land.

The Appellant on the other hand averred that he is the biological son of Yosefina Bulimarwa and in 1992 his mother gave the suit land to him. That the Respondent and the Appellant's mother connived and sold off the Appellant's land fraudulently. That the suit land was given to him by his mother and the Respondent bought it well knowing it belonged to the Appellant.

Issues for determination were;

1. Who is the rightful owner of the suit property?
2. Whether the Defendant is a trespasser to the land?
3. What are the remedies available to the parties?

The trial Magistrate found that the suit land belongs to the Respondent, the Appellant was a trespasser, a permanent injunction was issued, awarded UGX 8,000,000/= as general damages at a rate of 12.5% from the date of judgment till full payment and costs.

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 in fact when he failed to evaluate the evidence on record by not establishing that the Respondent claimed land given to the Appellant by his mother.
2. That the trial Magistrate erred in law and in fact when he awarded excessive general damages of 8 Million to the Respondent.
3. That the trial Magistrate erred in law and fact when he did not properly interpret the sale agreement between the Respondent and Bilimarwa Josephine dated 11/08/2008 to establish that the Respondent encroached on the Appellant's land across Bwachapira Road given to him by the mother.

Representation:

Counsel Herbert Kwikiriza appeared for the Appellant and Counsel Ahabwe James represented the Respondent. By Consent both parties agreed to file written submissions.

Duty of the first Appellate Court:

It is the duty of the first Appellate Court to re-evaluate the evidence on record by subjecting it to a fresh and exhaustive scrutiny in order to form an opinion on the correctness of the decision of the lower Court. **(See: Begumisa versus Tibega, Supreme Court Civil Appeal No. 17 of 2002 and Section 80(2) of the Civil Procedure Act, Cap. 71).**

Resolution of the Grounds:

Ground 1: That the trial Magistrate erred in law and in fact when he failed to evaluate the evidence on record by not establishing that the Respondent claimed land given to the Appellant by his mother.

Counsel for the Appellant submitted that it was the evidence of DW1, uncle to the Appellant that the Appellant got the suit land when he was 15 years old from his mother. DW1 further stated that he was present when the Appellant's mother was giving him the land and documentation was executed to that effect which was corroborated by DW2, DW3 and DW4. That this piece of evidence was ignored by the trial Magistrate yet it clearly indicated that the suit land belonged to the Appellant.

Further that PW1, mother to the Appellant told Court that she gave land to the Appellant before selling to the Respondent which indicates that the Appellant acquired land before the Respondent. That the Respondent ought to have carried out due diligence when purchasing the suit land because as per his testimony he never talked to the Appellant but only asked his mother if she had talked to her children.

Counsel for the Appellant cited the case of **Sir John Bageire versus Ausi Matovu, CACA No. 7 of 1996 at Page 26**, to emphasise the fact that it is vital to carry out a search as due diligence to establish ownership before purchase. In that case it was held inter alia that;

“Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the land but of the sellers before purchase.”

Furthermore, that the Respondent had a duty to satisfy himself through conducting a diligent search to ascertain the owner of the suit land as opposed to relying on the word of the Appellant’s mother.

That the Appellant disputed the sale of the suit land and an agreement was made to the effect that the Appellant pays back the purchase price of the suit land which he has not done to date. That the act of making the Appellant pay the purchase price and the interest on the bank loan as obtained by the Respondent was unfair. Besides the Respondent should have occupied the suit land upon purchase and also sued the Appellant after failure to pay back the purchase price and not wait to sue in 2010. That Respondent was only tricking the Appellant and brought the suit after interest had accrued to UGX 3.6Million.

Counsel for the Appellant further submitted that the trial Magistrate disregarded the Appellant’s evidence and only relied on the Respondent’s evidence. That from the Appellant’s evidence it was very clear that the Appellant had been in occupation of the suit land since it was given to him by his mother and there were banana plantations on the same. In the circumstance the trial Magistrate was wrong to find that the Appellant was a trespasser.

Counsel went on to submit that the trial Magistrate in his judgment noted that the Appellant had not testified but this was never raised by Counsel for the Respondent and besides the Appellant could have chosen to testify or not to. That the trial Magistrate disregarding, the evidence of the Defence occasioned the Appellant injustice.

Counsel for the Appellant also submitted that during the locus visit the trial Magistrate merely indicated that he had seen the suit land but did no mark the boundaries of the suit land which led to the trial Magistrate making a wrong decision.

Counsel for the Respondent on the other hand submitted that Ground 1 was inconcise in as far as it did not point at the direct piece of evidence that shows that the Appellant was given the suit land by his mother and therefore the trial Magistrate’s judgment deprived him of the same. That the Ground gives Counsel for the Appellant an opportunity to go on a fishing expedition and offends **Order 43 Rule 1 and 2** of the Civil Procedure Rules therefore should be struck out.

Counsel for the Respondent also submitted that the Respondent produced 4 witnesses including him and PW1 was the key witness since all the parties were referring to her. PW1 gave the Appellant some land and sold the remaining piece to the Respondent and she stated the same before Court. PW1 also ably identified her thumb print on the agreement and this was corroborated by PW2 and PW3.

The Respondent told Court that he sued the Appellant because he refused to let him use the suit land even when the Respondent gave him the chance to buy it off and the Appellant failed to pay.

Further that the Appellant did not challenge these facts and the Appellant did not testify yet he claims to be the owner of the suit land. This therefore leaves the evidence hanging, the witnesses that testified had nothing to support. Thus, the Appellant's contention that his mother gave him the suit land is unfounded.

Furthermore, that the sale is not being challenged by the Appellant but is merely faulting the findings of the trial Magistrate.

Counsel for the Respondent also submitted that PW1 did not require permission to sell the suit land that she had given the Appellant another piece of land near that which she sold to the Respondent and that the Appellant was not prevented by Court or the Respondent from testifying. Thus, the land belonged to the Appellant's mother who properly sold the same to the Respondent.

Counsel for the Respondent also submitted that the case of **Sir John Bageire** (Supra) is inapplicable in the instant scenario because the initial owner of the suit land is known and there was no suspicion pointed out in the testimony of the Respondent that would have led him to think that PW1 was not truthful.

In regard to the locus visit Counsel for the Respondent submitted that locus was visited and the Magistrate observed the boundaries, as per the sale agreement and the same is indicated in the record of proceedings.

In regard to the Ground being inconcise, I find the Ground as drafted is very precise and not in contravention with the provisions of **Order 43 Rule 1** and **2** of the Civil Procedure Rules. Thus, the ground will not be struck out.

In my opinion from the evidence on record I find that the mother of the Appellant though can write she denied ever executing a document while giving land to the Appellant. It is not in dispute that the Appellant acquired land before the Respondent as this was clearly stated by PW1 who gave the Appellant land. PW1 also did not require consent of the Appellant for her to deal in her land. Thus, the argument of Counsel for the Appellant that none of the Appellant's witnesses knew about the sale with all due respect is baseless.

PW1 in this case was the key witness since she was the owner of the suit land and also sold the same to the Respondent. She told Court that the land she sold to the Respondent did not belong to the Appellant but rather were different pieces.

The Appellant in the instant case chose not to testify in Court but merely called witnesses to testify in his favour for reasons best known to him.

It is true that though locus was visited there are no proper proceedings as to what transpired during the visit on record. The sketch map with all due respect is lacking in content especially as to the boundaries since these are vital in confirming whether the land belonged to the Appellant or the Respondent or whether the suit land was a different piece of land all together. However, I find that the evidence as adduced by the witnesses was sufficient to prove ownership of the suit land.

In regard to due diligence on the part of the Respondent, I find that he carried out due diligence. In his testimony he stated that he inquired from the neighbours and also asked the Appellant's mother if she had talked to her children about the sale and she replied in the affirmative. I see any reason why the Respondent would have doubted her word, given the fact that she was the initial owner of the suit land and the Respondent was a native of the area. I also find that the case of **Sir John Bageire** (Supra) is inapplicable in the instant case.

The Appellant was given an alternative to buy off the suit land after contesting the sale but failed to pay the purchase price, and the Respondent then sued in 2010 after giving the Appellant ample time to pay for the land. I do not find this an act of trickery on the part of the Respondent but rather as being somebody that did not want a grudge/conflict with the Appellant. The Appellant if indeed was the owner of the suit land in my view would not have allowed to the arrangement to pay the purchase price to the suit land, but he voluntarily agreed only to breach the same.

Counsel for the Appellant alluded to the fact that the trial Magistrate disregarded the evidence of the Appellant thus occasioning him a miscarriage of justice. The Appellant never testified in Court to support his defence and the only evidence that was available was that of his witness which I find the Magistrate properly evaluated in reaching his decision.

In conclusion, I find that the trial Magistrate did not err in law and in fact in evaluating the evidence on record whereof he established that the Respondent was the owner of the suit land.

This ground therefore fails.

Ground 2: That the trial Magistrate erred in law and in fact when he awarded excessive general damages of 8 Million to the Respondent.

Counsel for the Appellant submitted that the award of general damages is at the discretion of Court, it is meant to be compensatory and put the aggrieved party in a position they previously were in but not to enrich them. That the Appellate Court can only interfere with the award of general damages if they were awarded based on a wrong principle of law or the amount is so high or so low as to make it entirely an erroneous estimate of the damages. He cited a number of authorities in that regard to wit:

- Visram and Kassam versus Bhait [1965] E.A 769.
- Security group Uganda limited versus Xerodoc Uganda Limited, Civil Suit No. 572 of 2006.
- Crown Beverages Limited versus Sendu Edward, SCCA No. 01 of 2005.
- Robert Coussens versus Attorney General, SCCA No. 08 of 1999.
- Mbogo & Another versus Shah [1968] E.A 93.

Counsel went on to submit that in the instant case the suit land was bought at UGX 2.5 Million as per the sale agreement. That the general damages awarded even exceeded the purchase price of the suit land. That this was excessive considering that the Respondent had

already got the suit land, a permanent injunction was issued and costs awarded. Thus, the general damages at a rate of 12.5% should be reassessed.

Counsel for the Respondent in this regard submitted that the Respondent purchased the suit land in 2008 and the Appellant prevented him from using the same until a suit was filed in 2010 and determined in 2015. That during the period from 2008 – 2015 the Respondent was inconvenienced, suffered mental anguish and the trial Magistrate was justified to make the award of UGX 8,000,000/= and the same should not be interfered with as there was no wrong principle of law acted on.

It is my opinion that the award of general damages in this case was excessive and unnecessary. I do concur with the submissions of Counsel for the Appellant. This award was made to enrich the Respondent as opposed to compensating him for any acts occasioned by the Appellant.

I therefore vary the award of general damages as awarded to the Respondent to UGX 1,000,000/= at Court rate per annum from the date of judgment in the lower Court till full payment.

The Respondent did not suffer much inconvenience from the time he instituted the suit till judgment therefore, he cannot make the Appellant shoulder unnecessary blame. The Respondent was also part of the delay in hearing of the matter causing numerous adjournment of the case as per the record of proceedings.

This ground therefore succeeds.

Ground 3: That the trial Magistrate erred in law and fact when he did not properly interpret the sale agreement between the Respondent and Bilimarwa Josephine dated 11/08/2008 to establish that the Respondent encroached on the Appellant's land across Bwachapira Road given to him by the mother.

Counsel for the Respondent submitted that Counsel for the Appellant did not submitted on this ground and it should be presumed as abandoned and struck out.

Further, that the trial Magistrate analysed the fact that the sale agreement was not challenged by the Appellant who even wanted to pay the purchase price and take over the land and failed. That the Magistrate having evaluated the evidence found that the agreement between the Appellant's mother and the Respondent was entered into freely and must be respected and quoted the case of **Cambell Discount Co. versus Bridge (1961) 2 ALLER 97** where Court observed that;

“Courts should not interfere with ordinary contracts freely entered into by persons under no duress or mistake.”

That, indeed the trial Magistrate did not interfere with the contract of sale of land between the Appellant's mother and the Respondent since it was voluntarily entered into.

Counsel for the Appellant did not find it necessary to discuss this ground. I therefore consider it as abandoned.

However, without prejudice I find that this ground contradicts the earlier claim of the Appellant that the suit land belongs to him. This Ground alludes to the fact that the Respondent trespassed onto the suit land as per the boundaries in the sale agreement. There is confusion being created by the Appellant as to what exactly his claim is. It no longer seems to be an issue of ownership but rather trespass/encroachment.

This Ground is therefore struck out for offending the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules which is the effect that;

“The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.”

This ground is vague in my opinion and intended to confuse this Court and accordingly fails and is struck out.

In a nutshell, from the re-evaluation of the evidence on record, this appeal succeeds in part on ground 2 and fails on Grounds 1 and 3. The Respondent is granted only half of the taxed Bill of costs and no costs are awarded to the Appellant. The decision of the lower Court, is upheld, save for the General damages that I have varied. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK
JUDGE
5/5/2017

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

1. Counsel Herbert Kwikiriza for the Appellant.
2. Counsel Victor A. Businge holding Brief for James Ahabwe Counsel for the Respondent.
3. James – Court Clerk
4. Both parties.

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OYUKO. ANTHONY OJOK
JUDGE
5/5/2017