THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO. 33 OF 2017

(ARISING FROM CIVIL SUIT NO. 073 OF 2014)

SULAIMAN MBAZIIRA:: APPELLANT

VERSUS

MANDE KAFEERO STUART:: RESPONDENT

BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA

JUDGMENT

This is an appeal arising from the decision of the Magistrate Grade One, sitting at Nabweru Court vide the said case and delivered on the 25th day of January 2017.

The appellant appeals to this court against the said decision on the following grounds:

1. That the trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby arriving at the wrong decision.

2. That the trial Magistrate erred in law and fact when she held that the defendant had no proof of ownership.

3. That the trial Magistrate erred in law and fact when she failed to consider the defendant's exhibits in the evaluation of the evidence thereby arriving at a wrong decision.

4. That the trial Magistrate erred in law and fact when she awarded exorbitant general damages basing on wrong principles thereby occasioning a miscarriage of justice.

The appellant is seeking for the following orders:

1. That this Court allows the appeal.

2. That this Court sets aside the judgment and orders of the trial Magistrate.

3. That this court holds that the Appellant owns the suit land.

4. Costs of the appeal and the trial court be awarded to the appellant.

BACKGROUND

The respondent/plaintiff filed a suit in the trial court against the appellant/defendant seeking for general damages for trespass, an eviction order, a permanent injunction restraining the appellant and his agents or servants from further trespassing on the suit land, interest on general damages at court rate from the date of judgment until payment in full as well as costs of the suit.

The respondent/plaintiff claimed that on the 9th October 2000 he bought a plot of land (kibanja) in Nabweru South measuring 189ft by 132ft. That sometime in July 2013 the appellant unlawfully entered upon part of the respondent's land by 24 ft and built a two roomed house and a latrine. That the respondent protested against the appellant's encroachment on his land in vain.

The appellant/ defendant filed a defence wherein he stated that he never trespassed onto the Plaintiff's kibanja.

After analysing the evidence that was adduced in court, the trial magistrate held that:

i. An eviction order against the appellant/defendant by demolition of part of the building encroaching on by 4ft by 12 ft or compensation for the ft that was encroached on after the valuation by the Chief Government Valuer.

ii. That a permanent injunction be issued against the appellant his servants and agents from trespassing on the respondent's kibanja.

iii. General damages to the tune of ten million shillings (10,000,000/=) were awarded to the respondent.

iv. Interest at court rate was awarded on the general damages from the date of the Judgment until payment in full.

v. The respondent was awarded the costs of the suit.

It is against the said decision that the appellant now appeals to this court on the said grounds.

Counsel for the appellant and counsel for the respondent filed written submissions the details of which are on record and which I have considered in determining this appeal.

It was held in the case of ***Fredrick J.K Zaabwe versus Orient Bank Limited and 5 others –S.C.C.A No. 04 of 2006*** that the duty of the first appellate court is well settled. It is to evaluate all the evidence which was adduced before the trail court and arrive at its own conclusion.

Ground two: The trial magistrate erred in law and fact when she held that the defendant had no proof of ownership.

Submissions by Counsel for the appellant.

Counsel for the appellant submitted that according to the evidence of Professor Claver Matovu (DW2) he demonstrated that he acquired the suit land by way of purchase from a one late Naluuma way back in the 1970's and they planted boundary demarcation plants known as Oluwaanyi. That the same witness also testified that he went on and acquired a lease title in 1982 from the Uganda Land Commission having surveyed the same and boundary marks were put in place. That this went a long way to show the history of the land in question. That acquiring a leasehold title from Uganda Land Commission by DW2 was only re-enforcing the already existing interests acquired by DW2 from Naluuma in 1970's.

Counsel submitted that although the leasehold title had expired way back in the year 1987, it was important to consider the kibanja interests of DW2 which he had acquired from Naluuma in the 1970's. That the appellant agrees that the leasehold had expired long ago but DW2 interests remained which he acquired from Naluuma in the 1970's. Counsel further submitted that there was no mention of DW2's interests he had acquired from Naluuma but instead the trial magistrate went on to determine the ownership of the land basing on the expired leasehold.

Counsel further submitted that the respondent does not contest the entire interests of the appellant or DW2's entire piece of land but what was being contested is in the boundaries of the appellant vis-as-vis those of the respondent. That the land title of DW2 though expired can be very helpful in determining the boundaries of the said land since there has never been any contestation in respect of the same since 1970 to the time when the respondent filed **Civil Suit No. 073 of 2014 in Nabweru Chief Magistrate's court.**

Counsel contended that the trial magistrate's conclusion was erroneous in as far as it seeks to vitiate the interests of DW2 which he acquired from Naluuma and later passed on to the appellant and other occupants not a party to this suit. Counsel cited the case of ***Aluma Michael Bayo and 2 others versus Saidi Nasur Okuti-H.C.C.A No. 023 of 2013 (Arua High Court)*** to buttress his submissions.

Counsel further submitted that the evidence of DW2 that he had occupied the suit land since the 1970's uninterrupted and that no one had challenged his interests on the entire land when he acquired it in the 1970's was never challenged. That it was part of the land that DW2 sold to the appellant which is the subject of this case. Counsel submitted that what was in contention in the trial court was whether or not the appellant trespassed on the respondent's land which are adjacent to each other by way of extending boundaries to what belongs to the respondent.

Counsel further contended that for the trial court to determine ownership basing on the certificate of a lease agreement from the Uganda Land Commission was to introduce a new ground which was not pleaded by either the plaintiff or the defendant in this case. That the appellant's interest in the entire property was never challenged by the reversionary owner of the lease who is now the Buganda Land Board, and no one had brought any claim before

court for the trial magistrate to seek to determine ownership in her judgment. That the respondent's counsel admitted that the matter before the court was not to determine ownership.

Counsel for the appellant further submitted that the appellant bought his kibanja from Professor Claver Matovu whose lease had expired in 1987 but retained an equitable possessory interest in the suit land given that he had earlier bought an equitable interest from Naluuma in the 1970's before he processed a lease which equitable interest he sold to the appellant and the appellant's equitable interest in the land has never been challenged by the landlord to whom the expired lease reverted.

Counsel for the appellant further submitted that the issue of ownership of the appellant's land was not in issue but rather unauthorized entry and the respondent's contention was in unauthorized entry upon his kibanja but the trial magistrate determined an issue which was not part of the issues before the court.

Counsel further contended that the trial magistrate provided redress in an action for recovery of land by the lessor who in this context is the Uganda Land Commission but did not address the prayers sought in an action for trespass before the trial and thus coming to the wrong conclusion basing on the issue of ownership. That what the court had to address was an action of unlawful entry touching possessory rights and not challenging title.

Counsel further contended that even at the scheduling, a joint scheduling memorandum was filed and only two issues were framed for determination namely; whether the defendant trespassed on the plaintiff's land at Nabweru and the remedies available to the parties. That the trial magistrate therefore erred in law and fact by divulging into the issue of ownership as opposed to the gist of the action for trespass which is possessory interest rather than challenging the title.

Submissions by counsel for the respondent on issue one.

Counsel for the respondent submitted that when Rev. Peter Claver Matovu sold part of the suit land to the appellant in 2011 he neither had an equitable nor lawful interest in the suit land and so did not pass any valid title to the appellant.

Counsel for the respondent submitted that it was erroneous for the appellant to argue that following the expiry of the lease and failure to renew it, he had acquired an equitable interest in the land which is a kibanja interest. That the appellant never cited any authority in support of that argument. He prayed that this court dismisses that argument and instead uphold the findings of the trial magistrate. That as rightly pointed out by the trial magistrate, one could not isolate the measurements of the land from the lease interest. That since the appellant did not acquire any valid interest in the suit land, his version of the measurements could not be relied upon. That the claim by the respondent that the appellant had encroached on his land, in the absence of any proof from the appellant to the contrary was rightly considered and believed by the trial magistrate who properly applied the law to the facts and arrived at the correct decision.

Counsel for the appellant filed submissions in rejoinder in essence reiterating his earlier submissions. The details of the submissions in rejoinder are on record.

Decision of the Court.

The issue that had been raised for determination in the trial court was whether defendant/appellant had trespassed on the Plaintiff's /respondent's land at Nabweru.

It was held in the case of ***E.M.N Lutaaya versus Sterling Civil Engineering Co. Ltd-S.C.C.A No. 11 of 2002*** that trespass to land occurs when another person makes an unauthorized entry upon another person's land and thereby interferes or portends to interfere with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land, but against the person who is in actual or constructive possession of the land.

The appellant bought his land from Professor Claver Matovu (DW2) and the undisputed evidence that was adduced was that the said vendor's lease had expired on the 1st October 1987. There was no evidence to show that the said vendor had even applied for the extension of the lease. The trial magistrate rightfully held that that after the expiry of the lease the land reverted back to the lessor Uganda Land Commission. I also agree with her finding that the said vendor did not have the authority to sell the said land to the appellant.

I do not agree with the submission by counsel for the appellant that when DW2's lease expired he retained some interest in the land which he could pass over.

Under **Section 2 of the Land Act Cap 227 (as amended)** Citizens of Uganda can own land in accordance with the following land tenure systems-

(a) Customary;
(b) Freehold;
(c) Mailo; and
(d) Leasehold.

One can own land by one form of tenure system but not dually as the appellant would wish to intimate. Even if DW2 had formerly bought the land which was subsequently taken over by the Uganda Land Commission, he cannot claim his former ownership of tenure once the lease expired.

It was held in the case of ***Daphne Musoke versus Samu Investments-C.A.C.A No. 85 of 2003*** referring to the case of ***Dr. Adeodata Kekitiinwa versus Edward Wakida-C.A.C.A No. 3 of 1997*** that it was well established that once a lease for a definite term expires, the lessee or tenant ceases to have any legal right on the property and is merely a trespasser. The possession goes back to the lessor. One cannot sell what does not belong to him or her. Once a lease expires it follows that whoever got an interest of the leased land from the lessee, his or her interest equally expires and the person has no locus standi to claim any interest from that land.

One of the defences to a cause of action in trespass is to prove ownership of the land from which one claims the trespass occurred.

I will not fault the finding of the trial court that the appellant had trespassed on the respondent's land 4ft by 12ft.

I therefore find no merit in this ground of appeal which I will dismiss.

Ground 1: The trial magistrate erred in law and fact when she failed to evaluate the evidence on record thereby arriving at the wrong conclusion.

Ground 3: The trial magistrate erred in law and fact when she failed to consider the defendants exhibits in the evaluation of evidence thereby arriving at a wrong decision.

I will combine both grounds while resolving them as they are related.

Submissions by Counsel for the appellant on both grounds.

Counsel for the appellant submitted that during the trial, a copy of the leasehold certificate of title, **LRV 1239 Folio 12** ,was submitted and agreements upon which the purchase had been made by the appellant. That the trial magistrate looked at all the said documents/exhibits in addition to the survey report but maintained that the measurements had expired. Counsel submitted that the process of acquiring the land title just like what DW2 acquired in 1982 arose from a completed and reliable survey with physical determination of such parcel of land. That the same manifestly allows one to know easily the history, legal situation, definitive description, location and the boundaries.

Counsel contended that the trial magistrate erred in holding that the results of the survey had expired and thus came to the wrong conclusion that the defendant had trespassed upon the respondent's land.

Counsel had contended that upon the expiry of the lease, DW2 retained an unchallenged equitable interest on the land which he sold to the appellant.

Submissions by Counsel for the respondent on grounds two and three.

Counsel for the respondent submitted that the certificate of title and the purchase agreement were never tendered in court by the appellant as exhibits but for identification purposes. Counsel for the respondent cited the case of ***Biteramo versus Situma-S.C.C.A No. 15 of 1991*** where it was held that an item tendered for identification does not become an exhibit until it is formerly proved and admitted in evidence. Counsel also cited the case of ***Uganda Corporation Creameries Limited and another versus Reamaton Limited – C.A.C.A No. 44 of 1998*** where it was held that an exhibit is a document or thing tendered in court during a trial or hearing to prove a fact.

Counsel for the respondent further submitted that since the certificate of title and the agreement of purchase were never exhibited by the appellant in the lower court, the appellant had nothing to rely on to prove his defence.

Counsel contended that the trial magistrate properly evaluated the evidence on record before she arrived at her decision.

Decision of Court on grounds one and three.

In her Judgment, the trial magistrate held that the purchase agreement was brought to court only for identification purposes. It is my considered view that even if the sale agreement had been properly exhibited (which was not in this

case as it was only allowed for identification purposes) it had no probative value once the appellant based his proof of ownership from purchase from a lessee whose lease had expired.

The above notwithstanding, there was no proof adduced by the appellant that he had purchased the suit land a one Naluuma way back in 1970 as he claimed. The sale agreement which was only admitted for identification purposes was not sufficient proof to that effect and it had no probative value. It was indeed held in the case of ***Biteremo versus Situma-S.C.C.A No. 1 of 1991*** as cited by counsel for the respondent that a document tendered for identification purposes does not become an exhibit until it is formerly proved and admitted in evidence.

The survey report the appellant heavily relied on was of no probative value once it was established that the appellant bought from someone whose lease had expired. The sale/purchase of the disputed land was void ab initio.

I therefore find that the trial magistrate properly evaluated the evidence that was adduced before her and rightly rejected the appellant's documents as exhibits since they were only tendered in court for identification purposes.

These grounds of appeal also fail.

Ground 4: The trial magistrate erred in law and fact when she awarded exorbitant damages basing on wrong principles thereby occasioning a miscarriage of justice.

Submissions by counsel for the appellant on ground 4.

Counsel for the appellant submitted that it was trite law that damages are the direct consequence of the act complained of and such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Counsel cited the case of ***Stanbic Bank Limited versus Sekalega Civil Suit No. 185 of 2009*** where the court held that measurement of the quantum of damages was a matter of discretion of the individual judge which discretion has to be exercised judicially with the general conditions prevailing in the country and that courts are mainly guided by the value of the subject matter, the economic inconvenience the party may have been put through and the nature and breach or injury suffered. That the law prohibits award of interest that would amount to unjust enrichment to one of the parties. Counsel also

cited the case of ***Kilembe Mines Limited versus Bitegye- Civil Appeal No. 46 of 1971*** to buttress his submissions.

Counsel for the appellant further submitted that the award of general damages by the trial magistrate did not have a basis as no evidence was adduced to show the inconvenience or loss the respondent had suffered because the appellant was at all material times in possession of this portion of kibanja. That the general damages of ten million shillings (10,000,000/=) awarded to the respondent was manifestly high with no basis upon which court could grant such costs and prayed that the award should be reversed.

Submissions by counsel for the respondent on ground 4.

Counsel for the respondent submitted that rarely would an appellate court interfere with the decision of the lower court in awarding general damages unless wrong principles of the law were applied or the award is excessively low or high as to occasion a miscarriage of justice. Counsel cited the case of ***Uganda Revenue Authority versus Wanume David Kitamirike 1 H.C.B 2012, page 43*** to buttress his submissions.

Counsel contended that the trial magistrate relied on the testimony of the respondent when he awarded him ten million shillings (10,000,000/=) as general damages.

Counsel submitted that the respondent testified that he could not develop his kibanja as he would have to spend a lot of money to demolish the encroachment so as to build a garage and a storied building from which to sell vehicles and spare parts.

Counsel further contended that the trial magistrate followed the right principles in awarding the said general damages in order to restore the aggrieved party to the position he would have been in had the loss or damage not occurred. That in the instant case the respondent had asked for twenty million shillings (20,000,000/=) as general damages but the trial court awarded the respondent ten million shillings (10,000,000/=). Counsel contended that the said award was not exorbitant but reasonable in the circumstances and prayed that the award should be upheld by this court.

Decision of Court on ground 4.

It was held in the case of ***Simon Lobia versus Mutwalibi Mukungu-C.A.C.A No. 36 of 1999*** that an appellate court will not interfere with the discretion of the

trial court in awarding damages unless it is satisfied that the trial court acted on wrong principles of the law.

In the case of ***Armstrong versus Sheppherd and Short (1959) 2 Q.B 384*** it was held that an action of trespass if proved entitles one to recover damages even though he or she has not suffered any actual loss.

An award of general damages is a matter of discretion of the court. In this case the trial magistrate never adduced reasons as to why she award the said quantum of damages.

In his evidence the respondent had stated that he had intended to develop his land but was unable to do so because of this dispute. He instituted this case seven years ago and he is still inconvenienced by the appellant. This must have caused the respondent mental pain and anguish. There is no mathematical formula to arrive at the quantum of general damages and in my view an appellate court should interfere with an award of general damages by the trial court if it is manifestly too low or manifestly too high and based on the wrong principles of the law.

I find the quantum of general damages awarded by the trial magistrate reasonable in the circumstances and I will not interfere with it.

This ground of appeal also fails.

This entire appeal therefore fails and will be dismissed with costs to the respondent. The Judgment and decree of the lower court will be upheld.

Hon. Justice John Eudes Keitirima

29/06/2021