THE REPUBLIC OF UGANDA

IN THE REPUBLIC OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL APPEAL NO: 020 OF 2021

KITAKA PETER & 12 OTHERS::APPELLANTS

VERSUS

MOHAMOOD THOBANI::: RESPONDENTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA.

JUDGEMENT

This an appeal against the judgment and orders of Her Worship Mary Kisakye, a Chief Magistrate vide Civil Suit No. 283 of 2006 at the Chief Magistrate's Court of Entebbe at Entebbe.

The brief facts as presented by the pleadings on record are the Plaintiff in the Lower Court (herein referred to as the Respondents) brought a suit against the Defendant, (herein referred to as the Appellants) for trespassing on his land comprised in LRV 3337 Plot 36-40 (herein after the suit land), Eric Magala Road Entebbe.

The Appellants (the Defendants in the Lower Court), save Sebugwawo Steven (8th Appellant), put up joint defence as customary owners of the said land.

The lower Court considered three issues, as per the judgment on record, namely;

1. Whether the Plaintiff is the registered proprietor of the suit land.

2. Whether Defendants are customary owners of their respective pieces of the land suit land?

3. What remedies are available to the parties?

These issues were agreed to by the parties in their joint scheduling memorandum.

At the conclusion of the Trial Court conducted a locus in quo, where after the trial Court determined the suit in favour of the Respondent.

The Appellant was dissatisfied thereby raising four grounds on appeal that:

1. The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole thereby reaching a wrong decision.

2. The learned Magistrate erred in law and fact when in disregard of the overwhelming evidence on record at locus visit held that the Appellants are trespassers on their Bibanjas with no lawful interest in the suit land thereby arriving at a wrong conclusion.

3. The learned Trial Chief Magistrate erred in law and fact when she qualified the Respondent's Certificate of Title for these interest as lawfully acquired in respect of the Appellant's Bibanja's who were sitting tenants at the time of acquisition in total disregard of their interests at law as sitting tenants thereby arriving at wrong conclusions.

4. The learned Trial Magistrate erred in law and fact when she abdicated her duty as Court from according the 2nd, 3rd, 4th, 5th, 7th, 8th, 11th, 12th, 13th Appellants a fair hearing as by law required thus leading to a wrong finding.

This Court, being a first Appellant Court, has a duty to reappraise the evidence adduced at the trial and draw its own interferences therefrom. (See ***Kifamunte Henry versus Uganda SCCA No. 10 of 1997*****).**

Counsel for all parties filed written submissions, which I have considered in determining the appeal.

Counsel for the Appellants abandoned ground one; and both Counsel argued ground 2 and 3 together, and ground 4 separately. I shall adopt the same approach.

Group 2 and 3:

2**.** The learned Trial Magistrate erred in law and fact when in disregard of overwhelming evidence on record at locus visit held that the

Appellants are trespassers on their Bibanja with no lawful interest in the suit land thereby arriving at a wrongful conclusion.

3. The Learned Trial Chief Magistrate erred in law and fact when she qualified the Respondent's Certificate of Title for the lease interest as lawfully acquired in respect of the Appellant's Bibanja's who were sitting tenants at the time of acquisition in total disregard of their interests at law as sitting tenants thereby arriving at wrong conclusions.

The crux of these two grounds is the Appellants' plea in defence that they are customary tenants on the suit land. Their plea joined with the Respondents' claim that they trespassed on the suit land, hence the issue: whether the Defendants are customary owners of their respective pieces of land on suit land?

I reviewed the learned Trial Magistrate's judgment where she not only found that the Respondents are not customary tenants on the suit land, but also went to a great length to find that they had no recognizable interest in the same.

That the above said, Counsel for the Appellants still faults the Trial Magistrate for not qualifying the Appellant's interest as "*bonafide occupants since by law their customary holding could not be established in an urban area…*" (Page 15 of the submissions). He relied on the Supreme Court case of ***Kampala District Land Board &***

Anor versus Venansio Babweyaka & Others SCCA No. 02 of 2007 in submitting as such.

I do not subscribe to this view.

My reason is that in the very case cited, Court qualified the Respondent's claim a bonified occupants (their claim of being customary tenants having failed) simply because they had also pleaded being "*bonifide/lawful occupants and /or customary owners of the suit land*" **(***see page 2 paragraph 2 of the decisions as attached to Counsel for the Appellant's submissions***).** This was not the case here. The record shows that Appellants only pleaded being customary tenants on the suit land in their joint written statement of defence.

The record bears a copy of an amended written statement of defence wherein they attempted to include a claim being bonified occupants on the suit land, but this amendment is unsigned and was filed about 7 years later, without leave of Court. The trial Court properly found that the amendment was irregular and improperly before it. I have no reason for departing from this finding.

It is trite law that parties are bound by their pleadings **(**O.6 r 7 of the Civil Procedure Rules). This position was re – affirmed in the cases of ***Jani Properties Ltd versus Dar-es-Salaam City Council (1966) EA 281; and Struggle Ltd versus Pan African Insurance Co. Ltd (1990) ALR 46 -47*****,** wherein Court rightly observed that;

> *"the parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings" (see also* ***Semalulu versus Nakitto High Court Civil Appeal No. 4 of 2008)".***

In this case the Appellants pleaded being customary tenants on the suit land. The issue which was agreed upon by all parties for trial by Court was also in regards to the same. It was therefore not open to the Trial Magistrate to entertain anything else other than investigating whether the Appellants were indeed so. As such, I find that to depart from the parties' pleadings and issues framed submitted upon the parties, and wondering into other claims would be irregular.

There is some jurisprudence to the effect that where a departure from pleadings is revealed in the course of the trial and both parties submit on unpleaded points, then it is proper to deal with such an irregularity while dealing with one of the issues framed (*see.* ***Lukyamuzi versus House & Tenants Agencies Ltd (1983) HCB 74; Ajok Agnes versus Centenary Rural Development Bank Ltd HCCS No. 722 of 2014***). This is however, not the case here. The record shows that the Plaintiff/Respondent submitted only on the issue of the Appellant being customary tenants at trial, just as in this appeal. It would therefore, be prejudicial to the Respondent for this Court to

indulge into other matters not put to his notice. To add a little flavor to this, if necessary. It is now well established that a party cannot be grant a relief which it has not claimed in pleadings. In the case of ***Ms. Fang Min versus Belex Tours & Travel Ltd. versus Belex Tours & Travel Ltd,*** the *Supreme Court*, at Page 27, underscored the importance of the pleadings to describe precisely the respective cases of the parties and to define the issue in dispute for resolution by the Court.

So as per the record, the Appellants only claimed as customary tenants. Since they never pleaded facts as bonafide occupants on the suit land, issues to do with bonafide occupancy could not arise. At the risk of repetition, the pleadings were specifically restricted to them being customary tenants of the suit land and not otherwise. As such, I disagree with the submissions of Counsel for the Appellants that the Trial Court was bound to qualify the Appellants as bonifide occupants having not pleaded the same. In this case also, I shall determine the above two grounds only on the basis of the pleadings and issues on record before the Trial Court.

As already stated, one of the issues before the lower Court was whether the Appellants were customary tenants on the suit land. The record shows that the suit land is located in Entebbe. It also shows that the Appellants claim was premised on the allegation that they were in occupation of the suit land, by themselves or proxies, prior the enactment of the Land Act, 1998.

According to the Supreme Court, for one to acquire a customary tenancy in an urban area prior 1998, he or she had to apply to the prescribed authorities and receive approval of his or her **application (*Kampala District Land Board & Anor versus Venansio Babweyaka & Others SCCA No. 02 of 2007; Tifu Lukwago versus Samwiri Mudde Kizza & Nabitaka Civil Appeal No. 13 of 1996; Paul Kisseka Ssaku versus Seventh Day Adventist Church Civil Appeal No. 8 of 1993*).**

It is in dispute that the suit land was located in an urban area prior 1998 (Entebbe). That said, there is no evidence on record to suggest that the Appellants ever applied to any prescribed authority and receives approval for their respective applications. As such, it could not be found that they were customary tenants on the suit land. This is not withstanding their allegation that they were in occupation of the suit land for some time.

On the other hand, the Respondent adduced evidence through PW1 showing that he was registered as the owner of the suit land having obtained a lease from Wakiso District Land Board. Further, PW2 (former Town Clerk of Entebbe Municipal Council when the lease was offered) also testified that the Municipality inspected the suit land prior acquisition by the Respondent and confirmed that it was available for leasing since it only had two temporary grass thatched structures made of mud and wattle.

This evidence was corroborated by PW3 and PW4; and was unchallenged in cross –examination making it believable. This is incomparable to that of the Appellants, whose evidence is lacking to establish their claim.

In view of this, I find nothing to fault the learned Trial Magistrate for finding that the Respondent is the lawful owner of the suit land, and that the Appellants have no interest save for being trespassers on thereon.

The 2nd and 3rd grounds are thus found in negative.

Ground 4.

5. The learned Trial Magistrate erred in law and fact when she abdicated her duty as Court from according the 2nd, 3rd, 4th, 5th, 7th, 8th, 11th, 13th Appellants a fair hearing as by law required this leading to a wrongful finding.

The record shows that 8th Appellant did not file a written statement of defence. That said, the 8th Appellant filed a witness statement as DW2 and was cross –examined by Counsel for the Respondents. The evidence he gave was in his personal capacity and in support of his claim of being a customary tenant.

It came shows that the 8th Appellant did not file a written statement of defence. That said, the 8th Appellant filed a witness statement as DW2 and was cross – examined by Counsel for the Respondents. The evidence he gave was in his personal capacity and in support of his claim of being a customary tenant.

It came to the attention of the Trial Magistrate later on the 8th Appellant had not filed a written statement of defence. This prompted the Trial Magistrate to expunge his evidence from the record. In doing so, she relied on the case of ***Mufumba Fredrick versus Waako Lastone Revision Cause No. 006 of 2011***, where Court held that;

> "*A party who fails to file his or her defence puts himself or herself outside Court*".

In **Sengendo versus Attorney General (1972) 1 EA 140** Phadke J at Page 141 followed an East African Court Of Appeal decision that a Defendant who fails to file a defence puts himself out of Court and no longer has any locus standi and cannot be heard. He noted:

I drew his attention to the decision of the Court of Appeal in ***Kanji Devji versus Damor Jinabhai & Co. (19340) 1 E. A.C.A. 87*** where it was held;

> "*That a Defendant who fails to file a defence puts himself out of Court and no longer has any locus standi and cannot be heard".*

See also ***Administrator General versus Kakooza & Anor Miscellaneous Application No. 11 of 2017***, among others.

The failure of the 8th Appellant to file a written statement of defence was by choice.

Having exercised such a choice, he in principle, disentitled himself of any *locus standi* and a right to be heard. Since it was his choice, it there is no reason for faulting the Trial Magistrate for following an

establishment legal procedure and reaching the conclusion she reached.

Further, the record also shows that the 2nd, 3rd, 4th, 5th, 7th, 11th, 12th, and 13th Appellants did not turn up for cross – examination despite having filed written statements. It is not captured anywhere on record that Court declined to admit their evidence, but their Counsel called all witnesses he deemed necessary and closed the defence case thereafter.

It is the submission of the Appellant's Counsel that the Trial ought to have guided the said Appellants in their case by directing their Counsel to produce them to testify in their own cases. I find this submission awkward.

The duty of Court is not make parties' cases. It's duty is to decide cases on the basis of evidence put before it by the parties, save in exceptional circumstances where it can call it's own witnesses in such for the truth of the matter. The 2nd, 3rd, 4th, 5th, 7th, 11th, 12th, and 13th Appellants could not be called as Court's witnesses being parties to the case.

As such, the choice of whether they could give evidence lay on them and their Counsel. Having not exercised such choice, they cannot fault the trial Court.

In view of the above, I find nothing to fault the learned Trial Magistrate for not taking the 2nd, 3rd, 4th, 5th, 7th, 11th, 12th, and 13th Appellant's evidence. The fourth ground is also found in the negative.

Ultimately, this Court finds no merit in the appeal. The appeal is dismissed with costs to the Respondents.

I so order.

…….

Henry I. Kawesa

JUDGE

23/11/2021

23/11/2021

1st, 2nd and 5th Appellants present.

Respondents absent.

Clerk: Grace.

Waiswa Henry for the Appellants.

Nansukusa Rebecca for the Respondent.

Waiswa:

Matter for judgment. We are ready to receive the same.

Court:

Judgment read and delivered in the presence of the above.

Sgd:

Natukunda Janeva

DEPUTY REGISTRAR.

23/11/2021

…….

Henry I. Kawesa

JUDGE

23/11/2021