THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

LAND CIVIL APPEAL NO.104 OF 2019

(Arising From Mbale Magistrate's Court C. S No.039 Of 2015)

1. BENAYO WANDUKWA

2. DANIEL WASYA

3. SILVER KITONGO

4. MOSES MUTAMBO :: APPELLANTS

VERSUS

WAKHASA WILSON ::RESPONDENT

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This is an appeal from the judgment and orders of **H/W Nantaawo Agnes Shelagh**, Magistrate Grade1 Mbale Chief Magistrates' court at Mbale, in Civil Suit No.039/15 dated 11/7/ 2019.

[2] The facts of the appeal are that in the court below, the Respondent/plaintiff filed a suit claiming against the Appellants/defendants jointly and severally inter alia for a declaration that he was the lawful owner of the suit land of about $1^{1}/_{2}$ acres of land situated at Namama- Kitidia village, Bushienda Sub county, Mbale district.

[3] It was the Respondent/plaintiff's case that he is a bona fide purchaser for value of the land in dispute, having purchased it from a one **Ekobwamu Maena** and **Nandaan Henry** in 1964 and that since the purchase, he has been using the suit land with his family for cultivation of food crops and grazing cattle. He averred and contended that it was in June 2014 when the defendants/Appellants jointly and severally

unlawfully trespassed on the plaintiff's land and planted illegal mark stones without any colour of right or lawful claim at all.

[4] On the other hand, the defendants/Appellants denied the plaintiff's claims and contended that the plaintiffs acquired the suit piece of land from **Ekobwamu** who shared common boundary with the defendants' 20 acres of land on the south at Namama village and that they had lived peacefully until 2013 when the plaintiff encroached and trespassed on their portion of land measuring about $3^1/_2$ acres hence their counter claim.

[5] In evaluation of the evidence on record, the trial magistrate found that the plaintiff asserted ownership of the suit land by virtue of purchase from **Ekobwamu Maena** in 1964 and **Nandaan Henry** in 1967, while the defendants claimed ownership over the suit land by virtue of inheritance from their respective fathers. That however, there was no evidence as to how the defendants/Appellants came to inherit the suit land and besides, the defence was full of contradictions as regards the boundary between the suit land and the plaintiff's land. She concluded by giving judgment in favour of the plaintiff whose evidence she found more consistent as to how he acquired the suit land.

[6] The defendants/Appellants were aggrieved and dissatisfied with the judgment and orders of the trial magistrate and filed the present appeal on the following grounds as contained in their memorandum of appeal:

1. The trial magistrate erred in law when she failed to properly evaluate evidence on record and thus came to a wrong decision occasioning a miscarriage of justice.
2. There was gross procedural error, omission and biasness by the trial magistrate in hearing and determining the case.
3. The trial magistrate erred in law and fact when she entered judgment in favour of the Respondent on the basis of inconsistent and contradictory evidence.
4. The trial magistrate erred in law and fact by the manner in which she conducted locus in quo and applied the evidence thereby arriving at a wrong decision.
5. The trial court erred in law and fact when it considered and placed emphasis on extraneous matters and thus came to the wrong decision.
6. The trial court applied wrong principles of law hence arrived at a wrong decision occasioning a miscarriage of justice.

Counsel legal representation

[7] The Appellants were represented by **Counsel Nakale** of Justice Centres Uganda, Mbale while the Respondent was represented by **Counsel Wamimbi Jude** of Ms. Wamimbi Jude Advocates, Mbale. Both counsel filed their respective written submissions as directed by court.

Duty of the 1st Appellate court

[8] This court being a first appellate court has a duty to re-evaluate the evidence before the trial court and draw its own inference of fact while making allowance for the fact that it did not have the opportunity enjoyed by the trial court of seeing or hearing the witnesses; **BANCO ARABE ESPANOL Vs B.O.U, S.C.C.A.No.8 OF 1998.**

Preliminary point of law

[9] Counsel for the respondent in his submissions raised an objection to the effect that the 1st ground of appeal is too generalized and does not point out the parts of the evidence which the learned trial magistrate failed to scrutinize and evaluate thus offended **O.43 r.1 (2) CPR** which provides for precise and concise points which are said to have been wrongly decided.

[10] Counsel for the Appellants never responded to the preliminary point of law raised by the Respondent. I nevertheless agree that the 1st ground of appeal is too generalized and failed to point out the parts of the evidence which the learned trial magistrate failed to scrutinize and evaluate. It would appear to me that counsel for the Appellants avoided the risk of being argumentative and narrative in his memorandum of appeal and reserved the parts of the evidence which the learned trial magistrate failed to scrutinize and evaluate to the submissions. **O.43 r. 1(2) CPR** require every memorandum of appeal to set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative, properly framed grounds of appeal should therefore specifically point out errors observed in the course of the trial including the decision, which the Appellants believe occasioned a miscarriage of justice.

[11] However, as Justice Mubiru observed in **KITGUM DLG & ANOR Vs AYELLA ODOCH H.C.C.A.No.08/15** there is no maximum requirement as to the length or the fullness of detail of a ground of appeal, what is necessary is that the arguments for the objection to the decree should

be reserved for the written or oral submissions. To include justification, elaboration or illustrations in the objection in the ground itself risks introducing argument or narrative into the ground. It follows therefore, the raised objection to the 1st ground of appeal is about form and not substance. By virtue of **Article 126(2) (e) of the Constitution of the Republic of Uganda 1995,** courts are to administer substantive justice without undue regard to technicalities. It is thus not desirable to place undue emphasis on form, rather than the substance of the pleadings. Besides, the Respondent has not shown court how the first ground in the form it was presented has occasioned him a miscarriage of justice when the parts of the evidence which the magistrate failed to scrutinize and evaluate have been fully presented in the written submissions.

[12] In the premises, I reject the preliminary objection and proceed to determine the appeal on its merit.

Determination of the appeal

[13] Counsel for the Appellants opted to argue and submit on all the six grounds of appeal together. This was so probably because they all relate to evaluation of evidence both during the hearing and at locus in quo.

[14] Counsel submitted that under paragraph 4 of the plaint, the plaintiff/Respondent was claiming $1^1/_2$ acres of land but at scheduling, he told court that he was claiming 3 acres.

[15] Secondly, that under paragraph 6(a) of the plaint, it is stated that the plaintiff acquired the land in 1964 from **Ekobwamu Maena** and **Nandaan Henry** and in court, he presented 2 purchase agreements dated 10th/8/1964 **(P.Exh.I)** and 20th/3/67**(P.Exh.2)** but that one wonders where **P.Exh.2** dated 20/3/1967 which was even never signed by the plaintiff emerged from. According to her, this was violation of **O.6 r.7 CPR**.

[16] Counsel submitted further that at the locus visit, it was evident that the land in dispute was an arable land measuring the size of a football pitch and not $3^1/_2$ acres as claimed by the plaintiff and that there was nothing to show that the plaintiff and his children had homesteads on the disputed land as they claimed. She implored this court to find in favour of the appellants.

[17] I have perused both the plaintiff's and the counter claimants' pleadings. It is true that indeed, during scheduling conference, the plaintiff's brief facts as presented are that he is the owner of the suit land measuring about 3 acres. The defendants on their part presented their facts as being lawful owners of the suit land totaling to 20 acres which share a common boundary with the plaintiff/counter defendant.

[18] It is clear from the parties' respective pleadings that whereas the plaintiff claims he is the lawful owner of about **1½ acres** of land, during scheduling she stated that he owns **3 acres of land**. As regards the counter claimant, whereas they also claim that the counter defendant trespassed on their **3½ acres of land**, during scheduling they stated that they own **20 acres of land**. It is my view that neither of the parties offended **O.6 r.7 CPR** by departing from their previous pleadings. The parties merely misrepresented their facts at scheduling by failing to lay a distinction between their respective owned pieces of land and the portions out of those only allegedly encroached/trespassed upon under the threat of being grabbed, i.e the suit portions of land.

[19] In the instant case, I find that the plaintiff's claimed suit land is **1½ acres** out of a total of 3 acres and the counter claimants' claimed suit land is **3½ acres** out of their total 20 acres and this court is to proceed on that basis. However, I find that counsel for the Appellants fell into the trap of thinking that the suit land for the plaintiff is 3 acres as purportedly reflected in the scheduling notes. Discrepancies in the schedule conferencing notes and the submissions cannot be regarded as a departure from the pleadings. Schedule notes are not a product of evidence on oath. A party is only bound by his evidence adduced on oath or agreed upon facts during scheduling.

[20] As regards the status of the purchase agreement dated 20/3/1967, I do note that when the plaintiff testified, he presented 2 purchase agreements dated 10/7/1964 **(P.Exh.I)** and 20th/3/1967**(P.Exh.2)** in a bid to prove that he was the lawful owner of the suit portion of land. The plaintiff pleaded the 2nd agreement **(P.Exh.2)** properly in his **defence to the counter claim** dated 4/9/2017. It cannot therefore be taken, in the circumstances of this case that the plaintiff again in his evidence and submissions departed from his pleadings.

[21] The trial magistrate on her part also found no contradictions and departure by witnesses from their pleadings.

[22] At locus in quo, though the trial magistrate did not record her independent observations at locus, the locus record does not in any way show that the land in dispute was arable land measuring the size of a football pitch as submitted by counsel for the Appellant. The position however remains that the impression at locus supported the plaintiff's contention that the suit land is **$1^1/_2$ acres** and not **$3^1/_2$ acres** as claimed by the counter claimants.

[23] Counsel for the Appellants submitted that the plaintiff told court that he and his children had built on the suit land but at locus, there were nothing to show that the plaintiff and his children had homesteads thereon. As I said before in this judgment, there is no record of the trial magistrate's observation and or findings at locus. It is therefore not clear where the trial magistrate derived her finding that the plaintiff's sons had 2 permanent incomplete houses on the land claimed by the defendants.

[24] The trial magistrate's omission to record her observations of findings on record notwithstanding the plaintiff's occupation of the suit land, was not contested by the defendants. That is why they filed a counter claim to deal with his occupation. It appeared also apparent that it was not in dispute that the defendants had had land in the areas where the suit land is situate and they shared a common boundary with the plaintiff. The boundary marks to wit wild plants, a pond of water/dam and a playground appeared undisputed. It follows therefore that by virtue of **Sections 101-103 of the Evidence Act,** the litigants had the duty and obligation to prove their respective allegations on the balance of probabilities.

[25] As regards the plaintiff, he presented evidence of purchase of the suit land as per **P.Exhs.1 and 2** though **P.Exh.2** is of no evidential value to the plaintiff since it was neither endorsed by the vendor nor the purchaser. I however still find the 1st Agreement **(P.Exh.I)** alone sufficient to prove the plaintiff's interest. Secondly, the plaintiff presented evidence of occupation and utilization of the land by way of cultivation of crops and grazing of cattle.

[26] For the defendants, apart from mere stating that they inherited the suit land from their parents, no cogent evidence was led in support of this contention. They merely kept on referring to the L.C.III court judgment wherein court decreed them the suit land and erected the boundary

marks. However neither any member of that L.C.III committee court nor a judgment of the court was presented in court.

[27] The trial magistrate found and considered the contradictions in the defence case which included the boundaries between the suit land and the plaintiff's land, and then considered the plaintiff's case which she found consistent on how the plaintiff acquired the suit land, and held in favour of the plaintiff with orders inter alia, a declaration that the suit land belongs to the plaintiff. I have no grounds to fault her. As a result, I find the appeal having no merit. The appeal is accordingly dismissed with costs.

Byaruhanga Jesse Rugyema

JUDGE.

2nd/08/2021.