

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO.0051 OF 2016
(ARISING FROM CIVIL SUIT 109/2013)

KAGGWA JENNIFER NABWEGGAMU:::::::::::::APPELLANT
VERSUS
KANSANGA MARKET VENDOR LTD:::::::::::::RESPONDENT

JUDGEMENT

BEFORE: HON. JUSTICE TADEO ASIMWE

BACKGROUND

The Respondent filed the main case against the Appellant and KCCA for a declaration that the Appellant is a trespasser on the portion of land measuring 0.11 hectares forming part of LRV 3385 Folio22 Kyadondo block 254 plot 843 at Kansanga, vacant possession, permanent, exemplary damages, general damages, interest injunction and costs of the suit.

On the other hand, the Appellant/1st defendant in her written statement of defence denied the Respondent /plaintiff's suit and claimed the suit is bad in law and that she would raise a preliminary objection at trial for the suit to be struck out.

Court entered Judgement in favor of the Respondent. The Appellant being partly dissatisfied by the said Judgement appealed to this Honorable Court on the following grounds.



1. The learned trial magistrate erred in law and fact when he made ruling deciding the matter without a formal trial and hearing all evidence.
2. The learned trial magistrate erred in law when he made a ruling declining to allow the Appellant opportunity to bring an application to add a party even before it was filed.
3. The learned trial magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion.

At the hearing, the Appellant was represented by Counsel Opio Moses while the Respondent was represented by Ita Kaija. Both counsel filed written submissions which I shall consider in this judgement.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in **Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236** thus;

Therefore, this court is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly, the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.



RESSOLUSSION

Bearing the above principles in mind I shall proceed to resolve the grounds of appeal. The Appellant argued grounds 1 and 3 together and ground 2 separately. I shall also resolve them as such.

Ground 1 and 3.

- 1. The learned trial magistrate erred in law and fact when he made ruling deciding the matter without a formal trial and hearing all evidence.**
- 3. The learned trial magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion.**

On the above grounds, counsel for the Appellant submitted that the trial magistrate relied on a survey report and gave judgement without hearing parties or visiting locus and gave judgement without evidence.

In reply counsel for the Respondent submitted that when the matter came up for hearing, counsel for the 2nd defendant made a prayer in court to have this matter resolved out of court. That a survey was directed and a joint report compiled. That court summoned the 3 surveyors to confirm that the Appellant had trespassed.

That for the Appellant made a prayer to amend his pleadings to add a one Nabukenya as a party which the Respondent objected to. That the trial court relied on expert evidence in assisting him reach his decision.

From the pleadings, the lower court record and submissions of both counsel it is not clear what exactly the trial magistrate delivered on 20/05/2016. The document is titled ruling but the content and conclusion contain resolutions on merits of the case which are in effect a Judgement.

From page 10 of the lower court record the Appellants counsel made an oral prayer for amendment of pleadings to include a one Nabukenya Margret as party to the proceedings. And this was the trial magistrate's

response and I will quote him verbatim **“court will make a ruling on all issues raised before proceeding”**

The matter was adjourned to 1/3/2016. On the said date, the trial magistrate returned to court with a document titled ruling. However, this ruling had nothing to do with the prayer of amendment made. Instead the said Ruling considered the evidence of surveyors and determined the merits of the case.

In my view it was not only wrong for the trial magistrate not to pronounce himself on the Appellant's prayer of amendment but very wrong for him not pass judgement without hearing evidence of both parties and worse still before the parties closed their case.

The **black's law dictionary** defines a judgement as *the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final determination of the rights of the parties in an action or proceeding. The sentence of the law pronounced by the court upon the matter appearing from the previous proceedings in the suit. It is the conclusion that naturally follows from the premises of law and fact* The determination or sentence of the law, pronounced by a competent judge or court, as though result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist. 1 Black, Judgm.

From the above definition a judgement flows from facts presented to court through evidence of parties and the law.

However, in civil suit no 109 of 2013 from which this appeal arises, court relied on expert evidence without an attempt to hear or record any evidence from the parties to determine the rights of the parties.

Whereas expert evidence is relevant in decision making of court, it is not binding on court but rather a guiding factor that must be considered with other evidence.

This was emphasized in the case of **Kimani vs republic 200)2 EA 417 & Shosho v Waniale & 3 Ors (HCT-04-CV-CA 224 of 2014)** where court held *that although the courts must give respect to the opinions of experts, such opinions are not binding on courts and that such evidence must be considered along with all other available evidence and court would be entitled to reject it if the expert opinion is not sound.*

Be that as it may, the trial magistrate could not have adequately determined the rights of the parties in civil suit no 109 of 2013 without hearing or taking evidence of both parties locus. In my view, the expert evidence was/is insufficient to make such a determination of party's rights.

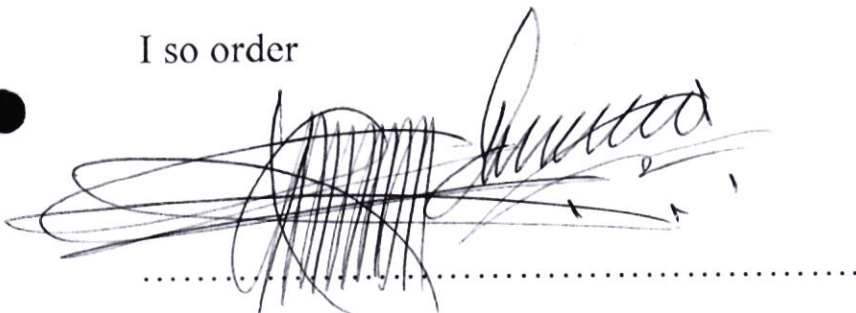
I therefore find merit in the 1st and 3rd grounds of this appeal which I allow.

In addition the resolution of the above grounds determines ground 2 and I don't find it necessary resolve the same again.

In the circumstances, I find merit in this appeal and the same is here by allowed with the following orders.

1. Civil suit No. 109 of 2013 is sent back to the trial court for a re-trial.
2. Costs of this appeal are in the cause.

I so order

A handwritten signature in dark ink, appearing to read 'Tadeo Asiimwe', is written over a horizontal dotted line. The signature is stylized with loops and flourishes.

TADEO ASIIMWE

JUDGE

28/10/2022

