THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

CIVIL APPEAL NO.59 OF 2020

(Arising from Rukungiri Land Case No.008 of 2015)

RURYABEITA FRANK :::APPELLANT

VERSUS

1. **BEYUNGA KENNETH**
2. **KAKWERERE JULIUS**
3. **KYARABARWEIRE KISHEIJA**
4. **AKANKWASA BEATRICE:::::::::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

This Appeal arises from the judgment of His Worship NgamijeMbaleFaishal delivered on 3rd December 2020.The suit was filed by the Respondents against the Appellant for alleged trespass on pieces of land they had respectively bought from different persons. Reliefs sought by the Respondents were a Permanent injunction, obtaining vacant possession from the Appellant, general damages and costs.

Summary of the Respondents' claims.

The 1st,2nd and 3rdRespondents claimed to have bought land from Anna Maria Bakeine and KazoobaManjeri in 2007 and 2008 which they occupied by growing coffee, bananas and other crops without any interference from anybody. Later in 2015 the Appellant trespassed on their pieces of land by harvesting their crops and threatening to harm whoever interfered with his occupation of the land. The Respondents resorted to court for the reliefs outlined herein above.

Summary of the Appellant's claim.

The Appellant contended that the purchase transactions by the 1st,2nd and 3rd Respondents were null and void because Bakeine and Kazoba did not have capacity to sell or deal with the land. The Appellant further contended that the purported sale of the land was challenged in litigation by his late fatherwho died before the case was concluded by the court at Mbarara.

The jurisdiction of the Local Council 11 Court which first entertained the dispute between his father Bitereshoni and the two vendors who sold pieces of land to the Respondents was also challenged by the Appellant.

The Appellant contended that Bitereshoni had acquired a certificate of title to the land described as Ruzhumbura Block 12 Plot 1225 in 1963 wand it forms part of the estate he administers. He was thus not a trespasser on the suit land. It was contended by the Appellant that the purported purchase of part of the land by the late husband of the 4th Respondent in 2007 was also flawed for lack of capacity to sell by Anna Maria and his mother Kazooba.

The Appellant conceded that he witnessed some of the sale agreements on behalf of his brothers which act however did not validate or legalize the illegal transactions. The only transactions the Appellant recognizes relate to land he sold with the consent and knowledge of his father.

He also contends that Bitereshoni had challenged the decision of the Local Council 11 Court which declared that the land was the property of Anna Maria and Kazooba but died before the case was concluded by the High Court at Mbarara.

Decision of the court.

The trial court framed two issues for resolution:-

1. Whether the Plaintiffs/Respondents legally acquired the suit land.
2. Remedies available to the parties.

The trial court found for the Respondents reasoning that they were bonafide purchasers for value without notice that the pieces of land they bought were on titled land.The court further observed that the LC11 Court had decided the dispute over the land betweenBitereshoni and his two relatives who had sold the land to the Respondents. Bitereshoni did not disclose that he had acquired a certificate of title and had not appealed against the decision against him.

The court further found that the acquisition of the certificate of title by Bitereshoni was tainted with fraud since he did not disclose it to the LC 11 Court. It was held that the title for the land

comprised in Block 1225 Plot 12 Ruzhumbura was of no legal effect on the ownership of the Respondents since it was acquired on land that did not belong to Bitereshoni and he had not compensated the father of Anna Maria and Kazooba who were in occupation up to the time of the sale to the Respondents.

A permanent injunction from further trespass on the suit land was issued against the Appellant. Costs were awarded to the Respondents. Dissatisfied with the judgment of the lower court, the Appellant lodged an Appeal listing the following grounds;-

1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence and as a result reached a wrong conclusion that the respondents are lawful owners of the suit land whereas not.
2. The learned trial Magistrate erred in law and fact when he held that the title of Block 12 Plot 1225, Ruzhumbura is of no legal effect on the respondents which decision is erroneous.
3. The learned trial Magistrate erred in law and fact when he held that the respondents have a right to apply to High Court for a consequential order cancelling Block 12 Plot 1225 Ruzhumbura which decision is erroneous at law.
4. The learned trial Magistrate erred in law and fact when he held that the appellant, who is the registered proprietor, is a trespasser on the land, a total disregard of the law and evidence which occasioned a miscarriage of justice to the appellant.
5. The learned trial Magistrate erred in law and fact when he failed to find that the appellant is the registered proprietor of the suit land in total disregard of the evidence adduced at trial.
6. The learned trial magistrate erred in law and fact when he condemned the appellant to pay costs.

Legal representation.

The Appellant was represented by M/S Kigenyi-Opira&Co.Advocates while the Respondents were represented by M/S Mark Mwesigye&Co. Advocates.

Counsel filed submissions with supporting authorities which have been considered in the disposal of the Appeal but not reproduced.

Duty of the court.

The legal obligation of a first appellate court is to reappraise evidence. The parties are entitled to obtain from the court its own decisions on issues of fact as well as of law.In case of conflicting evidence the court has to make due allowance for the fact that it has neither seen nor heard the witnesses.

Fr. NarcensioBegumisa&Others V Eric Tibebaga. SCCA No.17/2002; BancoArabeEspaniol V Bank of Uganda.SCCA No.008/1998.

Preliminary Objections.

Counsel for the Respondents raised two preliminary objections on the merits of the Appeal. It was submitted by Counsel that no Decree had been extracted and filed with the Appeal contrary to the mandatory provisions of section 220(1)(a) of the Magistrates Courts Act. Counsel argued that the omission is not a mere technicality but a fatal one that goes to the root of the appeal which thus merits to be struck out.

The second objection relates to grounds 1-5 of the Memorandum of Appeal. Counsel submits that they are argumentative and carry narrations contrary to Order 43 rule 1(2) of the Civil Procedure Rules. The court was urged to strike out the impugned grounds of Appeal.

Counsel relied on **National Insurance Corporation V Pelican AirServices.CA No.15/2003** and **Migadde Richard Lubinga&Others VNakibuule Sandra &Others.HC Civil Appeal No.0053/2019** to support the submission.

Counsel for the Appellant in response argued that appeals do not arise from decrees but from decisions and reasoned judgments passed by the courts.Failure to extract a decree was thus not fatal and courts have since the promulgation of Article 126(2)(e) of the Constitution adopted a more liberal approach to the subject. The court was urged to adopt a similar position and dismiss the objection.

In regard to the second preliminary objection, Counsel for the Appellant reasoned that the impugned grounds of Appeal are precise and directly attack the findings of the trial court in conformity with the

Order 43 of the Civil Procedure Rules. The court was urged to ignore the objection.

Decision.

In a number of decided cases, Courts held that it was a requirement of the law to extract a formal decree before filing an appeal and failure to do so would be a defect going to the jurisdiction of the court rendering the appeal incompetent. The justification for such decisions was premised on section 220(1) of the Magistrates Courts Act which provides for Appeals arising from Decrees of the lower court.

WTM Kisule V Nampewo{1984]HCB 55;YoanaYakuze V Victoria Nakalembe[1988—90]HCB 138.

This position was however reversed by the Courts reasoning that an appeal by its very nature is against the judgment or reasoned order and not the decree extracted from the judgment or the reasoned order.The Court of Appeal further observed that the requirement was moribund and contravening the provisions of Article 126(2)(e) of the Constitution which enjoins courts of judicature to always render substantive justice without undue regard to technicalities.

KibuukaMusoke William &Another V Dr. Apollo Kaggwa. CACA No.46/19997; BancoArabeEspanolV Bank of Uganda. CACA No.42/1998;MbakanaMumbere V MaimunaMbabazi HCCA No.3/2003.

I am bound by the decisions of the Court of Appeal and find no merit in the 1st preliminary objection relating to the failure to extract a decree by the Appellant.

Order 43 Rule 1(2) of the Civil Procedure Rules provides;-

"The memorandum of appeal 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."

The Black's Law Dictionary, 8th Edition at Page 1191 defines an argumentative pleading as;-

" a pleading that states allegations rather than facts and thus forces the court to infer or hunt for supporting facts."

It has been held before that grounds of appeal ought to be (a) as clear as possible (b) as brief as possible (c) as persuasive as possible without descending into narrative and argument.

M/S TatuNaiga&Co.Emprorium V Verjee Brothers Limited.SCCA No.2/2000;Kitgum District Local Government &Another V AyellaOdoch Jimmy Joel.HCCA No.008/2015.

I have perused the impugned grounds of appeal and found them to be devoid of arguments or narrative but on the contrary set out the decisions which the appellant believes occasioned a miscarriage of justice.

I find no merit in the second preliminary objection.

Resolution of the Grounds of Appeal.

For purposes of consistency I will handle the grounds of Appeal in the order they are presented.

Ground of Appeal No.1.

The learned trial magistrate erred in law and fact when he failed to evaluate the evidence and as a result reached a wrong conclusion that the respondents are lawful owners of the suit land whereas not.

The evidence relating to the disputed ownership of the suit land is fairly straight forward. The Respondents bought land from Anna Maria and Kazooba. Some pieces of land were bought from Kankiriho and Shumbusha who are brothers of the Appellant who also sold a portion of the same to the 1st Respondent.

It is not denied that Anna Maria and Kazooba were sisters and the latter is the mother of the Appellant. The two vendors were in occupation of the land and they sold with the knowledge of Bitereshoni according to the Appellant.

At page 56 of the record of proceedings the Appellant stated:-

"My father never knew the sale transaction of Sumbusha and Caleb. My father was aware of Anna Maria and Manjeri's sale. My mother Manjeri and Anna Maria built a house in which they stayed."

The Appellant further told court that two ladies sued his father in the LC 11 Court where he lost. He appealed to the High Court at Mbarara after the Chief Magistrate's Court had dismissed his application for a review of the decision.Bitereshoni died before the hearing and judgment was passed by the court at Mbarara.

The Appellant acquired Letters of Administration but never followed up the case in the High Court but opted to trespass on the land after being registered on the title as the Administrator of

the estate. The Appellant claims not to dispute what he sold to the 1st Respondent and what his brothers sold while their father was alive and he was a witness to their sale agreements.

Counsel for the Appellant contends that the LC 11 Court decision that declared the vendors to be the owners of the land was a nullity on account of lack of jurisdiction. It is also argued that one of the members who was allegedly part of the coram disowned both the sitting and the

signature attributed to her on the judgment but the court ignored the observations raised before it.

For the Respondents it is contended that the Appellant who also sold a portion of the land and further witnessed sale transactions for his brothers is estopped from claiming that those who bought did not have ownership.Counsel relies on section 144 of the Evidence Act.

Decision.

Considering the evidence on record, it is clear that the decision as to whether the Local Council Court did not have jurisdiction to entertain the claim by Anna Maria and Kazooba and/or their right to the ownership of the land they sold to the Respondents has never been resolved by the courts.The sale was conducted in the lifetime of Bitershoni who filed an application for review of the decision.It was dismissed by the court and he appealed to the High Court at Mbarara.

The Appellant had the legal obligation to conclude the litigation lodged by his father as the Administrator of the estate soon after acquiring the Letters of Administration. The entry on to the pieces of land bought by the Respondents yet there was still live litigation over the same neither conferred ownership on the Appellant nor settled the legality of the purchase by the 2nd to 4th Respondents.

I thus hold that the trial court prematurely and without jurisdiction decided the question of the ownership of the suit land since it is still a subject of litigation in the court at Mbarara High Court per the evidence of the Appellant. This court cannot also inquire into the matter pending hearing in another court and cannot thus rule on the contention.

The ground of Appeal thus succeeds.

Ground of Appeal No.2.

The learned trial Magistrate erred in law and fact when he held that the title of Block 12 Plot 1225, Ruzhumbura is of no legal effect on the respondents which decision is erroneous.

The trial magistrate held that the title to Block 1225 Plot 12 is of no legal effect on the legal ownership of the Plaitntiffs/Respondents since it was acquired on land that did not legally belong to Bitereshoni and who did not pay compensation to Anna Mariya and Kazooba.

I have held that the question of the ownership of the suit land was prematurely decided since it is a subject of litigation before the High Court at Mbarara that was abandoned by the Appellant. Even then the legality of the title held by Bitereshoni and subsequently registered into the name of the Appellant as the estate administrator was never inquired into by the Court.

The Respondents did not particularize fraud which was not proved. No evidence relating to how Anna Mariya and Kazooba came to be in possession of the land was heard by the court. The two vendors had passed on at the time the suit was heard and Bitereshoni had also died. The holding of the court was thus based on conjecture and cannot be upheld by the court since it was not premised on evidence on record.

Kampala Bottlers Ltd V Damanico(U)Ltd SCCA No.22/1992;Orient Bank Ltd V Frederick Zaabwe.SCCA No.4/2006.

A decision of a trial magistrate based on his own conviction rather than on evidence available to him or her is liable to be set aside.

The ground of Appeal succeeds

ZakariaOnno V OlandoDifasi&Others.HCCA No.25/2013(Mbale)

Ground of Appeal No.3

The learned trial Magistrate erred in law and fact when he held that the respondents have a right to apply to High Court for a consequential order cancelling Block 12 Plot 1225 Ruzhumbura which decision is erroneous at law.

The suit filed by the Respondents related to trespass,an order for a permanent injunction, giving of vacant possession by the Appellant, general damages and costs. The suit was not for recovery of land and it was the evidence of the Respondents that they were all in possession of the respective portions they bought. The Appellant had however at some point harvested their crops claiming to hold a title to the land.

Section 177(1) of the Registration of Titles Act provides:-

"Upon recovery of any land,estate or interest by any proceedings from the person registered as proprietor thereof,the High Court may in any case in which the proceedings is not herein expressly barred,direct the Registrar to cancel any certificate of title or instrument or any entry or memorial in the Register Book relating to that land,estate or interest and substitute such certificate of title or entry as the circumstances of the case require,and the Registrar shall give effect to that order."

On account of the fact that the Respondents did not sue for recovery of land,did not particularize fraud and led no evidence on fraudulent acquisition of the title by either the Appellant and/or his father, it was erroneous for the court to impute fraud and hold as it did.

It was not disputed by any party that Bitereshoni acquired the certificate of title over the land on which the Respondent bought portions in 1963 .He may not have disclosed the existence of the certificate of title in the impugned LC 11 Court proceedings but that did not amount to evidence of fraud.

Under sections 59, 64 and 176 of the Registration of Titles Act the only ground that leads to impeachment of the title is fraud that was not pleaded, particularized and proved by the Respondents. It also follows that the court could not order for a relief that was not prayed for by the Respondents.

I dismiss the ground of Appeal.

Ground of Appeal No.4

The learned trial magistrate erred in law and fact when he held that the appellant who is a registered proprietor on the suit land is a trespasser on the suit land in total disregard of the law and evidence which occasioned a miscarriage of justice to the appellant.

Trespass to land occurs when a person makes an unauthorized entry upon land,and thereby interfering,or portends to interfere,with another person's lawful possession of that land. Trespass is committed not against the land, but against the person in actual or constructive possession of the land.

A claim against trespass to land can only succeed where the claimant proves that the disputed land belongs to him/her;that the defendant had entered upon it and that the entry was unlawful in

that it was made without permission or that the defendant had no claim or right or interest in the disputed land.

Justine EMN Lutaaya V Sterling Civil Engineering Co.SCCA No.11/2002;Sheikh MuhammedLubowa V Kitara Enterprises Ltd.CACA No.4/1987.

On account of the fact that the decision on the ownership of the suit land by the Respondents had not been conclusively handled by the court at Mbarara, the trial court had no basis on which to declare the

Appellant a trespasser on the land. The decision was further not backed by a valid finding on fraud in regard to the certificate of title held by the Appellant.

I find merit in the ground of Appeal which succeeds.

Ground of Appeal No.5.

The learned trial Magistrate erred in law and fact when he failed to find that the appellant is the registered proprietor of the suit land in total disregard of the evidence adduced at trial.

I find no basis for this ground of Appeal.The fact of the Appellant being registered on the certificate of title as the Administrator of his late father's estate was never framed as an issue in the lower court.The court did not also hold that he was not the registered proprietor on the title.

The ground of Appeal thus fails.

The 6th Ground of Appeal.

The learned trial Magistrate erred in law and fact when he condemned the appellant to pay costs.

It is settled law that costs of and incidental to all suits are in the discretion of the court or judge with full power to determine by whom and out of what property and to what extent those costs are to be paid. It is also settled that costs of any action, cause or matter shall follow the event unless the court or judge shall for good reason otherwise order.

The award of costs to the winning party by the trial magistrate and in the exercise his discretion cannot therefore form a ground of appeal.

I find no merit in the 6th ground of Appeal.

The Appellant succeeds on the 1,2nd,3rd and 4th grounds of Appeal and fails on the 5th and 6th.The Respondent's ownership of the respective portions of land is still subject to litigation in the court at Mbarara thus their occupation cannot be disturbed until the case/appeal is resolved.

The judgment and orders of the lower court are set aside for they were prematurely arrived at.Each party shall meet its costs of this Appeal and in the lower court.

Moses KazibweKawumi

Judge

14th March 2022