THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0015 OF 2020

(Arising from Kagadi C.S No.42 of 2017)

ASABA JOSEPHINE :: APPELLANT

VERSUS

AKILEO LUKASWAZA :: RESPONDENT

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This is an appeal from the judgment and decree of the Magistrate Grade 1 Kagadi court, Hoima Chief Magistrate's court delivered on the 27th/6/2020.

[2] The brief facts of the appeal as found by the trial magistrate and evidence on record are that the Appellant being the defendant in **Kagadi C.S No.42 of 2017** was sued by the plaintiff (now Respondent) for inter alia, declaration that the Appellant/defendant trespassed on the Respondent/plaintiff's plot of land and the attached property situated at Kyenzige Trading Centre, Kagadi district.

[3] It was the Respondent/plaintiff's case that in 1993, he bought an un measured unregistered plot of land with a semi- permanent house from a one **Nyakatura Nyanzi** and in 1996, he bought an adjacent unregistered plot from a one **Kaahwa Vincent,** both plots formed the suit plot. In 2017, he found the Appellant/defendant measuring his plot, the behind part, putting a foundation thereon and built some lock ups/boys quarters.

[4] The Appellant/defendant on her part flatly denied the Respondent/plaintiff's allegations. She contended in evidence that

she lawfully acquired the suit property measuring **150ft & 50ft** which is fully demarcated by purchase in November from a one **Kisembo**.

[5] The trial magistrate upon evaluation of the evidence on record, perusal of the documentary exhibits tendered in evidence and consideration of the locus in quo evidence found and established that the only contention was the part of the suit land where the Appellant/defendant constructed her boys' quarters and the toilets on the behind part of the disputed plot of land. At locus, he found clear signs of recently demolished latrines/toilets which was right in front of the contested boys' quarters and therefore held that the Appellant/defendant trespassed on the plaintiff's land. Judgment was given in favour of the Respondent/plaintiff; declared that the Appellant/defendant trespassed on the Respondent/plaintiff's land and ordered the Appellant/defendant to vacate part of the land she trespassed.

[6] The Appellant/defendant was dissatisfied with the judgment and decree of the learned magistrate Grade 1, and filed an appeal to this court with the following grounds as contained in her memorandum of appeal.

1. *The learned trial magistrate erred in law when he omitted and or refused to respond to the 1st issue agreed at scheduling as to ownership thus leading to a miscarriage of justice.*
2. *The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record, disregarded and or overlooked the entire defence evidence on record respectively for DW2 and DW3 on ownership thereby reaching an unjust decision.*
3. *The learned trial magistrate erred in law when he ignored the entire final submission by the defendant thereby reaching an unjust decision.*

Duty of the 1st Appellate court

[7] This is a first appeal lodged in this court arising from the decision of the Magistrate Grade 1 at Kagadi court. It is now a settled position that the duty of the first appellate court is to review the record of evidence for itself in order to determine whether the decision of the trial court stands without necessarily interfering with its decision unless satisfied that the trial court has misdirected itself and thus arrived at a wrong decision. This court is to re-hear the case by subjecting the evidence presented at the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its conclusion; **FR.N.Begumisa & 3 Ors Vs Eric Tibebaga, S.C.C.A No.17/2000 (2004), KALR 236** and **Stewards of NIC Vs Mugenyi [1987] HCB 28.** The legal duty of a first appellate court is to rehear the case on appeal by reconsidering all materials as presented in the lower court; **Belax Tours and Travel Ltd Vs Crane Bank Ltd & Anor Civil Appeal No.071 of 2009 (CA).**

[8] This court is in the premises duty bound to re-appraise all evidence as was adduced at the trial and give it an exhaustive scrutiny in determination of this appeal.

Counsel Legal representation

[9] The Appellant was represented by **Counsel Isaac Mwebaze** of **M/s Aequitas Advocates, Kampala** while the Respondent was self-represented as it were in the lower court. Both parties nevertheless filed their respective written submissions that are to be considered during the determination of this appeal.

Ground 1: The learned trial Magistrate erred in law when he omitted and or refused to respond to the 1st issue agreed at scheduling as to ownership thus leading to a miscarriage of justice.

[10] Counsel for the Appellant submitted that at scheduling the parties, Counsel for the defendant (now Appellant) and the trial Magistrate

framed 3 issues upon which a determination of court would be made. The issues were as follows;

1. **Whether the plaintiff or defendant owns the suit land.**
2. Whether the defendant is liable.
3. The possible remedies to the parties.

That however, in his judgment, the trial Magistrate rephrased the 1st issue as ***whether the defendant trespassed on the suit land*** and therefore, that this meant that the trial Magistrate had totally ignored and or omitted the 1st issue as to ownership.

[11] While relying on the decision in **Orient Insurance Brokers Vs Transocean Ltd Civil Appeal No.55/95 (SC),** Counsel for the Appellant argued that where court amends issues which parties have agreed upon, it is necessary to give the parties the right to adduce further evidence or address the court on the amended issues. That the trial Magistrate therefore, amending the issues to omit the 1st issue and introducing a new issue in trespass meant that the trial court was unable to afford the parties opportunity to address the newly created issue before passing the decree. That in any case, omitting the issue of ownership in a suit brought under trespass like this meant that the learned trial Magistrate had literally resolved the issue of ownership in the Respondent's favour.

[12] The Respondent on his part submitted that under **O.15 r. 5 CPR** court has powers to strike out issues and therefore, the trial Magistrate having amended the issues acted within his powers. That his actions did not in any way lead to a miscarriage of justice because both issues were agreed upon at scheduling and the ones rephrased by the trial Magistrate lead to one fact finding of whether the defendant is a trespasser on the suit land.

[13] Upon perusal of the record, I find that it is true the learned trial Magistrate rephrased the issues but it is not true as claimed by counsel for the Appellant that the trial Magistrate omitted the issue

of ownership of the suit property/land. **At page 1** of the judgment, the trial Magistrate clarified the issues as raised at scheduling as follows;

1. Whether the plaintiff or defendant owns the suit land.

2. Whether the defendant trespassed on the suit land.

3. What remedies are available to the parties.

At page 6, upon scrutiny and evaluation of evidence, the trial Magistrate rephrased the issues by reducing them as follows;

1. Whether the defendant trespassed on the suit land.

2. Remedies.

[14] **O.15 r.5 CPR** provides thus

> *"(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.*
>
> *(2) The court may also at any time before passing a decree strike out any issues that appear to be wrongly framed or introduced."*

In the instant case, it is apparent that the trial Magistrate considered rephrasing the issues framed at scheduling and striking out the 1st and 2nd issues after consideration of the evidence before him. First, it is clear from the entire evidence on record that it is not in dispute that each party owned his or her respective plot of land. The plots of the respective parties neighbour each other and share one common **boundary** as revealed by the witnesses;

The Respondent/plaintiff (PW1) at **page 6** of the typed proceedings during cross examination stated:

> *"The defendant is using the behind part and I am using the front part... The defendant trespassed behind where my plot ends."*

At page 8 Tugume John Bosco (PW2) stated;

"That time the plot (suit land) was sharing the same boundary with the plaintiff behind. It is sharing the same boundary with the defendant..."

During cross examination, he clarified and confirmed thus;

"...the plot of the defendant...share the same boundary with the plaintiff."

Secondly, according to the defendant, she purchased her plot from **Matia Kisembo** while the plaintiff purchased one of the plots that form the suit land from **Kaahwa Vincent** (DW2). During Re-examination at **page 15 of the proceedings, Kaahwa Vincent** (DW2) stated that before he sold to the plaintiff, his neighbours were **Matia Kisembo** and Hoima-Kagadi Road.

[15] It follows from the above that once it is clear in the evidence of both parties that each of the parties owned his/her respective plot, the 1st issue of **"ownership"** becomes redundant and therefore, the trial Magistrate would be entitled to strike it out.

[16] The only contention was whether the defendant during the development of her plot extended beyond the boundaries of her plot and encroached on the plaintiff's plot thus the prominence of the issue of **"trespass".**

[17] The 2nd issue as framed during or at scheduling, **"whether the defendant is liable"** was in my view wrongly framed. It could not be necessary for determining the matters in controversy between the parties and as a result, relying on the totality of the evidence on record, the trial Magistrate was justified in striking it out because it was irrelevant. At the end of it all, the trial Magistrate rightly rephrased the entire issues by reducing them to two as **"whether the defendant trespassed on the suit land"** and **"Remedies."**

The evidence on the record dictated him to rephrase the issues as he did and as a result, it was not necessary to give the parties any opportunity to adduce further evidence or address the court on the

rephrased issues because the rephrased issues had been amply canvassed by the parties in their testimonies. The decision in **Oriental Insurance Brokers Ltd (supra)** is therefore in applicable to the instant case.

[18] In conclusion, I find that the newly framed issues were appropriate for determination of the actual matters in controversy, **"trespass"** and this ground of appeal therefore has to fail.

Ground 2 and 3: Both grounds relate to the evaluation of evidence.

(a)The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record, disregarded and or overlooked the entire defence evidence on record respectively for DW2 and DW3 on ownership thereby reaching an unjust decision.

(b)The learned trial magistrate erred in law when he ignored the entire final submission by the defendant thereby reaching an unjust decision.

[19] As already observed, it is not in dispute that each of the parties to the appeal owned his or her respective plot. The only big challenge was that the plaintiff in particular gave estimation as to the size of his plot and therefore, this posed a challenge as to how one would ascertain trespass without the actual measurements of the plots he purchased from **Edward Nyanzi Nyakatura** (DW3) and **Kaahwa Vincent** (DW2) under the purchase agreements dated 25/8/93 **(P.Exh.1)** and 30/5/96 **(P.Exh.2).** However, the plaintiff clearly pleaded that the 2 plots he purchased, were un measured and unregistered and he named the neighbours as he adduced his evidence. His evidence was not challenged by the defendant.

[20] On the other hand, the defendant in her Written Statement of Defence (WSD) merely denied the plaintiff's allegations generally without traversing specifically each allegation of fact. She never responded to each of the plaintiff's allegations in specific terms. She thus violated

the provisions of **O.6 r.8 CPR** and **O.6 r.10 CPR** which bars evasive denials of every allegation of fact in the previous pleading of the opposite party.

According to **Odgers principles of pleading and practice, 22 edition at page 136,**

> *"It is not sufficient for a defendant in his (her) defence to deny generally the allegations in the statement of claim, or for the plaintiff in his reply to deny generally the allegations in a counter claim. Each party must traverse specifically each allegation of fact, which he (she) does not intend to admit. The party pleading must make it clear how much of his (her) opponent's case he (she) disputes"*

(See also the provisions of **O.6 r. 8 CPR**)

[21] A defence of such nature as the instant one where the defendant put a mere general denial of each of the claim without responding to it in specific terms as required, ought to be struck out for the defendant never offered any substantial defence or any intelligible response to the claim hence the defence did not raise a reasonable answer to the plaintiff's claim thus offended the provisions of **O.6 r.8 CPR;** See also **Eco Bank (U) Ltd Vs Kalsons Agrovet Concern Ltd & Anor H.C.C.S. No. 573 of 2016 [2017] Ug. Comm C 141** and **Ben Byabashaija & Anor Vs A.G (1992) 1 KALR 161.**

[22] It is probable that the trial Magistrate took a very liberal approach to the defendant's WSD most likely because the WSD was drafted by the defendant in person. The above notwithstanding, the defendant in her testimony claim to had purchased her portion of land from a one **Kisembo** in 2008 and the portion measured **150ft x 50ft**, she also named the neighbours. She then proceeded further to testify that when the plaintiff attempted to halt her developments on her portion of land, the conflict was placed before the Area Land Committee which decided in her favour and despite the plaintiff's objection, the minutes of the committee were admitted on record as **DIDI**. This

document of the minutes though it had been listed as one of the documents to be relied on by the defendant, had not been properly pleaded in the W.S.D. 2ndly, the committees conclusion as found by the trial Magistrate **at page 7** of the judgment was that;

> *"they measured both plots, from this they found that no one had encroached on the others' land. Therefore each of them should be good neighbours and every one should do business in their plot."*

[23] It is not clear as to how the committee secured the size of the defendant's plot to be able to have measurements and ascertain that there was no trespass on the part of either party. The minutes do not reveal whether or on what agreements they relied on to determine the demarcations of the respective plots of the parties.

[24] As already observed, the plaintiff's agreements lacked the actual measurements of his plots. The defendant on her part indicated **"the agreement of buying the suit plot dated 3rd Nov 2008",** as one of the documents she was to rely on in the list of documents of her W.S.D. In evidence, her agreement never featured and was therefore not admitted in evidence.

[25] The trial Magistrate on his part disregarded these committee minutes because they were at variance with his findings at locus in quo and I would also disregard them because the findings therein are not based on any material that was presented for consideration.

[26] Lastly, the defendant claimed that a surveyor came on the ground and also concluded by looking at the defendant's "approved plans for development" **(D.Exh.2)** of their plot and found the plaintiff in the wrong. The defendant did not either plead a surveyor's report or have one exhibited. Developmental plans have never been a basis for determination of sizes of the plots. Instead, they are drawn in accordance to the size of the plot and other considerations.

[27] The trial Magistrate accordingly ignored the above piece of evidence and I would also accordingly do so.

[28] The defendant's witness **Kaahwa Vincent** (DW2) testified admitting that he sold the plaintiff one of the plots that form the suit plot but denied including the portion occupied by the toilet. It is this portion that the plaintiff claims has been trespassed upon by the defendant who demolished it and built there around infront lock ups/boys' quarters. **DW2** denied the agreement of sale **(PX2)** he executed with the plaintiff dated 30/5/96 which indicated the size of the plot as **25ft x 70ft** and instead "justified" or validated one that had been crossed which did not indicate the size **(DX3).**

[39] The admission of a crossed agreement **(DX3)** was definitely an error on the part of the trial Magistrate in view of the fact that **DW2** did not give grounds as to why court should disregard the plaintiff's agreement of sale **(PX2)** duly executed with **DW2** in favour of the crossed one **(DX3).** The "crossed Agreement" would only be considered if it were shown that the crossing was accidental. This was not the case in the instant case.

[30] Again, the trial Magistrate despite the error of admitting the crossed agreement **(DX3),** ignored the credibility of the evidence of **DW2.** On my part, I find DW2 a very dishonest witness who had probably been compromised by the defendant and the plaintiff clearly suspected this as during cross examination of **DW2** on that aspect, **DW2** answered *"I am not conniving with the defendant".* I find his denial of **P.Exh.2** in evidence in all aspects pointing to the fact that he had been compromised by the defendant.

[31] **Nyakatura Nyanzi Edward** (DW3) testified that the defendant was his sister in law. He admitted seeing the plaintiff on one of the plots that formed the suit plot but that the toilet was on the side of **Matia Kisembo** whom the defendant claim to derive her interest from. According to him, the defendant's portion measured **50ft x 150ft** but both the said, **Matia Kisembo** (DW3) and the defendant refused and

or failed to present the agreement upon which the defendant purchased the portion that bore the above claimed measurements of **50ft x 150ft.**

[32] **DW3** also appeared to had been compromised by the defendant and this is evidenced by **the statement he made to police on 13/5/2017** when this conflict was reported to police at Kyenzige. In the police statement revealed during cross examination at **p.17 of the typed proceedings** and placed on record, **DW3** clearly stated that the defendant had trespassed into the plaintiff's plot. In cross examination, he denied; *"I was not bought by the defendant."*

[33] The foregoing is a clear demonstration and evidence that the Appellant's star witnesses; **DW2** and **DW3** on grounds of appeal **1** and **3** are very unreliable, dishonest and no reasonable court would rely on their evidence and as a result, the trial Magistrate justifiably ignored their evidence. Their evidence was amply discredited by the plaintiff and therefore, the trial Magistrate ignoring their discredited evidence did not lead to any miscarriage of justice.

[34] As a result, I find **grounds 2** and **3** lacking merit and they accordingly fail.

Remedies available to the parties

[35] It is worth noting that **Kaahwa Vincent** (DW2) claim to had sold to the plaintiff a half plot in 1996 whereon there was a semi-permanent house but with no toilet. Then he stated thus;

> *"By that time I was using the toilet of Kyamanywa, brother of Kisembo Matia. The toilet was not in the plaintiff's plot"*

According to the defendant, the other half of this plot was sold to a one **Aloysius Mpaka** (father to Tugume John Bosco-PW2) measuring 25ft x 150 ft **(DIDI**). As per the agreement dated 19/2/2004 **(DIDI)** the plot had a latrine/toilet. No evidence was adduced by the defendant as to how this latrine/toilet came to be on the other half of the plot sold to **Aloysius Mpaka** when during the sale of the other half of it to the plaintiff, there was no latrine/toilet and instead, it was **Kyamanywa's** toilet that he was using.

[36] The only feasible credible explanation is from **Tugume John Bosco** (PW2), son to **Aloysius Mpaka**. He testified as follows;

> *"I know the defendant I am not related. I am not related to the plaintiff. It was in 2004, my late father Alozio Mpaka he came to buy a plot in Kyenzige trading centre. The person who sold him is Kaahwa Vincent. That time the plot was sharing the same boundary with the plaintiff behind. It is sharing the same boundary with the defendant... The defendant trespassed at the time where it was situated today's toilet and the one of the plaintiff, the defendant has put there boys' quarters. She built there last year in 2017.* ***She has trespassed our toilet and the one of the plaintiff."****(Sic)*

[37] The above piece of evidence once again undress **DW2** and render him a liar when it comes to the plot sold to the plaintiff, and an unhonest man when it comes to the part sold to the father of **PW2**. **PW1** however explained how the defendant trespassed on that portion of the plaintiff's plot that had the toilet. In cross examination, the plaintiff explained that

> *"The defendant trespassed behind where my plot ends. She demolished my toilet which I used..."*

[38] Indeed, at locus the trial Magistrate was moved by the "clear signs of recently demolished latrines" thus concluding that the defendant trespassed on the plaintiff's land. I do not have any reasons to fault him. As a result, the entire appeal fails and it is accordingly dismissed with costs here and below. The judgment and the orders of the lower court are accordingly upheld.

Dated at Masindi this **1st** day of **March,** 2022.

Byaruhanga Jesse Rugyema
JUDGE