THE REPUBLIC OF UGANDA

IN HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. 27 OF 2020

(Arising From Civil Suit No.06 of 2014)

KYALIGONZA ASHRAF :: APPELLANT

VERSUS

MUGISA STEPHEN :: RESPONDENT
(Administrator of the Estate
of the late **Anna Matama Kijeremuje)**

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

[1] This is an appeal from the judgment, decree and orders of **Her Worship Elizabeth Akullo,** the learned Chief Magistrate, Masindi Chief Magistrate's court dated 28th August, 2020.

Facts of the Appeal

[2] The plaintiff/Respondent sued the defendant/Appellant in land **C.S No.06 of 2014** inter alia, for a declaration that the suit land situate at Kalyango village, Nyangahya sub county, Masindi district measuring approximately **3½ acres** belongs to him, an eviction order against the defendant/Appellant from the suit property, for inter alia a declaration that the defendant is a trespasser, and a demolition order.

[3] It was the plaintiff/Respondent's case in the lower court that the plaintiff's late mother, **Anna Matama Kijeremuje** acquired the **3½ acres** of land now in dispute from her late husband **Kijeremuje Pio** in the late 1970s who had also acquired the same in the 1950s from the Royal **Mubiitu George Kabalega**. That the plaintiff and his late mother used the land quietly until June 2012 when the defendant encroached on it and started using it forcefully claiming that he purchased it from a one **Kulilya** hence this suit.

[4] On the other hand, the Defendant/Appellant denied the plaintiff's allegations and averred that he bought the suit land from a one **Kiirya** (Kuliya) on 14th/7/1971. That the defendant/Appellant allowed the mother of plaintiff/Respondent, the late **Matama** temporary

opportunity to use approximately 2 acres in 2002 and in 2012 he stopped her from using the same hence the suit.

[5] Upon evaluation of the evidence before her, the trial magistrate found that indeed the defendant/Appellant bought land where his homestead is located in 1971 but that this is not the land in dispute. That the land in dispute rightly belonged to the estate of the late **Anna Matama Kijeremuje,** the mother of the plaintiff/Respondent. Judgment was therefore in favour of the plaintiff/Respondent with inter alia, orders that the defendant /Appellant trespassed on the suit land and an order for vacant possession.

[6] The defendant/Appellant was dissatisfied with the judgment, decree and orders of the learned trial Chief magistrate and he filed the present appeal on the following grounds as contained in his memorandum of appeal.

1. *That the learned trial Chief magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision which has occasioned the Appellant a miscarriage of justice.*
2. *That the learned trial Chief Magistrate erred in law and fact when she considered evidence that was in variance with the defendant's pleadings having obtained the suit land by way of a gift intervivos thereby occasioning miscarriage of justice.*
3. *The learned trial Chief magistrate erred in law and fact when she entertained evidence at locus in quo that was not part of the evidence adduced in court thereby occasioning a miscarriage of justice.*
4. *The learned trial Chief magistrate erred in law and fact by awarding damages and mesne profits where there was no evidence led to that effect thereby occasioning miscarriage of justice.*
5. *The learned trial Chief magistrate erred in law and fact in awarding excessive and harsh interest of 28% per annum from the date of institution of the suit thereby occasioning miscarriage of justice.*

Party representation

[7] Whereas the Appellant was represented by **Counsel Ian Musinguzi** of **M/s Musinguzi & Co. Advocates, Masindi**, the Respondent appeared

and even responded to the Appellant's written submissions unrepresented. Counsel for the Appellant argued all the grounds of appeal separately but I think ground **1** and **2** should be resolved together as they relate to the evaluation of evidence and then grounds **3-5** be tackled separately.

Duty of the first Appellate court

[8] The duty of the first Appellate court was outlined by the Hon. Justice A. Karokora (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke Vs Sam Galiwango S.C.C.A No.48/95** as follows;

> *"...it is settled law that a first Appellate court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the court never observed the witnesses under cross examination so as to test their veracity..."*

[9] This is a first Appeal from the decision of the learned Chief magistrate and this court therefore, as 1st appellate court has the duty to subject the evidence presented at the lower court to a fresh and exhaustive scrutiny and reach its own conclusion; See also **Ephraim Ongom & Anor Vs Francis Benga S.C.C.A No.10/87.**

Grounds 1 and 2: Evaluation of Evidence

[10] In the instant case, the lower court framed 3 issues for determination of the suit;

a) Who owns the suit land?

b) Whether the defendant is a trespasser

c) Remedies

[11] In the case of **Sebuliba Vs Co-op.Bank Ltd [1982] HCB 129,** it was held that the burden of proof in civil proceedings lies upon the person who alleges , therefore, to prove the alleged trespass, the burden of proof was squarely on the plaintiff; See also **Section 101(1) of the Evidence Act which** provides thus;

> *"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."*

[12] In his bid to prove his case in the lower court, the Plaintiff/Respondent **(PW1)** adduced the following evidence;

a) That his late mother **Anna Matama Kijeremuje** acquired the disputed land in the 1950s and died in 2013.
b) That now, the plaintiff/PW1 is the administrator of the estate of the late **Anna Matama Kijeremuje** as per the letters of Administration dated 8th of January 2014 **(P.Exh.1)**
c) The suit land situated in Kalyango cell, Nyangahya division, Masindi Municipality is one of the properties his late mother left which measures approximately **$3^1/_2$ acres.** The land is purposely used for cultivation of food crops to sustain the family.
d) In 2012, the Defendant/Appellant forcefully entered the suit land and is the one currently using the land. That otherwise, his mother acquired this land during the 1950s from Bunyoro Kingdom for cotton growing. There was no document given. It was the law requiring the natives to grow cotton.

[13] It was the further evidence of the Plaintiff/Respondent during cross examination however, that he was not there when his mother acquired the suit land and when Bunyoro Kitara passed a law for growing cotton by every native in the 1950s and he never participated in the demarcation of boundaries in the 1950s.

[14] Lastly, he conceded that when he was acquiring letters of administration for the estate of his late mother **Anna Matama Kijeremuje**, he never listed the suit property as forming part of the estate he was to administer.
The plaintiff/Respondent did not give any reason why he never included the suit land as one of the properties left by his mother.

[15] **Asiimwe James** (PW2) aged 60 years (as per his evidence) stated that he had known the plaintiff (aged 39 years as per his evidence) since birth to date. He however despite the above, also conceded that he did not know how **Anna Matama** acquired the disputed land. As regards the description of the suit land, at **page 14 of the proceedings**, he stated;

> *"Anna had planted mango trees in the land. She was also cultivating food crops on the land...The first dispute started in 2000 when Anna had a boundary with the defendant and we went and planted back cloth trees as boundary marks and the dispute ended. Some of the boundary marks are there."*

[16] However, when court visited locus, no back cloth tree said to had been planted as boundaries could be seen or found on the suit land. The trial magistrate while conceding that court never saw back cloths boundary trees on the suit land, commented as follows:

> *"court never saw back cloth boundary mark trees on the lower part, indicative of the same having been uprooted"*

[17] The above comment appear to have been the trial magistrate's conjecture because no evidence is available from the trial record and at locus that the bark tree boundary marks were uprooted.

[18] Whereas **Asiimwe James** (PW2) stated during cross examination regarding the location of the late **Anna Matama's** (the mother of the plaintiff) home from the suit land to be about $^{1}/_{2}$ km, **Eston Byaruhanga** (PW3) born in 1947, a resident of the area stated that the distance between **Anna Matama's** home and the disputed land is about **500 metres**. With the foregoing kind of contradiction regarding the location of **Anna Matama's** home and the disputed land, it became apparent that both the 2 witnesses **PW2** and **PW3**, none knew the location of either the suit land or the home of **Anna Matama**. Besides **PW3** claimed to had seen and was present when the suit land was being given to the plaintiff's late parents and that the documents to that effect are with **PW1**. However, PW1 in his own testimony denied existence of any document regarding how his parents acquired the suit land.

[19] The trial magistrate on her part, while evaluating evidence, she down played the defendant/Appellant's evidence as being contradictory regarding how he acquired the suit land, that his evidence is to the effect that he purchased gardens of cassava, sweet potatoes and beans from **Kurilya** as per the purchase agreement **(D.Exh.1)** and then that he purchased the land from **Kiirya,** as per his testimony in court.

[20] It is nevertheless clear from the cross examination of the defendant/Appellant and his witness **DW2,** that the secretary who drafted the sale agreement **(D.Exh.1)** wrongly wrote the name **"Kiirya"** as **"Kurilya"** whatever that may be, but both names refer to one person **"Kiirya Baharagata"** the grandfather of **Asiimwe James** (PW2).**PW2** himself testified that **Kiirya Baharagata** sold the defendant/Appellant $2^{1}/_{2}$-3 acres of land between 1970-1971.The only contest is whether the land purchased from **Kiirya** is the suit land. The plaintiff/Respondent

assert that it is a different portion of land whereas the defendant/Appellant insist it is the suit land. The trial magistrate agreed with the plaintiff that the portion of land purchased by the defendant from **Kiirya** is separate from the suit land.

[21] It should be recalled however, that according to the plaintiff and his witnesses, the disputed portion of land was merely for cultivation of crops only. However, in his pleadings, the plaintiff is suing the defendant for among other things an **"eviction"** and **"demolition"** order. The question is, what did the plaintiff intend to demolish upon obtaining a decree in his favour? It must have been the defendant/Appellant's house in the suit land that was being targeted for demolition.

[22] The plaintiff's claim and prayer of demolition is consistent with both **PW2's** evidence and that of the defendant that the suit property is that property where the defendant/Appellant built his house. **PW2** stated at **page15 of the proceedings** thus;

> *"The defendant came in 1970's and lived with my grandfather called **Kiirya Baharagata.** The defendant then asked my grandfather a piece of land to construct his house. He was sold a portion between 1970 – 1971…He bought about $2^1/_2$-3 acres*"

[23] Had the trial magistrate properly evaluated the evidence and perceived it as from above, she would have arrived at a different decision that the plaintiff failed to prove his case to the required standard of the balance of probabilities. The plaintiff himself knew that the suit land did not belong to his mother, never included it as among the properties left by his deceased mother for administration as he conceded during cross examination. The suit land at Kalyango village, Nyangahya Sub County, Masindi district measuring **$3^1/_2$ acres** never formed part of the estate of the late **Anna Matama Kijeremuje.** As a result, the defendant/Appellant could not be found a trespasser on the suit land.

[24] In the premises, I find ground **1** and **3** having merit and they accordingly succeed.

Ground 3: Evidence at locus not being part of the evidence adduced in court occasioning a miscarriage of justice.

[25] Counsel for the Appellant correctly submitted that locus in quo is intended to enable court check on the evidence given by witnesses in court and not fill gaps in the evidence of the plaintiff/Respondent and his witnesses. As Udo Udoma C.J observed in **Mukasa Vs Uganda [1964] E.A 698 at 700,**

> *"locus in quo ought to be, I think, to check on the evidence already given...neither a view or personal observation should be substituted for evidence"*

[26] In the instant case, the trial magistrate came up with her own system of measuring the suit land in paces, an approach not envisaged by the parties in their pleadings. At **page 5 of the judgment,** the trial magistrate observed:

> *"Concerning the estimated size, court noted the following with clear boundaries;*
> *Northern part-138 paces*
> *Eastern part-135paces*
> *Southern part-124 paces*
> *Western part-112 paces"*

Then she concluded that the above estimated land could not be that portion of land the defendant bought from **Kulirya** in 1971 but that the above piece of evidence was in tandem with what **PW2** told court.

[27] I think the foregoing was a misdirection on the part of the trial magistrate. Neither the plaintiff nor **PW2** referred to or described the suit land as of the above paces. They described the suit land in acres and it has not been shown by the trial magistrate that the above stated **"paces"** translate into **$3^1/_2$ acres** of the suit land the plaintiff/Respondent allegedly acquired from her late mother, **Anna Matama.** The trial magistrate's strange approach of ascertaining the size of the suit property definitely occasioned the defendant/Appellant a miscarriage of Justice. I find this ground of appeal having merit and it accordingly succeeds.

Ground 5: Award of general damages and mesne profits when there was no evidence hence a miscarriage of justice.

[29] As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved fairly for the inconveniences accrued as a

result of the actions of the defendant. They are presumed or implied to naturally flow or accrue from the wrongful act. They are as a result of inconveniences and mental anguish caused due to the defendant's action as against the plaintiff; **Ronald Kasibante Vs Shell (U) Ltd (2008) HCB 163**.

[30] In respect to trespass, in all its form, it is actionable *per se* ie, there is no need for the plaintiff to prove that he or she has sustained actual damage; **Mugerwa Sulait Vs Umeme (U) Ltd H.C.C.S. No.86/12 (Jinja).** However, without proof of actual loss or damage, courts usually award nominal damages. It was therefore the duty of the plaintiff to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions. In the instant case, the learned trial magistrate awarded general damages of **Ugx 5, 000,000/-** and mesne profits of **Ugx 3,000,000/-** without reference to any proof adduced by the plaintiff/Respondent and as a result, I find the awards without any basis. Besides, since this court has found that the defendant/Appellant was not a trespasser, I find that the awards and interest of **28%** per annum from filing date, without any justification.
I find this ground of appeal with merit and it also accordingly succeeds.

[31] All in all, the appeal is generally allowed. The suit land at Kalyango village, Nyangahya Sub county, Masindi district measuring **$3^1/_2$ acres** never formed part of the estate of the late **Anna Matama Kijeremuje**. As a result, the defendant/Appellant could not be found a trespasser thereon. The judgment, decree and orders of the lower court are therefore accordingly set aside with no order to costs considering the historical relationship that existed between the Appellant and the mother of the Respondent, **Anna Matama Kijeremuje**.

Dated at Masindi this **22nd** day of **April, 2022.**

Byaruhanga Jesse Rugyema
JUDGE