

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

HCT- 12-CV-CA-NO. 052 OF 2020

(Arising from Masindi Civil Suit No. 052 of 2015)

ISINGOMA LYDIA APPELLANT

VERSUS

MUGENYI FARIDAH RESPONDENT
(Administrator of the Estate of the late Kesi Nkoba Mugenyi)

Before: Hon. Justice Byaruhanga Jesse Ruggyema

Judgment

- [1] This is an Appeal from the Judgment of **His Worship Kule Lubangula**, Chief Magistrate of Masindi at Masindi delivered on 30th October, 2020 seeking for orders *inter alia* that the Judgment and Order of the learned trial Chief Magistrate be set aside and the order decreeing property to the Respondent be quashed and or set aside.

Facts of the Appeal

- [2] The Respondent/Plaintiff a widow to and Administrator of the Estate of the late **Kesi Nkoba Mugenyi**, filed a suit against **Isingoma Zulia** (mother of the Appellant) as a Defendant for recovery of land measuring approximately **0.44 ha (1.1 acre)** comprised in **LRV No. 1550, Folio 18, Plot No. 82, Buruli Block 6** at **Nyangahya Cell, Southern Ward, Central Division, Masindi Municipality, Masindi District** (hereinafter referred to as the suit

land) claiming that she is the rightful and lawful owner of the land.

- [3] It was the Respondent/Plaintiff's case that on the 26th August, 1991, her late husband **Kensi Nkoba Mugenyi** sold a portion of the suit land measuring about **0.27 of an acre** to the late **Paul Kato Isingoma**, husband to the Defendant, **Isingoma Zulia** and it was surveyed off the Defendant's certificate of title and boundaries were clearly marked upon which the family of the late **Paul Kato Isingoma** immediately assumed occupation by way of cultivation of crops and construction of a residential house.
- [4] That it was however in mid 2019, that the Defendant **Isingoma Zulia** extended from her **0.27 acre** portion and trespassed on approximately $\frac{1}{4}$ **acre** of the Respondent/Plaintiff's land by way of growing seasonal crops where upon the Respondent reported the matter to Police. The Police referred the matter to the District surveyor to open the boundaries of the suit land and on 2nd August, 2015, the boundaries were accordingly reopened and the suit land was demarcated in the presence of the families of the parties, LC I Chairperson and neighbours.
- [5] It is the contention of the Respondent that despite the re-demarcation of the **0.27 acre** portion of land, the Defendant **Isingoma Zulia** stubbornly continued to put construction materials on the trespassed/encroached upon portion of $\frac{1}{4}$ **acre** of the suit land thus causing untold anguish, discomfort and inconvenience which the Respondent holds her liable for several damages.

- [6] The Defendant **Isingoma Zulia** on her part denied the Respondent's claims and contended that the Respondent's case was bad in law which ought to be struck off with costs as there is a pending and/or concluded **Civil Suit vide 41 of 2011** in respect of the same land filed by **Kensi Nkoba Mugenyi**, the husband of the Plaintiff/Respondent.
- [7] The trial Chief Magistrate evaluated the evidence that was adduced before him and found that the claim by the Defendant **Isingoma Zulia** that the disputed $\frac{1}{4}$ portion of the suit land was purchased from the late husband of the Respondent was not true for it was not supported by any evidence. He concluded that it was instead evident that the Defendant **Isingoma Zulia's** husband purchased the **0.27 acre** of land from the Respondent's late husband on which the Defendant's family had a permanent building and home and therefore, their encroachment on the $\frac{1}{4}$ acre of the suit land amounted to trespass for which the Respondent/Plaintiff was entitled to inter alia, a declaration that she was the rightful owner and an eviction order against the defendant **Isingom Zulia**. He accordingly gave Judgment in favour of the Respondent /Plaintiff.
- [8] The daughter of **Isingoma Zulia**, the Defendant was dissatisfied with the Judgment and orders of the learned trial Chief Magistrate and lodged the present Appeal on the sole ground that;
1. *The learned trial Magistrate erred in fact and in law when she failed to properly evaluate the evidence on record and arrived at a wrong decision thereby occasioning a miscarriage of justice.*

Duty of the first Appellate Court

- [9] This is an appeal from the Judgment and orders of the Chief Magistrate. This being a first appellate Court, it has the duty to review the evidence and consider materials adduced before the trial Court make up its own mind on the evidence and come to its conclusion, **Pandya Vs. R [1957] EA 336** and **Uganda Breweries Vs. Uganda Railways Corporation S.C.C.A. No. 6 of 2001**.
- [10] In carrying out the above duty, the first appellate Court subjects the evidence on record to a fresh analysis. In the process, the Court can determine issues not raised by the parties if the determination of such issues will aid the Court to come to a logical conclusion; **Elizabeth Nalumansi Vs. Jolly Kasande & 2 Ors S.C.C.A No. 10 of 2015**.

Competence of the Appeal

(a) Parties to the Appeal

- [11] In the pleadings in the lower Court, the Respondent/Plaintiff sued the Defendant, **Isingoma Zulia**. When the Defendant, **Isingoma Zulia** was duly served with the summons to file a defence, a one **Isingoma Lydia** filed the Written Statement of Defence (W.S.D) on record dated **6th April, 2016**. **O.3 r 1 CPR** allows a party to a suit to appear in person, by his or recognized agent or by an Advocate duly appointed to act on his or her own behalf.
- [12] In the instant case, there is no evidence on record that the said **Isingoma Lydia** was either authorized or a recognized agent of the Defendant **Isingoma Zulia** to file a defence and or the appeal on the Defendant's behalf. Even in instances where a party would

be authorized and or is a recognize agent, he or she can not file pleadings in his or her own names. The position of the law is that an agent or attorney can only bring an action in the names of the principal or donor of the Power of Attorney and not in their personal names; **Fenekasi Kiwanuka Vs. Malkit Singh Jondo** H.C.M.A. No. 163 of 2004, Jinja.

- [13] At **page 8 of the typed proceedings**, the lower Court questioned the capacity under which the said **Isingoma Lydia** appeared in this case as a party but neither party responded to the query. It appeared as if that subsequently, **Isingoma Lydia** continued to appear in the Court proceedings as a representative of her mother, the Defendant **Isingoma Zulia**. **O.1 r 8 (1) & (2) CPR** as amended would however still require the said **Isingoma Lydia** to attach a Representative Order by Court to confer upon her locus standi to defend in the representative capacity, **Taremwa Kemishani Vs. A.G.** H.C.M.A. No. 38 of 2012, Mbarara.
- [14] In the premises, I find that the trial Magistrate erred in fact and law to proceed with the suit and entertain the defence on an incurable defective Written Statement of Defence.
- [15] The trial Magistrate ought to have struck out the Defence for being filed by a party with no locus standi. By correlation, the present Appeal by **Isingoma Lydia** would in the premises be found incompetent as it is incurably defective for having been filed by a party with no locus standi.

(b) Evasive Written Statement of Defence

- [16] The Written Statement of Defence in this suit contained several denials without stating the material facts on which the Defendant relies for a defence. **O.6 r 10 CPR**, it is provided that

“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance. Thus, if it is alleged that he or she received a certain sum of money, it shall not be sufficient to deny that he or she received that particular amount, but he or she must deny that he or she received that sum or any part of it, or else set out how much he or she received. If the allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances”.

Odgers Principles of Pleading and Practices, 22nd Edition at page 136 explain s evasive defences as follows:

“It is not sufficient for a Defendant in his defence to deny generally the allegations in the statement of claim each party must traverse specifically each allegation of fact, which he does not intend to admit. The party pleading must make it clear how much of his opponent’s case he disputed”.

See also **Spry, J.P. in Namadashanker M. Joshi Vs. Uganda Sugar Factory Ltd H.C.C.A. No. 16 of 1968** where he observed that what is expected of the Defendant is to furnish particulars where he is

making a positive averment and to plead facts on which he seeks to defend himself to avoid surprises during trial.

[17] In the instant case, the written statement of defence is clearly an evasive one containing mere general denials without facts on which the Defendant seeks to defend herself thus, it offends **O.6 r 10 CPR**. Such written statement of defence is deemed incurably defective and would be struck out for offending the aforesaid provisions of the law, **MHK Engineering Services (U) Ltd Vs. MacDowell Ltd H.C.M.A. No. 723 of 2018**.

[18] In the premises, I find that the trial Magistrate erred in fact and law to proceed on a Written Statement of Defence that was incurably defective for offending **O.6 r 10 CPR**. This Appeal is therefore incompetent for it emanated from defective pleadings of the Appellant before the trial Court.

(c) **General ground of Appeal offending provisions of O.43 rr 1 & 2 CPR**

[19] The law requires a Memorandum of Appeal to set forth concisely the grounds of the objection to the decision appealed against. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the Appellant believes occasioned a miscarriage of justice. Such a ground of appeal as contained in the Memorandum of Appeal in this appeal was found in **Olanya Vs. Ociti & 3 Ors H.C.C.A. No. 64 of 2017 [2018] UGH CCD 52** to be offending **O.43 rr 1 & 2 CPR** and would in the premises be liable for being struck out, see also **Katumba Byaruhanga Vs. Edward Kyewalabye C.A.C.A. No. 2 of 1998 [1999] KALR 621**.

- [20] The present sole ground of appeal fails the test of a proper ground for it fell short of specifically pointing out the error i.e. the specific evidence on record that was not evaluated that led to the alleged miscarriage of justice.
- [21] The entire of the above would dispose of this appeal but for purposes of ensuring that this Court carries out its duty as a first appellate Court to review the evidence adduced before the trial Court so as to come to its own conclusion, I proceed to consider the merits of the appeal.

Evaluation of evidence

- [22] On record, it is not in dispute that the Respondent's late father **Kesi Nkoba Mugenyi**, owner of the suit land comprised in **LRV No. 1550, Folio 18, Plot 72, Buruli: Block 6 land at Nyangahya cell, Masindi Municipality, Masindi District (P.Exh.3)** sold a portion of it measuring **0.27 of an acre** to the husband of the Defendant **Isingoma Zulia** a one **Paul Isingoma Kato (P.Exh.2)**.
- [23] It is also not in dispute that in addition to occupation and use of the above **0.27 of an acre** portion of land purchased by the late **Paul Isingoma**, his family; daughter (**Dw1**) and widow (**Dw2**) occupied and are utilising another portion of **¼ of an acre** on the suit land. It is this portion of land measuring **¼ of an acre** that the Respondent allege comprise the trespass by the Defendant that is being complained of.
- [24] According to the Defendant **Isingoma Zulia (Dw2)**, her late husband **Paul Isingoma Kato** bought 2 pieces of land i.e. the **0.27 acre** and **0.10 acre** from the Respondent's husband **Kesi Nkoba**

Mugenyi. She however explained that the late **Kesi Nkoba Mugenyi** later sold off the **0.27 acre** to one **Betty Kakooko** which is now being occupied by a one **Wamara** though the seller compensated them another portion of land of the same acreage and this is where she has her home.

[25] Though the above arrangement regarding the sale and compensation portion of land measuring **0.27 of an acre** as was stated by the Defendant (Dw2) are not supported by any evidence, I find it immaterial because that portion of the suit land is not in any way in dispute. What is in dispute is the 2nd is portion of land described by the Respondent as **¼ an acre** and or as described by the defendant **Isingoma Zulia** as a **0.10 of an acre**. Whereas the Defendant claim purchase of this **0.10** or **¼ an acre** (whichever the case), there was no evidence offered by the Defendant to support such a claim. Both **Dw1** and **Dw2** claim that the documentation regarding the purchase of the **0.10 acre** was "tactfully confiscated" by the vendor, **Kesi Nkoba Mugenyi**, husband to the Respondent. It is however surprising that in evidence, nobody was alluded to by the defence witnesses to had witnessed the transaction. Besides it was never pleaded in the written statement of defence that the Appellant's father/husband to the Defendant purchased the said **0.01 acre of land** from the Respondent's late husband.

[26] As a result, the trial Magistrate could not believe such evidence as regards the Defendant's husband/Appellant's father purchase of the **0.10 of an acre** from the husband of the Respondent. This

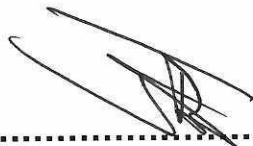
Court in the same premises finds no reason for faulting the trial Magistrate on such a finding.

[27] In the premises, it follows that the Defendant's occupation of the **0.10** or as described by the Respondent or $\frac{1}{4}$ **an acre** of the land on the Respondent's suit land was illegal and amounted to trespass. The Defendant and her family are only restricted to only the **0.27 of an acre** of the portion of the suit land which her late husband purchased from the husband of the Respondent.

[28] As a result, I find that the trial Magistrate properly evaluated the evidence as adduced before him and reached a conclusion that was correct when he declared that the Defendant was a trespasser on the suit land. There is therefore no reason to fault him upon his findings.

[39] In the premises, the sole ground of appeal is found devoid of any merit. The appeal is accordingly dismissed but with no costs for it is inexplicable how Counsel for the Respondent came to acquiesce the illegal prosecution of the suit in the lower Court and on appeal by a party that had no locus. The Respondent and her Counsel cannot be rewarded for their acquiesce of the illegal prosecution of this Appeal by a party with no locus standi.

Dated at Masindi this^{15th} day of **September, 2023**.



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Byaruhanga Jesse Ruggyema

JUDGE