

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL APPEAL NO.12 OF 2020
(Arising from Kiryandongo C.S No.008/2016)

OKUMU ONGEI APPELLANT

VERSUS

ONYA GERISHOM RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] This an appeal from the judgment and decree of **H/W Alule Augustine Koma**, Magistrate Grade 1 of Kiryandongo at Kiryandongo dated the 26th of February, 2020.

Background

- [2] In 2016, the Respondent/plaintiff sued the Appellant/defendant for inter alia, recovery of 30 acres of land located at **Kifuruta village, Kigumba Sub county, Kiryandongo District**.
- [3] It was the Respondent's case that in 1971, he acquired 360 acres of land and in 1986, he secured a certificate of title of the land thereof in his names and other family members. It is the 30 acres of this land that is in dispute.
- [4] In 2002, the Appellant entered the suit land and started cultivating and hiring it to people who cleared it for farming.
- [5] In his defence, the Appellant/defendant contended and averred that the suit land does not form part of the Respondent/plaintiff's land. That he inherited the suit land from his late father **Okumu Bosco** who had also inherited the same from his late father **Aloku Tisiano** who were all buried on the suit land.
- [6] The Appellant averred that he had been in quiet possession of the suit land since 1971 without any interruption until 2013 when the Respondent/plaintiff filed a suit in the L.CII court of **Mboira parish, Kigumba sub county, Kiryandongo District**.

- [7] It was the Appellant's contention that the Respondent's land is situated at **Katamarwa village** and therefore, does not extend to **Kyaka-Kunguru village**, the location of his customary land measuring approximately 17 acres.
- [8] Upon evaluation of the evidence before him, the trial Magistrate found that the suit land belonged to the Respondent/plaintiff, the registered proprietor thereof and that the use of the suit land by the Appellant/defendant without the Respondent/plaintiff's consent amounted to trespass. The Appellant/defendant was accordingly found a trespasser on the Respondent/plaintiff's land. The Respondent/plaintiff was awarded **Ugx 5,000,000/=** as general damages for the mental anguish and inconveniences caused.
- [9] The Appellant/defendant was dissatisfied with the judgment and decree of the trial Magistrate upon which he lodged this appeal on the following grounds;
- 1. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate defence witnesses and submission that the suit titled land **LRV 1538, Folio 17, Block 4, plot No. 16** is in a different location far away from the Appellant's land thereby arriving at a wrong decision that the Appellant's land belongs to the Respondent.*
 - 2. The learned trial Magistrate erred in law and fact when he decided in favour of the Respondent on the basis of certificate of title which is not in names of the Respondent who had no locus to bring the matter before court thereby arriving at a wrong decision that the Appellant's land belongs to the Respondent.*
 - 3. The learned trial Magistrate erred in law and in fact when he awarded general damages of Ugx 5,000,000/= and costs to the Respondents without any basis.*

Counsel legal representation

- [10] The Appellant was represented by **Mr. Komakech Oloya Robert** of **M/s Kayongo Jackson & Co. Advocates, Kampala** while the Respondent was represented by **Ms. Susan Zemei** of **M/s Zemei Aber Law Chambers, Masindi**. Both Counsel filed their respective written submissions for consideration by this court in the determination of this appeal.

Duty of the 1st Appellate court

- [11] As a first Appellate court, this court is to re-examine, reappraise and re-evaluate the evidence on record and come to its own decision. In doing so, it should subject the evidence on record to a fresh and exhaustive scrutiny and come to its own conclusion; **Banco Arabe Espanol Vs B.O.U, SCCA No.8 of 2001.**
- [12] **Grounds 1&2** revolve around how the trial Magistrate evaluated the evidence before him. As a result, both grounds shall be dealt with together while **ground 3** shall be dealt with separately.

Grounds 1 & 2: Evaluation of evidence

- [13] The major issues for determination before the trial Magistrate appear to have been two;
- a) **Whether the plaintiff/Respondent was the lawful owner of the suit land.**
 - b) **Whether the defendant/Appellant was a trespasser on the suit land.**

The trial Magistrate found that the Respondent was the rightful owner of the suit land and the Appellant as a trespasser.

- [14] As the trial Magistrate rightly directed himself, the burden of proof in civil matters rests on the plaintiff and the degree of proof is on the balance of probability. Under **S.101 of the Evidence Act**, the burden of proof is placed on the party alleging the existence of a set of facts.
- [15] In a bid to prove his case that he is the lawful owner of the suit land, the Respondent/plaintiff adduced evidence that in 1971, he applied for and acquired the land which he later in 1987 secured a lease hold thereon described as **LRV 1538, Folio 17, plot 16, Kibanda Block 4, land at Katamarwa, Kigumba in Kiryandongo District.**
- [16] The Respondent (**PW1**) explained that in 1987, upon a request of a one **Tisiano Toloka (Aloko)**, the grandfather of the Appellant, he temporarily offered him a portion of the suit land measuring about 12 acres for utilization. That however, upon the demise of **Aloko** in 2010, **Aloko's** son **Okumu Bosco** and his wife **Jeros Fambe (PW2)** took over the utilization of the land. In 2002, **Aloko's** son **Okumu Bosco**, father to the Appellant also passed on. In 2013, as per the evidence of **Jeros Fambe (PW2)**, the Appellant chased **PW2** away from the suit portion of land, with intention of selling it and renting it without the consent of the owner, the Respondent, thus the present suit for trespass.

- [17] However, according to **Odongi Akanjero** (DW1), holder of power of Attorney for the Appellant/defendant, **Aloko Tisiano** died on 21/1/2011 and not in 2010 as per the Respondent's version. The suit land belonged to **Aloko Tisiano** who was utilizing it until he died and was buried thereon without any one claiming the land. It was his further evidence that the suit land is located at **Kyakakuguru village** and not at **Kifuruta** as the Respondent/plaintiff claimed.
- [18] Then lastly, the defendant contended that a search of the Respondent's certificate of title tendered in evidence (**P.Exh.1**), showed that the Respondent did not own the title to the land because it bore different names as proprietors. According to counsel for the Appellant, it located the land at **Katamarwa** different from where the Appellant's land is located.
- [19] I have carefully perused the certificate of title (**P.Exh.1**) being relied on by the Respondent. As rightly found by the learned trial Magistrate, it is in the names of the Respondent's members of his family. However, as per the **Search statement** as at 28/3/2018 tendered in evidence by the Appellant (**D.Exh.1**), I find that it clearly referred to land described as **LRV 1331, Folio 19, Block 4, plot No.13 land at Katamarwa** in the names of **Kucharoma Enterprises Ltd of Kampala**. This land as reflected on the Search statement (**D.Exh.1**) is definitely different from the suit land which is in the names of the Respondent's members of the family and is described as **LRV 1538, Folio 17, Block 4, plot No.16 land at Katamarwa (P.Exh.1)**. These are 2 different pieces of land though in the same location. It is therefore not right to claim that the certificate of title, **P.Exh.1** was not registered in the Respondent's names and therefore, that he would not have any right over it. It was in the names of the members of the family of the Respondent whereby the Respondent would have vested legal interest.
- [20] As regards the claims that **P.Exh.1** was found registered in the names of **Garcha Ranjit Singh**, there is no evidence to support such a claim. Neither a copy of such certificate in the names of **Garcha Ranjit Singh**, nor a search statement was adduced by the Appellant/defendant or either of them pleaded in the first place. As a result, this court would regard the submissions of counsel for the Appellant's reference to these 2 documents as counsel adducing evidence from the bar.
- [21] The reference on the Respondent's certificate of title showing **Katamarwa** as the location of the suit land was in my view well clarified by **Okumu Charles** (PW3), chairperson Kifuruta II village, who stated that initially, the whole village was called Katamarwa village but it was

later sub divided into other villages; **Apodra, Kyakakuguru 1 & II and Kifuruta 1 & II villages**. From the foregoing, it is apparent therefore that the land currently being utilized by the Appellant is the same land the Respondent/plaintiff had offered **Tisiano Toloko (Aloko)**, which he now wants to recover from the Appellant.

[22] Counsel for the Appellant submitted that the certificate of title as adduced by the Respondent (**P.Exh.1**) is a product of fraud because according to him it is registered in the names of **Garcha Ranjit Singh** and not the Respondent.

[23] As rightly observed by the learned trial Magistrate, fraud must be specifically pleaded and proved and the standard of proof is higher than a mere balance of probabilities, although not so high to require proof beyond reasonable doubt; **Kazzora Vs Rukube, SCCA No.1992**. In the instant case, the Appellant never in his pleadings alluded to any fraud or later on lead any evidence to prove it. As I have already observed, the certificate of title is in the names of the family members of the Respondent and in any case, the fact that search on the title was effected after the filing of the suit and conclusion of the trial, since the Appellant never tendered in evidence a copy of the certificate of title as at the date of the alleged search statement to enable this court ascertain the status of the proprietors thereon, it is possible that between the time of filing of the suit and conclusion of the trial, proprietorship of the suit land changed. The burden would in all aspects be on the Appellant to prove the fraud he alleged to exist. The Appellant failed to discharge the onus placed upon him by the law; **Ss.101-103 of the Evidence Act**.

[24] This court finds that there is overwhelming evidence that the Respondent offered a portion of land for temporal use to **Toloka Tisiano (Aloko)** who upon his demise, his son **Okumu Bosco** and his youngest wife **Jeros Fambe (PW2)** took over the utilization of the land and when **Okumu Bosco** passed on, the Appellant undertook to chase his stepmother, the widow (**PW2**) from the suit land he is now disputing with the Respondent.

[25] As proof that **Okumu Bosco** and his wife (**PW2**) were temporarily utilizing the land, **Jeros Fambe (PW2)** testified that the suit land belongs to the Respondent/plaintiff. She and her husband were utilizing the suit land under the license of the Respondent whom they were paying rent. I find this evidence sufficient as regards the relationship between the Respondent and **Okumu** who was utilizing the land since none of the Appellant's witnesses knew how **Okumu** and his

youngest wife **Jeros Fambe** came to occupy the land. It is only Jeros Fambe's (PW2) evidence that sufficiently explains the status of the suit portion of land.

- [26] **Odongo Akanjero** (DW1), the holder/donee of the power of Attorney of the Appellant testified thus;

"In 1971, I migrated together with Tisiano Aloko and for him he settled on the disputed land. He started using that land until he died. He was buried on the same land without anyone claiming the land..."

Yet during cross examination, he revealed thus;

*"Yes, upon settling in Kyakakuguru, I was neighbor to my current wife. Yes, at the time, I settled in Kyakakuguru my wife had already settled there. Yes, I was first told by my wife **Manuela Ochaya** how **Tisiano Aloko** acquired the land and I believe her being my wife."*

- [27] The above excerpts of **DW1's** evidence clearly show that **DW1** lied to court when he stated that he migrated with **Tisiano Aloko** when he settled on the suit land. If it were so, he would not have stated during cross examination that it his wife **Manuela Ochaya** who **DW1** found already settled in the area first, that told him how **Tisiano Aloko** acquired the suit land, which any case is hearsay evidence.

- [28] It is nevertheless apparent that when **Tisiano Aloko** died, his son **Okumu**, as the L.C1 chairperson (PW2) explained, approached the Respondent for a portion of land to utilize and he was on similar temporal terms offered 13 acres of land which he was utilizing with his wife **Jeros Fambe** (PW2). As clearly stated by the widow of **Okumu**, **Jeros Fambe** (PW2), the area L.C1 (PW3) and alluded to by **Sibriano Onyul** (DW2) during cross examination, the suit land was being utilized by the late **Okumu** and his wife (PW2) and when **Okumu** demised, the Appellant forcefully chased her away from the land. In the premises, that **Okumu** and his wife were utilizing the land with permission of the Respondent, the Appellant's conduct of chasing away the widow (PW2) from the suit land and taking it over without the authority and consent of the Respondent amounted to trespass.

- [29] In the premises, I find no contradiction in the Respondent's witnesses, in particular **PW1** and **PW2** that the suit portion of land was offered to **Okumu** on terms as revealed by his wife **Jeros** (PW2).

- [30] The Appellant did not in any way inherit any land from his father **Okumu**. His father was in occupation of the suit land on temporal terms of rent as evidenced by his wife (PW2). In any case, the Appellant could not inherit

not inherit what **Okumu** left to his youngest wife **Jeros** (PW2), merely on the basis of being a son to **Okumu**.

- [31] As a result, I am unable to fault the trial Magistrate in his findings that the suit land belonged to the Respondent and that the Appellant was a trespasser. In the premises, I find **grounds 1 & 2** of the appeal without merit and they accordingly fail.

Ground 3: Damages awarded to the Respondent

- [32] The Respondent being the successful party was awarded general damages of **Ugx 5,000,000/=** for the pain, suffering and inconveniences he suffered as a result of the Appellant's acts. Trespass per se attracts damages, there is no need for the plaintiff to prove that he or she has sustained actual damage; **Omito & 5 Ors Vs A.G, HCCS No.73/2004 [2017] UGHCLD 85**. The award of general damages is in the discretion of court in respect of what law presumes to be the natural and probable consequences of the defendant's act or omission; **James Fredrick Nsubuga Vs A.G, HCCS No.13 of 1993**.
- [33] In this case however, there is ample evidence that the Appellant forcefully denied the Respondent's tenant/licensee from utilization of the suit land and the Appellant himself took over utilization of the land. There is a threat that he wants to dispose it off. I find the trespass to had been willful and therefore aggravated. As a result of the above, I have not been able to find the award of **Ugx 5,000,000/=** to the Respondent as either excessive or uncalled for in the circumstances of this case.
- [34] In the premises, I find no reason to temper with the trial Magistrate's award of **Ugx 5,000,000/=** as general damages. The 3rd ground of appeal is also devoid of any merit. It fails.
- [35] All in all, the entire appeal has no merit and it accordingly fails. The Appeal is in the premises dismissed with costs to the Respondent.

Dated at Masindi this ^{31st}..... day of **August, 2023**.


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Byaruhanga Jesse Rugyema
JUDGE.