THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 39 OF 2023

(Formerly MSD Civil Appeal No.035 of 2015)

(Arising from Hoima Civil (Land) Case No.039 of 2005)

NUNU BIRISI ANTHONY :: APPELLANT

VERSUS

1.BAHUNGULE PETER
2.ANTONIO KAAHWA :: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the Judgment and orders of **His Worship Yeteise Charles**, Magistrate Grade 1 of Hoima Chief Magistrate's Court delivered on 20th May, 2015.

Facts of the Appeal

[2] The Appellant sued the Respondents for a declaration that he is the rightful owner of the suit land situated at Buhimba, on **the Western side of Kabaale-Ngongoma Road,** Hoima District that the Respondents were trespassers on the suit land and sought for an eviction order against the Respondents, general damages and costs.

[3] Briefly, the back ground facts of the Appeal are that the Appellant identified free and unoccupied land measuring about 60 hectares located on the Western-side of Kabaale. The Appellant applied for a lease over the said land which was granted in 1984 for over 30 hectares. He was given a lease offer which he accepted by paying the requisite fees but contended that the Respondents trespassed onto his land hence this suit. The trial Magistrate believed the Respondents' version on how they acquired the

suit land and held that they were not trespassers. Court further held that the Appellant failed to prove fraud on part of the Respondent in acquiring the title, declaring that the suit land is property of the Respondents hence this appeal.

[4] The following were grounds of the appeal

1. *The learned trial Magistrate erred in law when he failed to properly evaluate the evidence.*
2. *The learned trial Magistrate erred in law and fact as regards the manner in which the locus proceedings were conducted.*
3. *The learned trial Magistrate misdirected himself and thus erred in law when he awarded excessive general damages and costs to the respondent.*

Counsel Legal Representation

[5] The Appellant was represented by **Mr. Kabigumire Innocent** while **Ms. Nyakecho** appeared for the Respondents. Counsel for the Appellant made oral submissions while counsel for the Respondents filed written submissions. Counsel for the Appellant argued grounds 1 and 2 together while ground 3 was argued separately.

Duty of the 1st Appellate Court

[6] The duty of a first Appellate Court is to re-evaluate evidence as a whole and come to its own conclusion bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that regard. The above principle has been re-echoed in a number of cases, **Uganda Revenue Authority Vs Rwakasanje Azariu & 2 Ors, CACA No.8/2007** and **Fr. Narsensio Begumisa & 3 Ors Vs Eric Tibebaga, SCCA No.17 of 2002**. This court therefore, has the duty to re-appraise the evidence and reach its own conclusion thereon subject to the caution that it did not see, hear, or observe the witnesses. The evidence on record was given through witness statements, and all witnesses were duly cross examined on their evidence.

Submissions by Counsel for the Appellant

[7] As far as the first two grounds of appeal are concerned, counsel for the Appellant submitted that the Appellant contends that his land is at Kabaale-Ngogoma but the Respondents contend that the land they occupy is at Katutwe and not at Kabaale. That **DW1** testified that his land is at Katutwe hill. He submitted that the neighbourhood differ and the disputed land described by the Appellant and the Respondents is very different.

[8] Counsel for the Appellant further submitted that to rule out the error, the trial Magistrate ought to have visited the locus in quo to ascertain whether the lands the two parties were talking about were the same but the trial Magistrate failed to do this. That had the trial Magistrate visited locus in quo, he would have established the proper boundaries and he would come with a different judgment in favour of the Appellant. That the Appellant during cross examination stated that he got free land yet **DW1** stated that he started using the land by building a house, planting mangos and grazing. That if the Magistrate had visited the locus he would have ascertained if the 1st Respondent/DW1's house did in fact exist. Counsel referred to the cases of the **Registered Trustees of the Pentecostal Assembly & Anor Vs Iga Anyi Godfrey & 14 Ors, Arua HCCA No.29/2011 and Kadamuse S/O Katikiro Vs Onyopa Alexander, HCCA No.119/2008** where the trial Magistrate failed to visit the locus and it was held that

> *"failure to visit the locus in quo has been considered in many cases, in the case of this nature where acreage is uncertain, parties description of location of lands and boundaries is unclear and at variance and where clearly documents have been brought to court which appear to contradict each other, there is no way a court can determine such dispute without visiting the locus."*

[9] That in the instant case where the defendant alleges that he had a house on the suit land and the plaintiff says there were none and more so the neighbours to the land differ, a locus visit would have been prudent and failure by the trial Magistrate to visit the same occasioned a miscarriage of justice. That in that above matter, court held that failure to visit locus was fatal and ordered for a retrial.

[10] Counsel submitted that according to the testimony of the Appellant at **page 3,** he stated that his land is at Kabaale-Ngogoma with its boundaries being omukongozi tree in the South, mulongo tree in the North-Eastern Ngogoma-Kabaale road and in the Western, Katutwe and Kabira Hill. **DW1** testified that his land is in Katutwe boarding John Kwebiha in the north, a hill and the road of Ngongoma Kabaale and Kakonge John in the West. That the evidence on record seemed to be pointing at different pieces of land, one at Katutwe hill and the other at Kabaale-Ngongoma and that these were matters which court ought to have inquired into, since it had been brought to its attention. Therefore court failed in its duty to correctly evaluate the evidence reaching to a finding based on erroneous assessment.

Submissions of Counsel for the Respondent

[11] Counsel for the Respondent on the other hand submitted that locus visit is not mandatory as implied in the ground of appeal. That in **Akugizibwe Francis Vs Nyamahunge Kotido, HCCA No.0032 of 2016** court held that

> *"a visit to the land in dispute is not mandatory. The court moves to the locus in quo in deserving cases where it needs to verify the evidence that has been given in court on the ground... such visits are necessary to enable court to determine the boundaries of the land in dispute and the feature thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in court."*

[12] Counsel submitted further that the locus visits are only necessary for courts to verify evidence given in court, especially where it cannot be achieved by testimonies of witnesses in court. That in the instant case, the witnesses convinced court of the nature and boundaries of the land. That it was not a matter regarding boundaries but rather the ownership of the land. Therefore the Appellant is misguided on this ground of Appeal. There would be no need for locus visit since the land title is registered under the RTA. Counsel relied on the case of **Mugerwa Muliisa Paul Vs Twaha Kiganda Civil Appeal No.9 of 2012 (H.C)** where Justice Monica Mugenyi observed that

> *"the present appeal, the boundaries of the suit land did not appear to be the dispute. This is neither reflected in the pleadings before*

the trial nor in the framed issues, neither can it be inferred from the dispute under consideration. What were primarily under dispute were the interests of either party in the suit land. The land in issue was duly registered and demarcated, the appellants had legal title thereto. The issue was whether or not the appellant's property interest was subject to the Respondents' alleged customary and statutory rights....this issue has been resolved in the negative by the court. Consequently I would hold that visits to locus in quo are not mandatory and omission to visit the locus in quo in the present case did not occasion a miscarriage of justice."

[13] Counsel concluded that the boundaries of the suit land were never in dispute at trial and the primary issue was interest of the parties in the suit land. Therefore failure to visit the locus in quo, never occasioned any miscarriage of justice.

Determination of the Appeal

Grounds 1&2: Evaluation of evidence and locus visit.

[14] The purpose of visiting locus in quo is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features such as permanent houses, natural trees on either side, to confirm boundaries and neighbours to the disputed land, to show whatever developments either party may have put up on the disputed land, and any other matters relevant to the case. It is during locus in quo that witnesses who were unable to go to court either due to physical disability or advanced age may testify. However, if the trial court finds or is satisfied that the evidence given in court is enough, then he or she may not visit the locus in quo. Evidence at the locus in quo cannot be a substitute for evidence already given in court. It can only supplement. It should therefore be noted that visiting locus in quo is not mandatory, it depends on the circumstances of the case; See **Damulira Aloysius Vs Nakijoba, Masaka HCCA No.59/2019** and **Lawrence Nabende & 2 Ors Herbert Semakula & 5 Ors CACA No.154/2017.**

[15] In the present case, it appears that there was no locus visit conducted simply because the defendants had a certificate of title and it was an agreed fact that the defendants were the registered proprietors of the suit. **Section 59 of RTA** states that

> *"Certificate of title shall be conclusive evidence that the person named in the certificate as the proprietor is the owner of the land."*

Basing on the section, the trial Magistrate was convinced that the defendants were the owners of the suit land and therefore the visit to locus in quo was not necessary.

[16] I also do not find any reason for the locus visit. The evidence adduced in court by either party was enough to pass a verdict. The Appellant told court that his land was in Kabaale, Ngongoma village, Buhimba Western-side of Kabaale-Ngongoma road while the Respondents told court their land was in Katutwe hill. The certificate of title is in respect of the land in Katutwe and not Kabaale Ngongoma, which in my view meant that parties live in different areas as disclosed by the following; Appellant's application for rural land dated 15/7/83 **(P.Exh.1),** instruction to survey his applied for land **(P.Exh.4),** and letter from Gombolora Chief Buhimba dated 30/8/83 **(D.Exh.1).** In the **WSD** and its annextures which form the defence and in evidence, the Defendants/Respondents adduced evidence that they applied for and were granted a lease offer for land at **Katutwe** (hill). The onus was on the plaintiff/Appellant to rebut this evidence which he did not do. So in my view, there was no need for locus visit.

[17] Counsel for the Appellant submitted that the trial Magistrate should have visited the locus in quo to ascertain the boundaries. The boundaries were however not an issue before court in the first place. Counsel is trying to submit on new evidence which this court cannot accept. I have also carefully perused the **Hoima District Land Tribunal Claim No.054/2003** (P.Exh.7) and **Hoima Chief Magistrate's Court, C.S. No. M.H1/1992** which had decreed the land to the Appellant, none refer to the defendants/Respondents' land at Katutwe (Hill). It is apparent that the Appellant was offered his **30 ha**. on Kabaale-Ngongoma and now wants to extend his claim to the Respondent's land at Katutwe. Besides, it is clear from the evidence on record that the Respondents secured their lease in 1974 before the Appellant secured his and during the inspection of his

applied for land, the Inspection Report reveal that it had developments in form of a semi-permanent house **(P.Exh.2)** yet for him, if it was after the inspection that he was allowed to start developing the land as he awaited for the lease offer (See cross examination of **PW1**) signifying that the semi-permanent house was not his. Indeed, the 1st Respondent raised a complaint during the inspection done for **PW1** in October 1983. I am therefore unable to find any fault with the judgment of the trial Magistrate. He properly evaluated the evidence on record to find that the Respondents were owners of the suit land. The first 2 grounds of appeal therefore fail.

Ground 3: The learned trial Magistrate misdirected himself and thus erred in law when he awarded excessive general damages and costs to the respondent.

[18] Counsel for the Appellant submitted that general damages awarded by court to compensate a litigant for the inconvenience suffered and are normally meant to place the litigant to a position he or she was before the said inconvenience, meaning court should award general damages after evidence has been led to justify such as award. He submitted that the Respondents told court that they had a stone quarry which stopped working, they lost cattle and were kept out of use of the land and the farm got destroyed. But the evidence does not show how many cows were lost, how much the stone quarry was fetching per month, how much land had been lost. That no visit was made to ascertain all this but contrary to the established law of assessing damages, the trial Magistrate went ahead and awarded Ugx 15,000,000/= as general damages. In **Ibanda Richard Vs Monica Wanume & 3 Ors, High Court Civil Appeal No.52/2009,** it was observed that

> *"general damages are usually granted by court to compensate a litigant for the inconvenience suffered."*

[19] Counsel concluded that awarding Ushs. 15,000,000/= where there was no proof of any damage or it could not be established that the stone quarry existed, whether land was taken away and how many cows were taken, then such award was excessive.

[20] Counsel for the Respondent on the other hand submitted that damages are issued at the discretion of court. That there is no mathematical fomula followed. That assessment is calculated at the verifiable inconvenience suffered by the innocent party. That general damages awarded were fair.

[21] It is my view that in considering claims for general damages, courts usually take into account the fact that they are deemed as compensatory and not punitive, for damages are pecuniary recompense given by the process of law to a person for the actionable wrong that another has done to him as it was defined in the case of **Hall Brothers SS Co.Ltd Vs Young (1939)1KB at 748(CA),**

> *"damages, to an English lawyer, imports this idea that sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation whether that duty or obligation is imposed by contract, by the general law, or legislation."*

[22] Indeed, in this case, the 1st Respondent adduced evidence regarding the inconvenience he has suffered as a result of the Appellant's claims over the suit land but failed to prove special damages as required by the law; **Luzinda Vs Ssekamatte, HCCS No.366/2017** which the trial Magistrate appeared to bundle together with the inconvenience caused to the 1st Respondent in awarding general damages. In the premises, I find that the award of the general damages amounting to Ugx 15,000,000/= was excessive. I substitute it with an award of **Ugx 8,000,000/=** only.

[23] In conclusion therefore, I find and hold that the trial Magistrate thoroughly examined and evaluated the evidence on record, and having held and found all grounds of appeal in the negative, I do hereby proceed to dismiss this appeal with costs and confirm the judgment and orders of the lower court save for the award of general damages of Ugx 5,000,000/= which I have substituted with **Ugx 8,000,000/=.**

Dated at Hoima this **28th day of July, 2023.**

Byaruhanga Jesse Rugyema
JUDGE.