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The Republic of Uganda

In the High Court of Uganda at Soroti

Civil Appeal No. 0029 of 2021

(Arising from Civil Suit No. 0012 of 2021)

10 Okurut Amosi Appellant

Versus

Okiror Ben Verenado Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

15

Judgement

1. Background:

This appeal arises out of the judgment and orders of the Chief Magistrates Court of Soroti at Soroti delivered on the 12th day of July 2022 by H/W Nause Tumuhimbise.

20 The respondent filed Civil Suit No. 0012 of 2021 in the lower court against the appellant for orders and declarations that the appellant is a trespasser on his land situate at Opiai B village, Amen Parish, Soroti city measuring approximately 120 ft. by 70 ft., for vacant possession, for a permanent injunction, general damages, interest on damages and costs of the suit.

25 The respondent's claim was that on the 17th day of May 2005 he bought a plot of land measuring approximately 120 ft. by 70 ft. from Mzee Oloya Martin Ewinya at Opiai B village, Amen Parish, Soroti and upon payment

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5 for the suit land he immediately took possession of it, fenced it and began cultivation of seasonal crops in it.

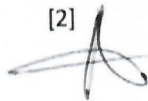
That in early 2017 he planted his crops and reported back on duty at his station in Kampala but that around September 2017 when he came to harvest his crops he found that the appellant had entered into part of the
10 suit land without his permission and or consent and had removed his wooden fence, damaged the crops therein and constructed a house thereon which he now rents out to diverse persons.

That when he discovered this existing situation, he made attempts to meet the appellant who promised to amicably settle the matter but in vain
15 prompting the respondent to report the matter to local council officials. However, sometime in April 2021 while mediation was still ongoing at the office of the LC1 the appellant furthered his illegal activities on the suit land by digging a foundation with the intention of erecting a perimeter wall fence which the LC1 officials asked him stop his illegal activities.

20 The appellant then defendant in the lower court in his written statement of defence denied the respondent's allegations and contended that he bought the land and developments situate at Opiai B village, Amen Parish, Soroti from one Eibu Donald by an agreement dated 8th of January 2008. That upon buying the said land he constructed a small structure way back
25 in 2009 and immediately took possession. That similarly upon purchasing the said land, one Aodu Richard put three wooden poles to act as a boundary between him and the suit land.

That on the 13th January 2009, the appellant caused a public hearing of the suit land by the Area Land Committee and there was no dispute
30 regarding his boundaries. That he later surveyed the land and four (4) mark stones were planted by a surveyor, only for him to get to know that the adjacent land, part of which now forms the suit land belonged to the

[2]



5 respondent in 2015 when the respondent introduced himself as the owner.
That from 2008 he had used the portion he had bought without any
objection and it was only in April 2021 when he was trying to put up a
perimeter wall that he was summoned by the LC1 on allegations of
trespassing on the respondents plot by 2 meters.

10 The matter was then brought to the magistrates' court with the
magistrate's court after hearing of evidence led by both entering
judgement in favour of the respondent with the following orders and
declarations;

- 15 a. The plaintiff is the rightful owner of the suit plot measuring 120 ft.
by 70 ft.
- b. The defendant is a trespasser on the suit plot.
- c. An order of vacant possession issues against the defendant.
- d. A permanent injunction does issue against the defendant
restraining him and or his agents and or assignees and any persons
20 claiming through him from further trespassing on the plaintiff's
land.
- e. As regards General damages, this court awards the plaintiff shs.
5,000,000/- (Uganda shillings five million only) as general
damages for the loss and inconvenience caused to the plaintiff.
- 25 f. Mesne profits of Shs. 1,000,000/-
- g. Costs of the suit awarded to the plaintiff.

Dissatisfied with the judgement and orders of the lower trial court the
appellant filed this appeal on the following grounds;

- 30 a. That the learned Trial Magistrate erred in law and fact when she
heard and decided a suit whose subject matter was beyond her
pecuniary jurisdiction.



- 5 b. That the learned Trial Magistrate erred in law and fact when she
 found for the Respondent who presented evidence which was
 inconsistent with his pleadings.
- c. That the learned Trial Magistrate erred in law and fact when she
 declared the appellant a trespasser on the suit land.
- 10 d. That the decision of Trial Magistrate occasioned a miscarriage of
 justice on the appellant.

2. Duty of the first appellate court.

In *Kifamunte Henry vs Uganda SCCA No. 10/1997*, it was held
that;

15 ***“The first appellate court has a duty to review the
 evidence of the case and to reconsider the materials
 before the trial judge. The appellate Court must then
 make up its own mind not disregarding the judgment
 appealed from but carefully weighing and considering
20 it.”***

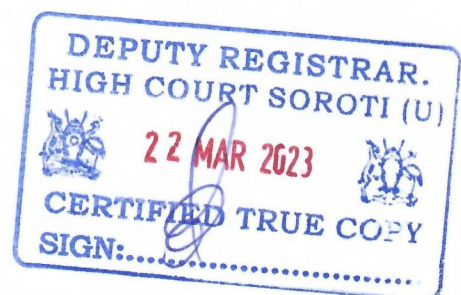
In *Father Nanensio Begumisa and three Others v. Eric
Tiberaga SCCA 17of 2000; [2004] KALR 236*, it was held that;

25 ***“This being a first appeal, this court is under an
 obligation to re-hear the case by subjecting the evidence
 presented to the trial court to a fresh and exhaustive
 scrutiny and re-appraisal before coming to its own
 conclusion.”***

The above holdings in regards to the duty of a first appellate court are
taken into account while considering this appeal.

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5 3. Resolution of Appeal:

Before I consider this appeal, I do take note of the submissions counsel for the respondent wherein is raised a point of law which must be resolved first.

10 The raised point of law is to the effect that the amended memorandum of appeal lodged by the appellant was without leave of court and as such is incompetent and should be struck out with costs.

In regard to the raised point of law, counsel for the respondent submitted that Order 43 rule 2 of the Civil Procedure Rules provides that the appellant shall not except by leave of court argue or be heard in support
15 of any ground of objection not set forth in the memorandum of appeal.

Counsel submitted that in respect of the present matter, on the 28th day of July 2022 the appellant through Ms. Opio & Co. Advocates lodged a Memorandum of Appeal though on subsequently on the 28th day of September 2022 he further engaged the services of Ms. Engulu & Co.
20 Advocates which filed both a notice of change of advocates and an amended memorandum of appeal, the latter of which was without leave of court yet it introduced new grounds.

Counsel, additionally, submitted that while Order 6 rule 19 of the Civil Procedure Rules allows amendments to pleadings at any stage of
25 proceedings, the rule shows that it is for the court to allow any such amendments and where the pleadings have been closed, parties have to seek permission from court to do so.

Counsel thus finally submitted that since the appellant filed the amended memorandum of appeal without first seeking the permission of the court,
30 the said memorandum of appeal ought to be struck out.

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- 5 In response, Counsel for the appellant submitted that at the time the appellant filed his first memorandum of appeal he did not have the certified record of proceedings reasons for which he indicated that he would adduce additional grounds of appeal upon perusing the typed record of proceedings which he had requested for.
- 10 Counsel for the appellant further submitted that the position of law is that where an appellant request for a record of proceedings, the time for lodgement of an appeal does not begin to run until the record of proceedings are received by the intending applicant.

That in respect of the instant matter, the appellant only received a typed
15 certified record of proceedings on the 8th of September 2022 meaning the time within which he was to file the memorandum of appeal began to run on the 8th of September 2022.

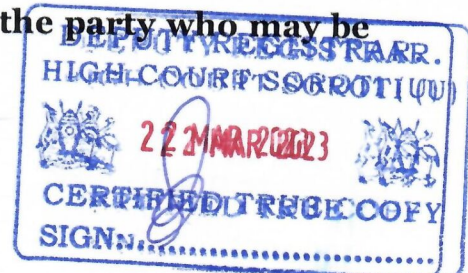
Counsel in conclusion submitted that at the time the appellant filed the amended memorandum of appeal pleadings were not yet closed and as
20 such no leave was required as submitted by the respondent. He prayed that the objection be overruled and the appeal decided on its merits.

In respect of the raised point of law, Order 43 rule 2 of the Civil Procedure Rules is the relevant law and it provides as follows;

Order 43 rule 2 of the Civil Procedure Rules

- 25 **The appellant shall not, except by leave of the court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the**
- 30 **court under this rule; except that the High Court shall not rest its decision on any other ground unless the party who may be**

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- 5 **affected by the decision has had a sufficient opportunity of contesting the case on that ground.**

The above provision of the law specifically commands that the leave of the court must be sought by a party before any amendment is made to an already filed Memorandum of appeal.

- 10 In respect of the instant matter, I am alive to the fact of the appellant statement in his first memorandum of appeal where he states clearly that at the opportune time, he would adduce more grounds of appeal after perusing the certified record of proceedings which at the time of filing the first memorandum of appeal had not yet been given to him.
- 15 The appellant actually did actually thereafter file an amended memorandum within time before pleadings were closed, I would find that the lodgement of the amended memorandum of appeal was legally proper as it was within the provisions of the law. Accordingly, the point of law is accordingly overruled.
- 20 I will now consider this appeal on its own merits.
- a. Ground 1: That the learned Trial Magistrate erred in law and fact when she heard and decided a suit whose subject matter was beyond her pecuniary jurisdiction.

- Counsel for the appellant submitted that the trial Magistrate who is a
- 25 grade 1 Magistrate heard and determined the suit in total disregard of the averments under paragraph 9 of the plaint where the respondent stated that the value of the subject matter was estimated to be Ugx. 30,000,000/= (Thirty Million shillings). That under section 207 (1)(a) of the Magistrates Courts Act as amended a Magistrate Grade 1 has
- 30 jurisdiction to handle cases whose subject matter does not exceed 20,000,000/= (Twenty Million Shillings).





5 Counsel for the respondent submitted that section 207 (2) of the Magistrates Courts Act creates an exception to pecuniary jurisdiction. He stated that the Respondent's civil customary rights by trespassing on his plot by 2 meters as substantiated in the lower court judgement.

The respondent in his plaint amongst others seeks a declaration that the
10 defendant/appellant is a trespasser on his land situate at Opiai B village, Amen Parish, Soroti city approximately 120 ft. by 70ft.

Under paragraph 5 (d) he states that the appellant entered part of the suit land without permission.

Under paragraph 9 he states that the land is estimated to be Ugx.
15 30,000,000/= which the court has powers to determine.

This matter was filed in the Chief Magistrates Court. When the plaint is read as a whole it is clear that while the respondent talks about the entire size of the suit land and the estimated worth, his interest was only in the portion trespassed on by the appellant.

20 The averments and evidence on from who and when the respondent bought the entire suit land as well as the boundaries planted or erected were meant to create a background to the main purpose of the suit which was the trespass on part of the land.

All the evidence led in court focused on this encroachment which the trial
25 Magistrate also noted in her judgement at page 5 to 6 where she states that the 2 meters by which the defendant is alleged to have entered the suit land is what forms the suit land and she then proceeds to evaluates the evidence regarding this boundary and finally determines that the two (2) From the pleadings and the evidence meters are indeed part of the
30 plaintiff's/respondent's land.

[8]



5 I do find that the subject of the suit was the 2-meter encroachment and not the entire 120 ft. by 70 ft. and as such the portion was well within the jurisdiction of the trial Magistrate. Ground 1 fails accordingly.

10 *b. On Ground 2: That the learned Trial Magistrate erred in law and fact when she found for the Respondent who presented evidence which was inconsistent with his pleadings.*

Counsel for the appellant submitted that the respondent in paragraph 4 (a) of his plaint described the land allegedly trespassed on by the appellant as 120 ft. by 70 ft. However, in his testimony he stated that the appellant only trespassed on part of the plot and not all. That this evidence was a complete departure from his pleadings which the trial court ought to have condemned.

20 The respondent in his plaint in paragraph 5(d) states that when in and around 2017 when he went back to the suit land he found that the appellant had entered part of the suit land without permission. Paragraph 4(a) which constituted the respondent's cause of action merely shows that the respondent's claim was for a declaration that the appellant was a trespasser on his land situate at Opiai B measuring 120ft by 70ft. Paragraph 4(a) sets out the cause of action and Paragraph 5 specifically (d) sets out the specific details that led to the cause of action.

25 I find that the respondent giving evidence in regard to the portion trespassed on by the appellant was not a departure from his pleadings. This ground accordingly fails.

c. On Ground 3: That the learned Trial Magistrate erred in law and fact when she declared the appellant a trespasser on the suit land:

30 Counsel for the appellant submitted that in Justine E.M.N Lutaaya vs Sterling Civil Engineering Company SCCA No. 11 of 2002 trespass was

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5 defined as unauthorized entry upon land that interferes with another person's lawful possession of that land.

He submitted that both the appellant and the respondent stated that they conducted surveys of their respective pieces of land. counsel submitted that it was necessary for court to procure the services of a surveyor to
10 ascertain whether indeed there was trespass or not. That it is strange how the trial court found that the appellant was a trespasser and yet the respondent confessed in evidence that he was the one in possession of his plot of land and was using it for cultivation. Counsel questioned what court used to determine that the appellant had trespassed on the
15 respondent's land by two feet, that these two feet were not part of the respondent's case which was on the 120fy by 70ft.

Counsel for the respondent submitted that the appellant in his WSD in paragraph 6(j) avers that the appellant accused him of trespassing on his land by two meters and during cross-examination he reaffirmed this
20 position and during the locus visit court was able to confirm indeed that the second house constructed by the appellant encroaches on the respondent's land.

My finding is that the trial Magistrate in her judgement in determining the issue of ownership of the suit land, specifically the boundary, used the
25 features of the land which included the trees and poles. She also relied on the measurements of the land as described by the parties and as seen at locus in quo.

The trial magistrate further found that the plaintiff/respondent's evidence was that he bought the suit land in 2005 from PW2 measuring 120ft by
30 70ft and these measurements were clearly stated in the sale agreement (PEX 1). The defendant/appellant on the other hand bought his land from

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5 Ebiu Donald and this is described in a sale agreement (DEX 1), however,
it does not include size or measurements.

The appellant during cross examination admitted that the size of the land
he bought was not indicated in the agreement and that when he told the
secretary to include the size he refused and that's why he brought the area
10 land committee.

The trial Magistrate did note that it was the evidence of both parties and
the appellant's evidence in cross-examination that the respondent
/plaintiff purchased his plot first in that area.

She also noted that the appellant brought DW2 to measure the land,
15 however, DW2 during cross-examination stated that the appellant did not
show him any documents stating the size of the land rather he showed him
where to construct the house.

Accordingly, the trial magistrate, found correctly that the evidence of the
appellant (DW1) and DW2 show that the appellant was not sure of the size
20 of the land he purchased from Ebiu. Further even that even at the time of
the purchase the appellant did not know the measurements of the land he
was buying.

The trial magistrate, additionally, noted that without any document
showing the size of the land, DW2 who the appellant brought to measure
25 the land and construct a house could have possibly encroached on part of
the respondent's land.

Furthermore, the respondent was not around when DW2 measured out
the appellant's plot per DW2's testimony with the trial magistrate noting
that the appellant in his testimony stated that when he counted his plot,
30 he found that the encroachment was by 2 meters into the
plaintiff's/appellant's land.

[11]



5 Basing on this admission by the appellant, the trial magistrate found that
on a balance of probabilities the suit land belonged to the
plaintiff/respondent.

In conclusion, the trial Magistrate basing on the above evidence, together
with her findings during the *locus in quo* visit, went on to conclude that
10 the appellant was a trespasser on the suit land.

Having perused the record of proceedings and the evidence adduced in
the trial Court, I would find that the trial Magistrate rightly evaluated the
evidence and found the appellant to be a trespasser.

The appellant's contentions that the 2 meters were not part of the suit land
15 are misplaced as already seen in ground 2. The suit was based on
encroachment on the boundary by 2 metres and not the entire 120 ft. by
70 ft.

There was no need for the trial court to procure the services of a surveyor
when the respondent who bought his plot first had well established
20 boundaries as well as size of his plot as opposed to the appellant who did
even know the size of the land he bought.

Ground 3 accordingly fails.

d. Ground 4: That the decision of Trial Magistrate occasioned a
miscarriage of justice on the appellant.

25 The essence of the appellant's submissions on this ground are that had the
trial Magistrate addressed herself to the gaps addressed in grounds 1 to 3
she would have found that the respondent's suit lacked merit. Therefore,
her decision occasioned a miscarriage of justice to the appellant.

From what I have analysed above and found in grounds 1 to 3, I would
30 conclude that the decision of the trial magistrate and her careful

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5 evaluation of the evidence before her left with no alternative other than to find for the respondent who proved his case on a balance of probabilities. Accordingly, the decision of the trial magistrate did not occasion any miscarriage of justice to the appellant.

Ground 4 accordingly fails.

10 4. Conclusion:

Having found that in the negative in all the grounds for this appeal cited by the appellant, this Honourable finds that this appeal lacks merit and accordingly dismisses this appeal with costs. The judgment and orders of the lower court are confirmed accordingly.

15 5. Orders:

- This appeal lacks merit and is accordingly dismissed with costs to the respondent.
- The judgement and orders of the lower court are upheld.
- The costs of this appeal is awarded to the respondent.

20 I so order.



.....
Hon. Justice Dr Henry Peter Adonyo

Judge

21st March 2023

