

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 55 OF 2014

- 1. NYANZI EVARISTO ::: APPELLANTS**
- 2. KIMERA AUGUSTINE**
- 3. CHRISTINE NALONGO**

VERSUS

MUKASA SILVER ::: RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Nakawa in High Court Civil Appeal No. 76 of 2010 by Hon. Justice Musalu Musene, dated 7th February 2010)

CORAM: HON. JUSTICE ELDAD MWANGUSYA, JA

HON.JUSTICE RUBBY AWERI OPIO.JA,

HON. JUSTICE RICHARD BUTEERA, JA

JUDGMENT

This is a second appeal arising from the judgment of the High Court (Wilson Musalu Musene, J) wherein he dismissed the appellant’s appeal against the judgment of the Chief Magistrate’s Court of Nakawa at Nakawa in which the appellants were found liable for trespass on the land of the respondent and ordered to pay Ushs 6,000,000/= as damages. The facts as discerned from the plaint and evidence are that;

The respondent purchased two pieces of land situate at Ntinda Kulambiro, Kampala from one Mzee Edward Sekisambu, the father of the first appellant. The first piece of land was purchased in 1988 and the respondent constructed a house thereon. He later purchased the second piece of land in 1999 in order to expand his compound and completed payments five years later in 2004. The overall purchase price was Ushs 900,000/= (nine hundred thousand shillings only). By 2001, the respondent had constructed a fence to cover both pieces of land. The second and third appellants are mother and son who own land neighboring that of the appellant. The respondent alleged in both the plaint and his testimony that on 7th April 2007, the appellant with surveyors invaded his home and took measurements of it. In their written statement of defence (WSD) and defence testimony, the appellants denied the trespass and admitted that a piece of land was sold to the respondent by the father of the first appellant but averred that the respondent fenced off the access road adjacent to part of the land sold to him and it was agreed that surveyors be engaged for the purpose of demarcating the piece and thereafter

a certificate of title would be obtained. The first appellant emphasized that he entered the land with the surveyors with the permission of the respondent's wife who first consulted the respondent before the gate was opened for them but the first and second appellants did not enter the land at all. The trial Chief Magistrate concluded that by entering the respondent's land on 7th April 2007, the appellants committed trespass. The appellants' first appeal to the High Court was also dismissed. Being aggrieved by that decision, the appellants made a second appeal to this Court on the following grounds:

- 1. The learned Judge on appeal erred in law and fact when he held that the demarcations of the respondent's land by the surveyors amounted to trespass**

- 2. The learned Judge on appeal erred in law and fact when he confirmed the finding of the trial Court that the appellants trespassed on the land**
- 3. The learned Judge on appeal erred in law and fact when he held that the title of the land had passed to the respondent.**
- 4. The learned Judge on appeal erred in law and fact when he failed to reevaluate the evidence on the record, and came to the wrong conclusions.**

The appellants were represented by Mr. Dennis Ayigihugu Kwizera of Ayigihugu & Co. Advocates & Solicitors while the respondent was represented by Mr. Eric Kiingi of Eric Kiingi & Co. Advocates.

The parties filed written submissions and authorities which we shall consider in the resolution of this appeal. However, the appellants argued grounds one, two and four together and ground three separately. We shall adopt that order.

Grounds one, two and four

Counsel for the appellant submitted that while the learned appellate Judge correctly stated the role of the Court on first appeal to subject the evidence to exhaustive scrutiny, he did not correctly reevaluate it hence coming to the wrong conclusion that the survey and demarcation of land in 2007 when the respondent had purchased it in 1999 and completed payments in 2004, amounted to trespass. Counsel also submitted that the first appellate court took into account irrelevant considerations by holding that land issues in Uganda are sensitive and

Cannot be treated lightly as it was irrelevant to the case at hand. Needless to state, there was no evidence presented to Court to that effect. He further submitted that this Court should undertake the duty to reevaluate the evidence on record which the first appellate Court failed to do, particularly, the evidence of the respondent [PW1], Nabakoza Joyce [PW2] and that of the first appellant [DW1]. He argued that the evidence of PW3, PW4 be disregarded as it is of no significance since they were neither witnesses to the purchase of the land nor to the alleged trespass.

In response, counsel for the respondent submitted that the learned appellate Judge was alive to and complied with the duty of the first appellate court by properly re-evaluating, assessing and scrutinizing all evidence on the record by subjecting the same to a re-trial and thus made his own findings and conclusions. In doing so, the learned appellate Judge was alive to the dictates in the Supreme Court appeal case of **Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634 (SCU)**. Counsel argued that in holding that the demarcation of the respondent's land by the surveyors amounted to trespass, the learned Judge looked at and clearly appraised the evidence of the sales transaction manifest in Exhibits PI and P2 at pages 48, 49 and 50 of the record of proceedings. Counsel further submitted that the learned appellate Judge considered paragraphs 6, 7 and 8 of the appellant's WSD at pages 51-52 of the record of appeal in conjunction with evidence of the respondent and his witnesses that clearly refuted any evidence of an access road on the disputed path save for only a foot path that was actually outside the boundaries of the purchased land. The appellate Judge also considered the evidence-in-chief and subsequent cross-

examination where he clearly admitted that he and the 2nd and 3rd appellants never possessed any written instructions or authorization by way of power of attorney from the 1st appellant's father at the time they descended on the respondent's home with an unknown surveyor to cause boundary openings inside his home a succinct finding of the trial Judge.

Ground Three

Counsel for the appellant submitted that the learned appellate judge erred in concluding that title of the land had passed to the respondent when there was no evidence that the respondent had a certificate of title

¹⁰ and was the registered proprietor of the land allegedly trespassed on. The only evidence of ownership of the land that the respondent produced was a sale agreement [Exh PI]. Counsel argued that the only way title would pass to the respondent is under Section 92 (1) & (2) of the Registration of Titles Act, Cap 230 [RTA] which provides that upon registration of the transfer, the estate and interest of the proprietor as set forth in the instrument shall pass to the transferee. There is no further evidence that the 1st appellant's father executed transfer forms to pass title to him. Counsel prayed that this Court finds that the learned Judge erred in concluding that the title to the land had passed to the respondent.

Counsel for the respondent submitted that the arguments advanced by the appellants' counsel that title to the suit land had not passed to the respondent is on all fours erroneous, warped and a departure from the pleadings considering that it is new evidence that was smuggled into the submissions since it was not pleaded in the joint statement of defence [WSD] or in the first appellate court. He argued that this runs counter to **Rule 32 (2) of the Judicature (Court of Appeal) Rules, SI 13- 10** and the case of **LABANITO OKWAJJA V OKELLO, Civil Appeal No. 120 of 1978; [1985] HCB 84** by not having the discretion to hear additional

evidence. Counsel further submitted that there was overwhelming uncontroverted facts in paragraphs 6 and 8 of the joint WSD that the respondent was the lawful owner of the land and prayed therefore that this ground be dismissed for lack of merit.

The Role of Court and preliminary matters

It is imperative before proceeding to make our findings and resolve this appeal that the duty of this Court on a second appeal be stated.

The case of Kifamunte Henry V Uganda, SC (Cr) Appeal No 10 of 2007

exhaustively discussed the role of a second appellate⁴Court. It was held that:

"...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 it...On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles...”

The court went on to hold that:

¹¹ *This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law and fact raised in*

*any appeal. If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate court and create unnecessary uncertainty We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, Court of Appeal misapplied or failed to apply the principles set out in such decisions as **Pandya v R [1957] EA 336'***

Finally the Court also held that:

*“...on second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably; that it would not have come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact; this being a question of law: **R V Hassan bin Said (1942) 9 EACA 62”***

We shall keep the above principles in mind when addressing ourselves to the grounds of appeal in this matter.

Resolution of the appeal

We have considered the submissions of both Counsel and perused the Court record. The point of law to be determined here is whether the appellants committed an act of trespass to the respondent's land as decided by the Chief Magistrate's Court and the first appellate Court. **Micheal Jones, A Textbook on Torts, 8th Ed. (Oxford University Press), chapter 11 at pages 494 & 495**, defines trespass to land as consisting of an unauthorized interference with a person's possession of land.

Trespass to land is actionable *per se*, i.e., without proof of damage, and so it is no defence to plead that the trespass was trivial (though an unmeritorious claimant might be penalized in costs). The reason for this lies in the historical origins of the action as a means of maintaining the peace and settling boundary disputes (which today are more easily resolved by an action for a declaration)

However, the defence of justification once available to a defendant absolves him or her of liability.

Trespass consists of an unjustified entry on to land in the possession of 10 another. Therefore, there is no trespass where the entry was authorized. Justification can be either a permission granted by the claimant, or a right of entry conferred by law or by the claimant or his predecessor in title. (See: Micheal Jones, *A Textbook on Torts*, 8th Ed. [*supra*] at page 499).

The same author states further:-

“A license is a permission which renders lawful which would otherwise have been unlawful but without passing any interest in land.

A person who enters land under a license, whether express or implied is not a trespasser” (emphasis mine).

The learned authors in Winfield and Zolowicz on Tort 11th Edition
page 335 have the following definition:-

“Trespass to land is the name given to form of trespass which is constituted by unjustifiable interference with the possession of land”

On the matter of license, the learned authors state:-

“For the purpose of trespass the best definition of license is that given by Sir Fredrick Pollock. A license is “that consent where without passing any interest in the property to which it relates merely prevent the acts for where consent is given from being wrongful”

In clerk and Lind sell on Torts 12th Edition at page 1236, it is stated thus,

*“An entry upon the claimants land is **not trespass** if it is justifiable. Justification of the entry may be afforded either by operation of law or by the act of the claimant or his predecessors in title*

The courts in this country have applied the above definitions in a number of cases. In Justine E.M. Lutaya VS Stivling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002, Mulenga JSC (as he

then was) stated as follows:-

“Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interfere or pretends to interfere with another persons lawful possession of that land”.

Manyindo VP went a little further in Sheikah Muhamad Lubowa VS Kitara Enterprises, Civil Appeal No. 4 of 1987 where he stated thus:-

“In order to prove the alleged trespass it was incumbent on the appellant to prove that the disputed land belonged to him. That the respondent had entered upon that land and that entry was unlawful in that, it was made without his permission or that the respondent had no claim or right or interest in the land”

We have carefully perused the record and considered all the evidence of the different witnesses for the appellants and respondent. At the trial Court, the learned Chief Magistrate held that:

”should be noted that the land has been adjudged property of the plaintiff and actually in his possession on the evidence as recorded the defendants entry onto the plaintiffs land was in broad day and night An independent person PW2, Nabakooza, saw the defendants entering on the land. And indeed the plaintiff would have no reason to slap these allegations of trespass on the defendants...”

The learned Judge on appeal agreed with the findings of the Chief Magistrate that since the

respondent had purchased the land in 1999 and been in possession ever since, the appellants' purported demarcation eight years later amounted to trespass.

In determining this point, we find that the Chief Magistrate should have considered the testimony of PW2 in its entirety because her account of events is important as it corroborates the testimony of the appellant. She testified at page 60 of the record that:

".../ was present on the 7-04-07 when at around 11.00am. / was going to wash Mukasas clothes. / found the first and second defendants outside the gate. / by-passed them and entered the

premises of Mukasa. After a short while Nalongo, the third defendant joined the first and second defendants. Ten minutes later 3 men came and began to take measurements at the fence. They then asked Mrs. Mukasa, wife to the plaintiff where the marks where the marks were. She then made a phone call. / was instructed by her to open the gate for Nyanzi and / did so. Mrs. Mukasa gave him the phone to talk to somebody. At that time two men entered their premises and started to take measurements. After they all left, Nyanzi talked on the phone for sometime as the measurements

were being taken then gave the phone to Mrs. Mukasa.” (Emphasis added)

In our view, the evidence of PW2 indicates that the first appellant entered onto the respondent’s premises after being granted permission to do so by the respondent’s wife. At the time of the alleged trespass, the respondent was not at home and so, we find the evidence of PW2 very persuasive.

The evidence of PW2 supports the evidence of the 1st appellant who testifies as DW1.

DW1 in his testimony at page 68 of the record stated that:

i know Mukasa Silver, he bought land belonging to my father, Edward Sekisambu. My co,defendants are people my father also sold land to, / have never trespassed on land that Silver Mukasa bought from my father.

/ was sent by my father after he had agreed with Mukasa to measure the piece we had sold to him. When we reached mukase's gate with the surveyors, we knocked and the wife came out.

Before she opened, she rang her husband who gave her a go ahead. She opened for us, we surveyed the land (plot), Mukasa had bought from my father.

We took about two hours, the surveyors got what had been agreed upon in the presence of Mukasa s wife. The surveyors explained to

her my co-defendants never entered.....to it is not true that we trespassed on Mukasa s land”.

In cross examination, he stated as follow-line 29 to 34 of the record.

i maintain / have never trespassed on the plaintiffs land on 7/04/2007 at 11:00am, / was at the gate of Mukasa Silvers home. / gained access into the premises upon being allowed in. it is my father and the plaintiff who allowed me, my father had written to me the instructions to go to Silver Mukasa s home to survey the land he had sold to him, my father was sick and in the village in Luwero.

We had the consent of the plaintiff to open the boundaries, Mukasa Silver was not at home to survey off the portion of land he had bought, so my father could give him the certificate of title he was demanding.

After we had done the surveying/opening of the boundaries, we informed the plaintiffs wife who rejected it and that is where the disagreement started. We had no written authorization from the plaintiff to do the survey but he had asked for the title in writing”

The above evidence clearly shows that the 1st appellant was granted permission to enter the respondent’s land.

With regard to 2nd and 3rd the appellants, the evidence on record shows that they did not play an active role in the demarcations save for their presence at the respondent’s gate. The respondent himself stated at page 59 of the record that:

“/ left the first and second defendants outside the gate. / left my wife and children at home together with a worker called Nabakoza Joyce ...” (Emphasis added).

Nabakoza in her testimony also confirmed that the 2nd and 3rd appellants remained outside the gate and never gained entry to the respondent’s land.

We find that the second and third appellants did not commit any trespass whatsoever since there is no evidence on record to show that they gained entry, unlike the first appellant to the respondent’s land. They simply stayed outside the gate. The appeal against them is accordingly allowed.

It is also our finding that there was prior communication between the first appellant and the respondent through the telephone calls. The evidence shows that the appellants, particularly the first appellant waited outside the respondent’s gate for permission to gain entry into the respondent’s premises. The respondent’s wife instructed PW2 to open the gate after consulting the respondent on phone and even as the demarcation took place, the flow of communication was not broken. In fact, the first appellant, Nyanzi used the phone of the respondent’s wife the whole time. It is rather an exaggeration to state that the appellants attacked the respondent’s land with insults as described.

We hasten to add that it is not irregular to cause a survey on any land after purchase particularly, where disputes arise. Evidence shows that the first appellant’s father had planted vegetative boundary marks (locally called “*empaanyi*) on the disputed land which were fully grown and visible. Clearly, this is not the proper and scientific method of demarcating land and cannot be substituted for the services of a surveyor. Simply because the land has vegetative boundaries does not mean that the land cannot be surveyed to determine with precision the actual boundaries of the suit land. The objective of having the land surveyed was to ensure that the respondent¹₄ does not interfere with the access road that had

existed even before the purchase of the suit land and subsequent fencing. PW3, John Katerega aged 28 who has lived on the suit land since birth testified at page 62 of the record that:

“.../ did witness the creation of an access road through my fathers and late uncles’ land to Mukasas plot .This access road did exist although it seems the fence erected by the respondent seems to have interfered with it. Given our findings above, we find that had the learned appellate Judge properly re-evaluated

the evidence on record, he would have come to the conclusion that the first appellant’s entry onto the land was justified having obtained permission from the respondent’s wife. The appellant had a license from the respondent to enter the land. His entry was authorized. He could not be liable in trespass. We are surprised by the trial judge’s observation that there was no power of attorney from the 1st appellant’s father sending him to cause survey and demarcation of the land. We think with respect to the learned Judge that he was asking too much of the parties to the transaction. There is no legal requirement that for one to send surveyors to survey and demarcate land there must be powers of attorney.

In the instant case, the 1st appellant was instructed in writing by his father Edward Sekisambu to accompany the surveyors to do the demarcation. It was a family instruction from father to son in respect of a family issue. Mr. Sekisambu sent his son the 1st appellant, because he was sick. We therefore find that the demarcations of the respondent’s land by the surveyors did not amount to trespass. The survey and demarcations was necessary and done in the interest of both parties to the transactions.

Accordingly, we answer grounds 1, 2 and 4 in the affirmative and they succeed.

Ground 3:

Considering that this is a second appeal, this particular ground as framed seems to fall outside the requisite scope. We are unable to

discern any matter of law that this Court must consider. The appellant faults the first appellate Judge for having erred in law and fact when he held that the title of the land had passed to the respondent.

We cannot disturb those findings. We are inclined to agree with the Chief Magistrate and the learned appellate Judge that the rightful owner of the land in question is the respondent. Paragraph 4 of the appellants' joint WSD states:

“the defendants jointly and severally further deny and will aver that the plaintiff is not the lawful owner as the registered owner is Sekisambu Edward, father of defendant No. 1

There is undisputed evidence on record that the respondent purchased the land from the first appellant's father and completed payments. Simply because the respondent has not yet processed a certificate of title regarding the land in dispute into his names does not dispossess him of the land he purchased. In our view, what is important in this matter is not the passing of title but in whose possession was the land said to have been trespassed upon. It was the respondent who was said to be in possession of the suit land for several years.

In the final result, we find that the determination of this appeal lies on the 1st, 2nd and 4th grounds of appeal. Consequently having found that the appellants' entry upon the land in question was justified and also that the demarcation of the respondent's land by the surveyors were justified, we find that there was no trespass. We accordingly quash the decision of the learned chief magistrate and that of the 1st appellant court and enter judgment for the appellants. The appellants are awarded costs in both the lower courts and this court.

We so order

Dated at kampala this 20th day of October 2015

Hon. Mr . Justice Elidad Mwangusya,J.A

Hon. Mr. Justice Rubby Aweri Apio ,J.A

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Hon. Mr. Justice Richard Buteera, J.A

