THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0022-2013
(From Mbale Civil Suit No. 115-2004)

HAJJI ALI CHEBOI…….……. ……APPLICANT

VERSUS

MESULAMU KIROKO…….……..…..RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal from the Judgment and orders of **His Worship Singiza Douglas** Magistrate Grade I Mbale dated 13th February 2013.

The brief facts are that appellant was sued under c/s 115 of 2004 by the respondent in the Chief Magistrate's court; at Mbale; for vacant possession of a customary piece of land, damages for trespass and other relief. In the Court below it was the case for the Appellant that the land in dispute measuring about 3 acres was part of the 35 acres of land which he purchased from **Brigadier J. Oketta** in 1995.

It was the Respondent's case in the lower court that he inherited the land from his father in 1952; and that Appellant encroached on the land in 1997.

It was against that background that the learned Trial Magistrate found in favour of the Respondents and entered Judgment in his favour with costs of the suit. The appellant now appealed this decision, on the following grounds:

1. The Hon. Trial Magistrate erred in law and in fact occasioning a miscarriage of Justice when he failed to evaluate the evidence on record in favour of the Appellant.
2. The Hon. Trial Magistrate erred in law and in fact occasioning injustice when he rejected the Appellant's evidence which was truthful and live.
3. Hon. Trial Magistrate erred in law occasioning a miscarriage of justice when he held that the Appellant did not have a colour of right in the suit land.
4. The award of U.shs.15,000,000/= as general damages in the circumstances is excessive and the award of interest thereon is unwarranted.
5. The award of costs has caused damage to the Appellant.

The Appellant chose to argue grounds 1, 2, and 3 above together as one issue and Grounds 4 and 5 together as a second issue. The Respondents decided to argue the matter ground per ground as raised by the appellants. I will follow the method adopted by the Respondents, and resolve the grounds one by one as presented in the Memorandum of appeal.

The duty of a first appellate court has been clearly set out in a number of cases. In the case of ***PANDYA V. R (1957) EA 336***; it is the duty of a first appellate court to subject the evidence of the lower court to a fresh and exhaustive scrutiny and draw its own conclusions mindful of the fact that the trial court had the advantage of attending to the witnesses during the trial. The case of ***PETERS V. SUNDAY POST (1958) EA 424***, emphasizes the need for exercising caution, while reviewing

the evidence as to appreciate its weight and to reach rightful conclusions therefrom.

With the above statements of the law and practice in mind I now turn to the determination of the issues arising from the grounds of appeal as stated.

GROUND 1 AND GROUND 2

The two grounds raise the issue whether the learned Magistrate erred in law and in fact occasioning a miscarriage of justice when he failed to evaluate the evidence on record in favour of the appellant.

Appellant in submission referred this court to page 3 of the Judgment where court considered 2 issues in the case. The first was "to whom does the suit land belong?" The second was on the Remedies available. Appellants argued that well as the respondents called three witnesses including himself, to prove his claim to the land, the learned Magistrate reached erroneous conclusions on the evidence. Appellants argued that the trial Magistrate should have found the evidence of **Oketta (DW.4)** more truthful as compared to Respondent. DW.4 being a senior Army officer and MP at time of testimony, it was argued, his testimony ought to have been more credible than that of Respondent. Appellant also faulted the findings of the trial court regarding evidence of **Masaba** and invited this court to find that the findings by Trial Magistrate were erroneous.

Another attack of the learned trial Magistrate's findings was that although he visited the locus in quo, he did not evaluate the evidence regarding the acreage. That while in the plant the Respondent is claiming for recovery of 10 acres in his

evidence in chief he claims that the disputed land is 19 acres yet the appellant testified that he purchased 35 acres out of which only 3 acres are in dispute. Appellant argues that it is not clear if the Judgment is for 10 acres, 19 acres or 3 acres. Appellant states that this shows that the learned trial Magistrate failed to properly evaluate the evidence if at all.

Respondents in submission addressed court on the above under their submission on Grounds 1 and 2. The Respondents point out that the learned Trial Magistrate exhaustively evaluated the evidence before him, assessed the testimonies of the witnesses, the exhibits and found as he did. They referred court to the authority of ***Okethi v. R (1965) E.A. 555***.

I have gone through evidence on record. In the lower court the Respondent (plaintiff) called three witnesses.

PW.1 Mesulamu Kiroko-79 years told court he sued the defendant for trespass onto his land. He stated that (on page 4 of proceedings),

> "*I went with Fenekansi and inspected the land. I found when the defendant had ploughed 10 acres. The whole land is 19 acres…..*"

During cross examination at page 5 the witness states thus:

> "*I don't know Brigadier Oketa. The defendant has been using the suit land right from 1997. Oketa has never used the suit land….. I have never hired the suit land to Oketa*."

PW.2 Phenekansi Kutosi (69) told court that in 1985 **Mr. Kiroko** (plaintiff) left him in custody of the suit land. In 1997 **Cheboi** (respondent) encroached and ploughed the land. He told court that the land at the time of his custody was around 19 acres but so far 10 acres were ploughed by **Cheboi**.

PW.3 Natiko Mukwana (89) told court that as a committee member, inspected the land and stated on page 8 as follows;

> "*There were 280 paces on both sides the other side was 60 yards. Cheboi by that time had ploughed the land but not planted anything. We only measured the ploughed land….*"

In defence five witnesses testified. **DW.1- Hajji Ali Cheboi** told court he bought land from **Brigadier J. Oketta** in 1995; and an agreement signed. He stated on page 10 of the record that **Oketta** told him he acquired the land from **Kiroko** (Respondent) and others he couldn't tell. He further testified the agreement in respect of **Kiroko** was in possession of **Masaba** who swore an affidavit on 25.10.2002 that he had it. In cross-examination the witness told court that the original agreement of purchase of the land from **Oketta** disappeared (see page 12 of record).

DW.2Mohamed Musene (40) told court that defendant bought land from Julius **Oketta**; the very land sold by **Kiroko** (RCs) to **Oketta** in 1990. He however during cross examination on (page 14) states;

> "*I was not around when Kiroko was selling land to Oketa. Oketa just told me about the transaction…..I was present when Cheboi bought land from Oketa……*"

DW.3 Wafula Stephen, stated that he knows that **Cheboi** bought land from **Oketta** in 1995. On page 16, he confirmed that;

> " *Oketa bought the land in dispute from Kiroko. I saw Oketa and Kiroko inspecting the land……I remained in my own land and showed them the boundary……I came to know Oketa had bought the land after he started using it……*"

During cross examination he stated;

> "*Cheboi came and told us that he had bought the land and he even inspected it…..I was not present at the time Mesulamu was being paid by Oketa….. The land in dispute was Mesulamu Kiroko's father's land…..Oketa told me that he had bought the land….*"

DW.4 Dr. Julius Oketta (55) MP representing UPDF, Management Science Consultant stated that **Phenekansi** is known to him as a caretaker of the suit land there. He stated in examination in chief;

> "*I do not have a copy of the agreement. By then I was basing in Karamoja. I handed over my documents to the late Captain Masaba. I did not get the documents from him….I did not remain with a copy of the agreement…..I do not know the exact location of the suit land…. I cannot remember exact acreage that I sold to the defendant. When I bought land from the plaintiff I do not know how much he owned in the area…..*"

On page 19 he states;

> "*It is true that of all the land I sold the defendant I do not have any documents in court to show that the land belonged to me before I sold it to him. I do not have the documents but those that I sold to have documentation. I did not survey my land. The agricultural staff at the veterinary offices helped me to measure the land…..*"

DW.5: Wamalelo Damasco, (65), stated that he knows that **Oketta** got three acres from **Kiroko** which he later sold to **Cheboi**.

In his Judgment the learned trial Magistrate having reviewed the evidence before him, concludes thus at page 3;

> "*I have considered the plaintiff's evidence and the defendant's documents. I also do recall that when I visited the locus, the disputed land was clearly pointed out to the court and the witnesses who testified in court reiterated their views. I also observed that there was recent structures at the suit land and evidence of freshly ploughed land was visible. I have however been unable to establish how defendant came to lay claim on the suit land*
>
> *In my view, this case is a clear case of sale of land by agreement. Either an agreement between the plaintiff and* ***Oketta*** *exists or it does not exist……*"

Having carefully gone through the above evidence, it is my finding that the Magistrate's evaluation of the evidence on record was correct. The case depended on the evidence of PW.1 (Respondent) and **(DW.4) Oketta**. The title to the land by the Respondent is customary and not disputed by **DW.4 (Oketta)** who claims to have sold to appellant.

DW.4 Oketta's evidence that he bought the land from Respondent was denied. The only way to avert that denial would be the production of direct evidence of a sale agreement, which unfortunately does not exist on record. The learned trial Magistrate therefore was right to observe on page 3 of his Judgment that there was no evidence on record that sufficiently explains how **Oketta** got his land and therefore how appellant (defendants in the lower court) got the Title to Respondent's land.

The fact that DW.4 is a Member of Parliament and a consultant, was a matter I believe the trial Magistrate took cognisance of, but still reached the conclusion that he could not believe him as truthful. The learned trial Magistrate, had chance to observe this witness in court, unlike the appellate court which had no chance so to do.

I have also carefully reviewed the testimonies of all witnesses and have found that there is no discrepancy worth, enough weight to lead me to find that the acreage the Respondent is suing for is not clear. The 10 acres that were mentioned by the Respondent and his witnesses have been shown to be the area the Appellant had cultivated out of the 19 acres which the Respondent informed court belonged to him. Respondent therefore went to court for 10 acres as in the plaint. Respondent

at locus showed where this land is situated and the Magistrate carefully took note of all this in his Judgment as I quoted him at page 3 of his Judgment. I am therefore of the considered opinion that there was no failure by the learned Magistrate to evaluate the available evidence on this matter.

From the extracts of evidence in chief and cross examinations of the witnesses in court, as shown in this Judgment, am of the considered opinion that Judging from the witnesses, and evidence of documents availed to court during the trial, it is my finding that the learned trial Magistrate properly evaluated the evidence on record and rightly held for the respondent.
I find Ground 1 and Ground 2 not proved against the Respondent.

GROUND 3:
Whether the Learned Magistrate erred in law when he held that appellant did not have a colour of right in the suit land.
As already shown from the extracts of evidence reviewed and from the submissions the evidence does not support the claims propagated by appellant on this issue. Appellant claims he had purchased the land from **Brigadier Oketta** in 1995. He never made any agreement with **Brig Oketta**, but with Watson in the presence of **Masaba** who kept the agreement.

The Respondent denied having sold the land to **Oketta**. He stated he left it to a caretaker **Kutosi**, who kept it until 1997 when he saw respondent cultivating the suit land.

The question mark here is whether **Oketta** bought the land from the Respondent, for him to be able to sale to appellant. This question is terminated in the negative because Respondent was able to prove in the lower court that he has never sold the land. He left the land to a caretaker. He does not know **Oketta**. **Oketta** did not prove his title to the land in court. As observed by the learned trial Magistrate, if an agreement of sale had been provided, this could have eased the work of court. However in absence of the sale agreement; the witnesses in court, offered oral evidence which was not conclusive on this matter. On a balance of probability, the court chose to believe the Respondent, and in my view the evidence on record supports this finding. It is on record that the land is customary, and used to belong to Respondent's father. The title to this land by Respondent is traceable as against the appellant whose title hangs in the air. It is my finding that this ground fails, as the learned trial Magistrate was right to hold that the appellant had no colour of right in the suit land.

Ground 4:

Whether the award of Ushs. 15,000,000/= as general damages in the circumstances is excessive, and the award of interest thereon is unwarranted.

In submission appellant argued that as per ***KHALID WALUSIMBI V. JAMIL KAAYA (1988-90) HCB 149***, per Justice C.K. Byamugisha,

> " *general damages are at large and quantum is within the discretion of the court*."

He argued that an award of 15,000,000/= is excessive.

Appellant prayed that the award be quashed or in the alternative a sum of 2,000,000/= (two million) would be reasonable.

I agree with the principle of the law as stated in the above case.

However Respondents in their submissions also referred court to several authorities in which the law governing award of damages were considered. Court was reminded through the case of ***VISRAM KARSAN V. BHATT (1965) E.A. 789***, that the aim of general damages is to compensate the plaintiff for the loss suffered as a result of the tortuous acts committed against him.

I have taken note of the fact that this case has had a long history, and the learned trial Magistrate was hearing it as a retrial. The plaintiff therefore needed to be adequately compensated for the loss inflicted upon him by defendants. It is true that courts will only interfere with an award of general damages where the award "was illegal, or based on a wrong principle or where it is manifestly excessive or inordinately low." (***Paul Mugalu v. Majeri Nabukenya CACA.19/03***).

The import of the above holding is that the award of damages is done basing on some principle or formula, so that court does not award an excessively high amount, or an inordinately low amount.

In reaching the amount above, the learned trial Magistrate, held at page 4 of his judgment,

> "*the plaintiff is awarded Ug. Shs. 15,000,000/= in general damages at the court rate of interest from the date of Judgment until payment in full*."

Definitely the learned trial Magistrate did not indicate which principle he followed to believe that a figure of 15,000,000/= is reasonable. Given the fact that there is nothing on record showing the extent of loss or damage occasioned by the

respondents, save cultivating the land, this court finds no merit upon which this award was based.

From 1995 when the trespass began to 2013 when the case was determined is a period of 18 years. If we approximately assess that out of 10 acres, each acre was producing for him 50,000/= per year, then each year he would have earned shs.500,000/=. For 18 years, he would have earned (500,000 x 18) = 9,000,000/= (Nine Million shillings).

I will therefore reduce the award of general damages from the shs. 15,000,000 (Fifteen millions) to shs. 9,000,000/= (Nine Millions) only. The ground therefore succeeds in part as above.

GROUND 5:

Whether the award of costs caused damage to the Appellant.

Appellant stated in the submission that the award of costs caused him damage. He didn't elaborate. However the Respondent in submission referred court to a number of decided cases re-emphasizing the law on awards of costs. I agree with Respondents on this ground that courts have held that successful litigants ought to be fairly reimbursed for costs he has had to incur in the case. The case of **Makula International Ltd v. Cardinal Nsubuga and Another 1982 HCB 11**.

In the Judgment, the learned trial Magistrate merely awarded costs of the suit. This appellate court is not dealing with "taxed costs" so as to assess if they are excessive so as to cause damage to appellant. Every successful litigant is entitled

to costs. The learned trial Magistrate did not go wrong in awarding the costs. This ground is redundant and must fail.

Having found as above, save the reduced damages in Ground4, this appeal fails on all grounds and is hereby dismissed with costs as prayed.

Henry I. Kawesa

JUDGE

14.01.2014