

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CIVIL APPEAL NO. 0001 OF 2019

(Arising from Busia Chief Magistrate's Court Civil Suit No. 06 of 2018)

1. LUHONI ANDREW
2. ROSELINE LUHONI } APPELLANTS

VERSUS

1. THE REGISTERED TRUSTEES
ARCHDIOCESE OF TORORO
2. THE MANAGEMENT COMMITTEE
SIBIRISIYE PRIMARY SCHOOL } RESPONDENTS

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] This is an appeal from the judgment and decree of the Magistrate Grade 1 Busia in **Busia Chief Magistrate's Court Civil Suit No. 06 of 2007** dated the 20th day of November, 2018.
- [2] The background of the appeal is as follows:
The suit in the lower court was initially filed in the District Land Tribunal of Busia at Busia in 2003. Upon the abolition and or suspension of the Land Tribunals vide the Chief Justice **Practice Direction No. 1 of 2006**, the suit was taken over by the Magistrate's Court in 2007.
- [3] The facts of the appeal are that in between the 16th of October, 2002 and 11th December, 2002, the Plaintiffs/Claimants purchased two parcels of land neighboring **Lumino Mission** and later surveyed it purportedly to demarcate the boundaries of the **Lumino Mill Hill Mission**. They took possession and embarked on transporting building materials to the new

site to construct a block for classrooms. The 2nd Defendant pupils dug and turned the Plaintiffs' suit portion of land into a school garden. The Plaintiffs filed a suit for recovery of the suit land and sought a declaration that they are lawful owners of the suit property, an eviction order against the 1st Defendant, permanent injunction, general damages and costs of the suit.

- [4] In their written statement of defence, the Defendants denied the Plaintiffs' allegations and averred that the land in issue (suit land) which falls between **Lumino Sub county** and the **Defendants** has since 1936 been under their possession and utilization as a school garden, brick project, houses for the Defendant teachers, training Demonstration (T.D.Ms) and toilets.
- [5] The Defendants filed a counterclaim alleging fraud and sought declaration orders that the suit land belonged to the Defendants and for an order to remove the Plaintiffs' mark stones, permanent injunction and general damages.
- [6] The trial Magistrate heard the suit and concluded that the Plaintiffs failed to prove that **Abangi** and **Lumala** who sold the suit land to the Plaintiffs had any **interest** capable of being passed to the Plaintiffs. The Plaintiffs claim was dismissed with costs and the counterclaim was allowed, that the suit land was for the 1st Defendant, with orders that the mark stones placed by the Plaintiffs be removed and awarded the Defendants/counterclaimants general damages of shs. 5,000,000/- for inconveniences suffered.
- [7] The Plaintiffs/Appellants were dissatisfied/aggrieved by the judgment and the decree of the learned trial Magistrate and filed the present

appeal on the following grounds as contained in the Memorandum of appeal:

1. *The learned trial Magistrate erred in dismissing the Plaintiffs/Appellants suit and allowing the Defendants/Respondents' counterclaim.*
2. *The learned trial Magistrate erred in failing to properly evaluate the Plaintiffs' evidence on court record while concentrating her entire judgment on the Defendants/Respondents' evidence.*
3. *The learned trial Magistrate erred and misdirected her mind in considering partial evidence while ignoring others, thereby arrived at a wrong decision.*
4. *The learned trial Magistrate erred in giving partial judgment touching only on one aspect of the Plaintiffs' claim.*
5. *The learned trial Magistrate erred in failing to relate the evidence adduced by the parties in court to her observations at locus in quo.*
6. *The learned Magistrate erred in awarding the sum of Ug. Shs. 5,000,000/- to the Respondents as being compensation for inconveniences and anguish suffered by the Defendants/Respondents.*

Counsel legal representation:

- [8] On appeal, the Appellants were represented by **Counsel Lebu William of Lebu & Associates Advocates, Busia**, while the Respondents were represented by **Counsel P.J. Nagemi of Nagemi & Co. Advocates, Kampala**. Both Counsel gave oral submissions in court for consideration by this court on appeal.

Duty of the Appellate court:

[9] It is well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. In case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses;
FR. NARSENSIO BEGUMISA & 3 ORS. VS. ERIC KIBEBAGA S.C.C.A NO. 17 OF 2002.

[10] The above principle will guide this court in the determination of the grounds of appeal. As correctly pointed out by **Counsel Nagemi** for the Respondents, grounds 1 - 5 are interrelated, they revolve around how the trial Magistrate evaluated and assessed the evidence before her and therefore ought to be disposed of together. I shall do so. It is only ground 6 that shall be dealt separately.

Grounds 1 - 5:

[11] Counsel for the Appellants submitted and argued that the trial Magistrate failed to properly evaluate the Plaintiffs' evidence on record and only concentrated on the Defendants' case. That the Plaintiffs' case is to the effect that they purchased 2 separate parcels of land adjacent to each other from 2 separate individuals.

1. The 1st piece of land was purchased on 16th October, 2002 from **Okumu Robert Abangi** (P. Exh. I).
2. The 2nd piece was purchased on 11th December, 2002 from **Ouma James Lumala** (P. Exh. II).

That there is an alternative piece of land purchased from **Ojambo Olunga** which was meant to serve as the road and it was purchased after the Defendants had already trespassed on the suit land and this parcel of land is not in dispute.

- [12] Counsel for the Appellants submitted further that when the trespass occurred, the parties with the help of the area L.Cs and police (**P. Exhs. 9 and 10**) opened and ascertained the boundaries of the Church Missionland. However, that after the establishment of the boundaries, the 1st Defendant trespassed into **1 acre** of the land which was first purchased by the Plaintiffs by cutting down and uprooting trees thereon as reflected in the photos on record.
- [13] That the Plaintiffs built a school in the **1 acre** of the 2nd piece of land they purchased and this is the one being unlawfully occupied by the school as a school garden. According to Counsel, the 2nd Defendant school which is Mission School on a Mission land, claimed that by its own, it got land from **Lumino Sub county**, a fact that the Defendants never pleaded thus, they departed from their pleadings. That there is no evidence from the Sub county to support the 2nd Defendants' claim.
- [14] The 2nd argument by Counsel for the Appellants is that the trial Magistrate gave partial judgment whereby she did not touch the **1st parcel** of the land which was trespassed upon by the 1st Defendant. She only directed her mind on the **2nd parcel** that is being claimed by the 2nd Defendant purportedly got from **Lumino Sub county**. Thirdly, that the trial Magistrate, though she visited locus, her judgment appear not to have taken into account what was verified at locus.
- [15] Lastly, Counsel for the Appellant submitted that the award of shs. 5,000,000/- as compensation for inconvenience and anguish suffered is erroneous because the Respondents were and have remained on the disputed land.
- [16] On the other hand, **Counsel Nagemi** for the Respondents opposed the appeal, arguing that the trial Magistrate evaluated the evidence of the

Plaintiffs' witnesses; **PW₁ – PW₄** and came to a finding that the Plaintiffs had failed to prove ownership of the land. That upon review of the defence case; **DW₁, DW₃, DW₅ and DW₆**, the trial Magistrate found their evidence cogent and concluded that the Defendants/Respondents were not trespassers since they could not be said to be trespassers on their own land.

[17] As regards what comprised the suit land, **Counsel Nagemi** submitted that it was between the registered land of the 1st Respondent/Defendant Catholic Mission and the unregistered land of the Sub county and that this was clearly shown to court while at locus. That therefore court was very much alive to all the evidence on record, there is no partial judgment, and court had no option but to dismiss the suit.

[18] As regards the counterclaim, **Counsel Nagemi** argued that the trial Magistrate did relate the evidence as obtained at locus and reached a finding that the Respondents/Defendants were not trespassers as they were owners of the suit land. She awarded them damages with reasons. He prayed that this appeal be dismissed with costs.

Consideration for the appeal:

[19] During the trial of the suit, the following issues were proposed by Counsel for the Defendants and were adopted by court during the determination of the suit;

1. Whether the suit land belongs to the Plaintiffs.
2. If so, whether the Defendants jointly or severally trespassed on the Plaintiffs' land.
3. Remedies available to the parties.

1st issue: Whether the suit land belongs to the Plaintiffs.

[20] During trial in the Plaintiffs' case, the Plaintiffs did not describe and define what the disputed land was. The Plaintiffs who are husband and wife and proprietors of **Ebenezer Progressive School** merely testified on how they purchased 2 pieces of land and proceeded as if the 2 pieces of land comprised of the suit land. The 2 pieces of land were purchased as follows:

1. The first piece of land measuring 2 acres was purchased from a one **Okumu Robert Abangi** (PW₃) as per the purchased agreement dated 16th October, 2002 (**P. Exh.1**).
2. The second piece of land was purchased from a one **Ouma Lumala James**, its size was not disclosed but it also borders that of the Defendants. The Plaintiffs' purchase agreement dated 11th December, 2002 is **P. Exh.2**.

[21] It is Plaintiffs' case that upon purchase of the 2 pieces of land that comprise the suit land, they started carrying/ferrying building materials to the land for construction of the school but the pupils of the 2nd Defendant Primary School were ordered by the School administration to cultivate and plant sweet potatoes on the land thereby blocking the road they had opened to their new building site thus the trespass complained about in the suit.

[22] As a result of the trespass by blockage of the road, the Plaintiffs purchased another piece of land on 07th July, 2004 from **Ojambo Olunga** for use as a road. Counsel for the Appellants however submitted that this "**alternative piece of land**" for the road which they are now using to access their land/new site for the school is not in dispute because it was purchased after the Defendants had already trespassed on their land.

- [23] The Plaintiffs' case is that the total acreage of the suit land is about **5 acres**. The 1st Plaintiff/PW₁ testified that the Defendants trespassed on an area of about **2½ acres** and the Plaintiffs were left with another **2½ acres** where the **Ebenezer Progressive S. S.** is established.
- [24] As can be seen from the foregoing, the Plaintiffs clearly purchased 2 pieces of land but in their evidence, they did not lay a distinction between the trespass committed by the 1st Defendant and trespass committed by the 2nd Defendant and on which piece of land. As a result, while determining the suit, the trial Magistrate also never made a distinction between the trespass on the 1st piece of land and trespass on the 2nd piece of land hence the criticism by Counsel for the Appellants that she did not properly appreciate the facts. What is however apparent from the Plaintiffs' evidence is that the 2nd Defendant's pupils are the ones who blocked the Plaintiffs' roads for carriage of building materials. No evidence was led as regards the conduct or act of the 1st Defendant that amounted to trespass.
- [25] It was however the Defendants' case generally that the 1st Defendant's land is surveyed and registered. The 2nd Defendant Primary School is a Catholic Church found School of the 1st Defendant Diocese established in 1916 though now, it has been taken over by Government. These are facts that were not disputed by the Plaintiffs because, even the Plaintiffs themselves studied in this 1st Defendant's Primary School.
- [26] **Apollo Hasaka** (DW₁), the Chairman Parents Teachers Association (P.T.A) and an old pupil of the 2nd Defendant's Primary School, 1970 - 1978, **Damiano Ouma** (DW₂), once a member of the 2nd Defendant's School Committee in the 1960s and also an old pupil of the School from 1937 - 1939 and **Onyango Donatu** (DW₃), a retired civil servant; all testified that the 2nd Defendant Primary School sits partly on the 1st Defendant's

registered land and partly on the suit portion of unregistered land that initially belonged to **Lumino Sub county** but was offered to the 2nd Defendant's Primary School in 1936. That the land is between the **Lumino Sub county** and the 2nd Defendant Primary School. This evidence was further corroborated by the evidence of **Fr. Centurion Olaboro** (DW₄), the Justice and Peace Commissioner and officer in charge of Church land and property of the Archdiocese, Tororo.

[27] **James Nagafa** (DW₅) in particular testified that as the Sub county Chairperson, knew the state of affairs of the Sub county. He explained that the Sub county owned unsurveyed land and that in 1936, it offered a piece of land to the 2nd Defendant Primary School. **The School utilized the land for cultivation, construction of quarters, latrines and in the 1990s they constructed TDMS (Teacher Development Management Service) buildings, planted mvule trees and gardens which were still there during the trial of the suit. It is fenced with barbed wire.** In cross examination, he explained that the disputed suit land is between the 2nd Defendant's Primary School and the **Sub county (Lumino)** and it is an unsurveyed portion of land.

[28] DW₅'s evidence was also supported and corroborated by the evidence of both DW₃ and DW₄.

[29] **Onyango Donatu Sikosima** (DW₃) also testified that the suit portion of land is between the **Lumino Sub county and the Plaintiffs' Ebenezer Progressive S. S.** He studied in the 2nd Defendant's Primary School which sits on the Lumino Sub county land, from 1953 - 1958 (P.1 - P.7) and came back as a teacher from 1966 - 2001. The suit land was

given to the school by the **Lumino Sub-county** in 1936 and the school used the land since 1953 **for cultivation/school garden and there is a foundation of the teachers block, a foundation of the**

toilets/pit latrines, houses of TDMS, a project set up in 1993. That, by the time the Government set up the above TDMS project, nobody came to complain or claim the land in dispute.

[30] **Fr. Centurion Olaboro** (DW₄) also testified to the same effect as DW₃ that where the disputed land is, **there was TDMS buildings which were built in 1988 or 1989 and have, as of now, been abandoned.**

[31] The Defendants' evidence appeared consistent and emphatic as to what is the exact portion of land that was in dispute unlike the plaintiffs' evidence which was not specific. Again, the Defendants' witnesses i.e. **Apollo Hasaka** (DW₁), **Domiano Ouma** (DW₂) and **Onyango Donatu** (DW₃) all described the suit land to be **2¹/₂ acres**, the same acreage the Plaintiffs claim that the Defendants have trespassed upon.

[32] From the foregoing, it's pretty clear to me that the suit land is that portion of land located between the Sub county and the 2nd Defendant's Primary School. It is unsurveyed and is comprised of the **school garden, abandoned old TDMS buildings, house quarters and latrines/toilets.** At locus, the trial Magistrate was under duty to establish and verify whether indeed, the disputed portion of land comprised the said features.

[33] In **KWEBIIHA EMMANUEL & ANOR VS RWANGA FURUJENSIO & 2 ORS, H.C.C. APPEAL NO.21/2011(MASINDI)** Court observed that;

"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 graves..., to confirm boundaries and neighbors 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.”

See also **JOHN SIWA BONIN VS JOHN ARAP KISSA H.C.C.S. NO.058/2007 and DE SOUZA VS. UGANDA [1967] E.A 78.**

[34] In this case, the trial Magistrate visited locus in quo, made her findings and drew the sketch of the disputed land. Though the sketch does not appear in the Appeal record of proceedings, it is available in the record below. She observed and noted the TDMS blocks, latrines, school garden, school forest, debris of an old block and school bathrooms are all in the fenced up disputed portion of land. In the south of the disputed portion, there is the **Sub county land** and on the east, there is the Plaintiffs' **Ebenezer School**.

[35] It is therefore not true as Counsel for the Appellants submitted in rejoinder that there was no sketch of the locus to show what was captured. The trial Magistrate at **page 5 of her judgment** was able to relate the evidence as obtained at locus with that of **DW₂** and **DW₃** and rightly came to the conclusion that the Plaintiffs failed to prove ownership of the suit land and instead, the 1st Defendant established ownership and possession of the disputed portion of land. She found the 1st issue in the negative but in favour of the Defendants as per the counterclaim.

[36] As I already observed, the Plaintiffs did not lead evidence laying a distinction between the trespass on the 1st parcel of the land and trespass on the 2nd parcel of the land so as for the trial Magistrate to tackle each parcel separately as Counsel for the Appellants wanted it. In any case, there is no evidence whatsoever from the Plaintiffs that the 1st Defendant whose land is undisputedly surveyed and

registered committed any act of trespass unto the disputed portion of land.

[37] Secondly, the Plaintiffs' claim that the Defendants knew very well that the Plaintiffs purchased the suit property from **Okumu Robert** and **Ouma Lumala** because this was done in the presence of the Defendants' representative **Wandera Vincent**, does not help the Plaintiffs. **Robert Abangi** (PW₃) stated that **Wandera Vincent** was a teacher but the Defendants denied knowledge of him as so and being their representative. Indeed, on the purchase agreements **P. Exhs.1&2**, he did not endorse as a representative of the Defendants but as General Secretary Bulangi village. There is therefore no evidence that **Wandera Vincent** was ever authorized to or ever represented the Defendants on any forum regarding the suit land.

[38] As regards the complaint by counsel for the Appellants that the 2nd defendant never pleaded having acquired the portion of the suit land from **Lumino Sub county** and that therefore, evidence to that effect should be rejected, in **DHANGI RANJI VS. RAMBHAI & CO. (U) LTD [1970] E.A. 515 (CA-U)**, it was held that judgment on unpleaded issue may stand if no prejudice is caused and if the issue is argued.

[39] In the instant case, the issue in the lower court was whether the land belonged to the plaintiffs. The 2nd defendant defended itself that the suit portion of land did not belong to the plaintiffs but to the 2nd defendant by virtue of the historical offer from **Lumino Sub county**. The plaintiffs were at liberty to destroy the defendant's defence by proving otherwise and they failed to do so. Since the issue was well canvassed by both parties, I find no prejudice caused to the plaintiffs who bore the burden to prove their case.

- [40] In the premises, all the grounds of appeal; 1 - 5 are found to lack merit and they accordingly fail.
- [41] As regards the award of shs. 5,000,000/= as general damages for inconvenience the Defendants/counterclaimants suffered, I do agree with Counsel for the Appellants that no evidence is available on record to justify any award of damages. The entry of the Plaintiffs unto the suit land was to carry out the survey for purposes of ascertaining the boundaries of the 2 pieces of land they had purchased from **Okumu Robert Abangi** and **Ouma Lumala James**. When a conflict arose, the Plaintiffs halted the exercise, the 2nd Defendant continued with utilization of the land and later the Plaintiff proceeded to file the suit out of which this appeal arises from. Besides, **Fr. Centurion Olaboro** (DW₄) was aware of the survey exercise by virtue of letters **P. Exhs. 5** and **8** and by the fact that he availed them the survey map of the Mission land to enable them appropriately do the survey.
- [42] In the premises, I find the 6th ground of appeal having merit and it is accordingly allowed.
- [43] On the whole however, the appeal is generally found without merit. It is accordingly dismissed with costs save for orders of the award of shs. 5,000,000/= as general damages for inconveniences which is accordingly set aside.

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Byaruhanga Jesse Rugyema

JUDGE

13th/09/2021.