

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT NAKAWA

CIVIL APPEAL NO. 76 OF 2010

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

VERSUS

MUKASA SILVER ===== RESPONDENT

JUDGMENT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

Nyanzi Evaristo, Kimera Augustine and Christine Nalongo Appealed to this Court against the Judgment and Decree of His Worship Ssejemba Deo dated 30/7/2007 in Civil Suit No. 074/2007 on the following grounds:-

1. That the learned Trial Magistrate erred in law and fact when he held that Defendants (Appellants) were trespassers thereby entering Judgment against Appellants.
2. That the trial Magistrate erred in law and fact when she took into account extraneous matters in dismissing Appellant's Defence.
3. That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence thereby occasioning a miscarriage of justice.

When the Appeal came up for hearing the Advocates for the parties were directed to file written submissions which are on record.

The Appellants were represented by M/S Ayigihugu & Co. Advocates, while the Respondent, Mukasa Silver was represented by M/S Eric Kiyingi & Co. Advocates.

The brief facts of the case were that sometime in the year 1999, the Respondent purchased land located at Kulambiro village, Kigoowa II Parish Zone in Kampala measuring approximately 0.06 acres from one **Ssekisambu Edward**, the father of the 1st Appellant. The Respondent paid for the said land in instalments and completed payment on 30/03/2004 as per exhibit P.1. Then in April 2007, the Appellants who never transacted any business with the Respondent, descended upon his home and forcefully opened up boundaries on the said land, attempting to create an access road where there was none. A deed print was consequently processed by the Appellants in the land office purporting the existence of the said road hence the filing of Civil Suit No. 74 of 2007 against the Appellants now for trespass.

Before considering the merits of the Appeal, Counsel for the Respondent raised Preliminary Objections or points with regard to the Limitation period and extraction of Order instead of a Decree. However, and with the input of Counsel for the Respondent, I discovered that the same Preliminary Points of law had been raised before my predecessor, Mrs. Faith Mwendha, J (as she then was). Then objections were overruled and there was no Appeal against the decision of the Honourable Judge. This Court cannot therefore entertain the same a Preliminary Points of Law. And a warning is given out to such Advocates who are bend on misleading this Court on the erroneous assumption that we don't peruse the entire record.

Be that as it may, I shall consider the merits of the Appeal. Needless to emphasise, it is the duty of this Court in entertaining the Appeal to subject the evidence to exhaustive scrutiny in light of the grounds of Appeal. There are a host of authorities including **D.R. Pandya vs. Republic [1957] E.A 366** and **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**.

Counsel for the Appellants chose to urge the three grounds jointly in his submissions.

He submitted that whereas trespass is an affront to possession as stated by the trial Magistrate, which possession was with the Respondent, that the said definition was narrow. Counsel for the Applicant quoted the learned **Authors Winfield and Jolowicz on Tort, 9th Edition page 36** where it is stated that trespass to land was constituted by the unjustifiable interference with

possession of land. So he reiterated that there could be justifiable interference with possession of land as was the position in the present Appeal. Counsel for the Appellants made reference to the Respondent's testimony in the lower court (PW1) and concluded that the testimony of the Respondent is that he did not witness the alleged trespass since he left Appellants No. 2 and 3 outside his gate. He added that it was only the 1st Appellant Nyanzi and two men who entered the premises after the gate was opened for them by witness PW2 on the instructions of the Respondent's wife. So according to Counsel for Appellants, the 1st Appellant, who is the son of Sekisambu who sold the land to the Respondent was sent by his father who was ill, to survey the piece of land sold to Respondent. And that they found that the Respondent had fenced off more land than he purchased.

Counsel for Appellants concluded that if the trial Magistrate had evaluated the evidence properly, he would have found that it was the 1st Appellant who entered the premises with permission of Respondent's wife and that the 1st Appellant was justified for the reason of accompanying surveyors demarcating off the portion of land sold off by his father.

With due respect to senior Counsel for the Appellants, I disagree with his prepositions. Issues of land in Uganda are very sensitive and cannot be treated casually as the submissions of Counsel suggest. And as correctly submitted by Counsel for the Respondent, the evidence on record in the lower Court (Exhibits P1 and P2) shows that the disputed land was purchased by the Respondent from 1st Appellant's father in 1999 and completion of payments was done in 2004. And for anyone to come up in 2007, 8 years later to purport to demarcate the same cannot be condoned by any court of Justice and in the circumstances amounted to trespass. The trial Magistrate cannot therefore be faulted on that finding. In any case the father of the 1st Appellant, Ssekisambu Edward who sold the land to the Respondent was still alive and kicking and did not complain. In the case of **Sheikh Mohammed Lubowa Vs Kitara Enterprises Ltd, Civil Appeal No.4 of 1987**, the Court of Appeal of East Africa held:-

“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 the 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.”

In the present case, the evidence in the lower court was overwhelming that the Appellants were strangers. They were not privy to the sale of the land to the Respondent and the Respondent had been in possession for 8 years. The Appellants therefore had no colour of right to trespass on the Respondent's land. And Counsel for the Appellants cannot vaguely submit that the 1st Appellant was the son of Ssekisambu who sold and was sent by the father. Unfortunately, there was no such authority from 1st Appellant's father either in writing or by way of Power of Attorney. And even if there was any such purported authority, the title of the land had already passed to the Respondent who was in Possession having bought 8 years earlier. There is no evidence by the Appellants that they owned the disputed land or that the Respondent's entry and possession was unlawful.

In the same vein, in the case of **Kalinga Vs Kalumwana [1990-1994] E.A. 137**; the Appellants have not proved anywhere that the Respondent was not in actual possession of the suit land by the time they unlawfully descended on the same in April, 2007. I therefore agree with the submissions of Counsel for the Respondent that Counsel for the Appellants and the Appellants have miserably failed to demonstrate how the learned trial Magistrate erred in law and fact when he held that the Appellants were trespassers to the Respondent's land. In my view, the trial Magistrate reached the right conclusion that the Appellant's entry on the Respondent's land was unlawful. So ground No.1 of Appeal fails.

As regards the second ground of Appeal, the Appellants have not substantiated their allegations that the learned trial Magistrate reached the right conclusion that the Appellants' entry on the Respondent's land was unlawful. So ground No.1 of Appeal fails.

As regards the second ground of Appeal, the Appellants have not substantiated their allegations that the learned trial Magistrate erred in law and fact when he took into account extraneous matters in dismissing Appellants' defence. The question is what were those extraneous matters? In the absence of such, this Court cannot be expected to act on mere assertions or allegations or rumours. Courts of law act on evidence brought before them and so without further ado, I do hereby dismiss the second ground of Appeal as baseless.

The third ground of Appeal was that the learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence thereby occasioning a miscarriage of justice to the

Appellants. A glance at the Judgment of the lower Court reveals that the learned Chief Magistrate was alive to the law and facts of the case. Under paragraph 4 on page 2 of the Judgment, he stated:-

“This is because trespass to land can at law never be investigated without first settling the issue of possession of the land in question. In resolving the above issues I am mindful of the law that in civil cases, unlike in criminal cases, the burden is on the party asserting or alleging to prove a matter on a balance of probability. The party must prove the matter beyond mere surmise or conjecture failing which he will have failed to discharge the burden.”

The trial Chief Magistrate then went on to consider the sale agreement to the Respondent who was in actual possession and observed that the 1st Appellant’s father planted vegetative boundary marks (locally called Empaanyi), which empaanyi was fully established and well developed. He added that no one challenged the positioning of the boundary marks nor the fencing. And after discussing many other relevant factors came to the rightful conclusion that the land in dispute belonged to the Respondent now.

In the premises, my finding is that the trial Chief Magistrate properly evaluated the evidence on record and reached the correct decision. Ground No.3 of Appeal therefore fails and is hereby disallowed. In conclusion therefore and having disallowed all the grounds of Appeal, I proceed to dismiss the Appeal with costs.

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WILSON MASALU MUSENE

JUDGE

07/02/2013