

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL APPEAL NO. 28 OF 2010
(Arising from Mengo Civil Suit No. 767 of 2007)

HAJAT AMINA MULAGUSI ::::::::::::::::::::::::::::::::::: APPELLANT
VERSUS
CONSTANCE PADE ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The appeal arises from a claim filed in 2004 by the Respondent in the then Kampala Land Tribunal Claim No. 100 of 2004 against the late Josephine Sentalo. The claim was for an eviction order, a declaration that the Appellant is a trespasser, permanent injunction, mesne profits, general damages plus costs. Alternatively, an order that the Appellant be compelled to accept compensation as assessed by the valuers.

The Appellant filed her defence denying being a trespasser and contending, among others, that she is a bonafide occupant of the land duly protected by the law. She contended further that she has been on the land since 1977 with the full knowledge and consent of the various successive Mailo owners. That the Respondent first wrote to her to quit the land in 1988 which she resisted. That the Respondent kept quiet since then and only returned in 2003 after a period of over 15 years. Accordingly it was her contention that the suit be dismissed.

The Plaintiff's/Respondent's evidence was heard and recorded by the Land Tribunal before the matter was transferred to the Chief Magistrates Court of Mengo in 2007 when the Tribunals were phased out and the case was redesignated Civil Suit No. 767 of 2007.

The learned Chief Magistrate heard and recorded the Defendant's (Appellant's) evidence in-chief. Unfortunately she passed away before cross examination was done by the Respondent's Counsel and no further evidence was adduced by the defence.

The learned trial Chief Magistrate framed the following issues for determination.

- (1) Whether the Defendant is a trespasser on the suit land.
- (2) If issue 1 is answered in the negative, whether the Defendant is obliged to accept compensation from the Plaintiff and how much.
- (3) Whether the Plaintiff is entitled to the remedies claimed.

In his judgment, the learned trial Chief Magistrate found for the Respondent on all the three issues and issued an eviction order against the Appellant and damages of Shs.10,000,000/= (ten million) plus costs, among others.

The Appellant was dissatisfied with the whole decision of the learned Chief Magistrate. Hence this Appeal.

The land in dispute lies at Makerere Kikoni and is known as Kibuga Block 3 Plot 356 Makerere title currently registered in the name of the Respondent but it is the Appellant who is in occupation.

The grounds of appeal are contained in the Memorandum of Appeal filed by the Appellant and they include:

- (1) The learned Chief Magistrate erred in law and fact when he held that the Appellant is a trespasser on the suit land.
- (2) The learned Chief Magistrate erred in law and fact when he entertained the Respondent's action when it was time barred.
- (3) The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving to wrong conclusions and orders.
- (4) The learned Chief Magistrate erred in law and fact when he based his decision on mere conjecture.

The Respondent opposed the appeal and relied on the evidence produced before the lower Court and the judgment thereof.

Resolution of the issues:

Ground No. I

Action for trespass relates to an unlawful entry on the land of another person. In **Justine Lutaya v Sterling Civil Engineering Company Limited, SCCA No. 11 of 2002** the Supreme Court held as follows:

“Trespass to land occurs when another person makes an unauthorized entry upon land and thereby interferes or pretends to interfere with other person’s lawful possession of the land.... It is trite law that in the absence of any person having lawful possession, a person holding a certificate of title to that land has sufficient legal possession of the land to support an action of trespass against a trespasser wrongly on the land.”

Also in **Busiro Coffee Farmers & Dealers Limited v Tom Kayongo & 2 Others, HCCS No. 532 of 1992, Byamugisha J** (as she then was) stated as follows:-

“...trespass to land is unlawful interference with another person’s right to land, the person bringing the action must be in actual possession or entitled to its possession, at the time of filing the action. Possession in primary sense is the visible possibility of exercising physical control coupled with intention of doing so either against the entire world or against all except perhaps certain people.”

In the instant case learned Counsel for the Appellant contended that the Appellant had lived on the suit land since 1977, when she acquired the Kibanja interest from Yunus Musoke at Shs.30,000/=. Yunus Musoke later became a Mailo owner before he transferred his Mailo interest to Kayizi in 1982 who also transferred his interest to the Respondent. The late Josephine Sentalo gave her evidence in-chief before she passed on where she stated that none of the previous owners attempted to evict her, save the Respondent. She stated that Yunus Musoke introduced her to Kampala City Council (KCC) where she paid property rate arrears from 1977 to 1987 and was recognized as the owner of the Kibanja and continued paying the rates.

In reply Counsel for the Respondent submitted that the evidence adduced by the Appellant was useless as she died before cross-examination and no further evidence was adduced to support her case. He denied that the Appellant was a bonafide occupant.

As rightly observed by Counsel for the Respondent, the late Josephine Sentalo gave evidence but passed on before she was cross-examined. The learned Chief Magistrate was right to regard the late Josephine Sentalo's evidence as no evidence at all because it was not tested by cross-examination. The contention by Counsel for the Appellant that the person who substituted Josephine should have been subjected to cross-examination on her behalf is to say the least, quite novel in law since she could not be cross-examined on the testimony of another witness. The only solution would have been for the substituted Appellant to be put on the stand and then be cross-examined thereafter.

Be as it may this appeal will be determined on the evidence on record.

From the evidence adduced by the Respondent **Constance Pade Pw₁, Kayizi Francis Pw₂ and James Lwanga Pw₃** it is clear that the Appellant had Kibanja interest in the suit land. The evidence of the above persons support the claim made by the Appellant that she was staying on the suit land since 1970s and before the Respondent bought the suit land. Under **Section 29 (2) of the Land Act** the Appellant qualifies to be a bonafide occupant since she has been occupying the suit land since 1970s unchallenged by the previous owners – Hajji Musoke and Francis Kayizi until in 1988 when the Respondent wanted to evict her. The Appellant has stayed on the suit land for more than 12 years before the coming into force of the 1995 Constitution thereby making her a bonafide occupant. Bonfide occupancy was born out of **Article 26 and 237 (1) of the 1995 Constitution.**

In **Kampala District Land Board & Another v National Housing and Construction Corporation (NHCC), Supreme Court Appeal No. 2 of 2004, Odoki CJ** while deciding on the issue of bonafide occupancy held as follows:-

*“It must be recognized that the Constitution made far reaching changes in the system of land holding in Uganda and the manner of control and management of land. By virtue of **Article 237 (1) of the Constitution**, land in Uganda belongs to the citizens of Uganda and shall rest in them in accordance with the land tenure system provided in the Constitution. The land tenure systems provided are customary, freehold, Mailo and leasehold. Provisions were made in the Constitution to protect the rights of those tenants in occupation of registered land... Subsequently, the Land Act was established to give effect to the provisions of the Constitution...”*

Since the Appellant qualified to be a bonafide occupant; she was protected by the Constitution and the Land Act. There is no way she could be termed a trespasser.

Furthermore the claim that the Appellant is a trespasser is further defeated by the fact that since 1988, the Respondent tried to compensate the Appellant with Shs.3,000,000/= which she declined to accept on grounds of insufficiency. As a matter of fact, the alternative prayer in the claim is that the Appellant be compelled to receive compensation as assessed by the valuer. The above request raises more questions than answers. Why compel a trespasser to accept compensation? If the Appellant was a trespasser why was the Respondent compensating her? Is a trespasser entitled to compensation? The only logical conclusion to draw from the

above is that the Respondent all along knew and recognized the fact that the Appellant was in occupation and possession of the suit land legally.

Accordingly, it is my humble conclusion that the Appellant is not a trespasser and the trial Chief Magistrate erred in law and fact in holding that she was, whereas not.

Ground 2:

The learned Chief Magistrate erred in law and fact when he entertained the Respondent's action when it was time barred.

It was the contention of the Appellant that this suit was time barred for being filed 12 years contrary to **Section 3 (1) (a) of the Limitation Act** since the cause of action arose in 1986. The Appellant contended that from 1988 when the Respondent challenged her occupation to 2004 when she instituted her claim is a period of 16 years. Therefore the action was time barred and the Chief Magistrate should have struck the same out with costs because this was a suit to recover land which should have been instituted at the time the land was acquired.

The learned Counsel for the Respondent contended that the claim was based in trespass to land which is a continuing tort. Hence the cause of action was not time barred.

It is trite law that where Court is moved to determine whether a suit has a cause of action, the Court should look only at the plaint and nothing else:

In the instant case, the Respondent's claim was based on trespass. In **Abraham Kituma vs Uganda Telecommunication Corporation**

Limited (1994) II KARL 126, a claim was brought after 14 years in trespass and Court held that the action in trespass was continuing for which the injured party could sue from the date of cessation of the wrong and in that case the wrong had not ceased.

For the above reasons I find that the suit is not time barred.

Ground 3 and 4:

The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to wrong conclusions and orders and that the learned Chief Magistrate erred in law and fact when he based his decision on conjecture.

According to **Bethans on Rationale of Judicial Evidence, Chapter I**, evidence is the basis of justice and when you exclude evidence you exclude justice. It is therefore trite law that judicial evidence should be carefully analysed to harvest their probative values and come to a conclusion which are capable of being understood by the litigating parties.

As already observed in Grounds 1 and 2, the learned trial Chief Magistrate failed to properly evaluate the evidence by holding that the Appellant was a trespasser on the Respondent's land and ignoring the fact that the Appellant as a person who had occupied the suit land in 1970s was indeed a bonafide occupant who was entitled to protection by the Courts of law. If the learned Chief Magistrate had evaluated the whole evidence, he would have come to the conclusion that the Respondent failed to carry due diligence to ascertain the truth that the Appellant had interest in the land.

The learned Chief Magistrate should have analysed why the Appellant was being pestered to accept compensation and valuation of her property without her knowledge and consent. The Valuation Report was commissioned by the Respondent herself and addressed to her but developments sought to be compensated belonged to the Appellant. All those should have looked curious to the Chief Magistrate. He should have appreciated the fact that a trespasser or a tenant at sufferance is not entitled to compensation. In this since 1988 the Respondent was struggling to compel the Appellant to accept compensation. The learned Chief Magistrate should have applied the law as held in **UPTC v Abraham Lutaya, SCCA No. 36 of 1995** where it was held that a person who purchases land which is occupied by a person other than the vendor, such a purchaser buys it subject to the equities therein. The learned Chief Magistrate came to the conclusion of the matter without addressing his mind to the above and the consequences it would have. The evidence was not properly evaluated by the trial Chief Magistrate and as a result he came to a wrong conclusion.

Lastly, it was contended that the Respondent disregarded the Interim Order of Court and took out execution proceedings against the Appellant after misleading the Chief Magistrate that the Appellant within 30 days yet the Respondent and Counsel were aware of the pending appeal, application for stay of execution plus the Interim Order granted by the Registrar. By the time the Appellant's Counsel wrote to the Police who took steps to stop the same, substantial damage had already been done on the Appellant's property. The unbecoming and contemptuous conduct of the Respondent is hereby condemned with the contempt it deserves. Court orders are supposed to be obeyed in all circumstances and in **Goyal v Goyal [2009] 2 EA 143** it was held that a Court order is not a mere technical rule of

procedure that can simply be ignored. Court Orders must be respected and complied with. A Court Order must be obeyed as ordered unless set aside or varied, and those who chose to ignore them do so at their own peril.

In this case the Appellant may opt to sue for damages or have the Respondent prosecuted for contempt of Court and for violating **Section 92 (e) of the Land Act** as amended for evicting a bonafide occupant.

In conclusion the Appeal is allowed with costs here and in the lower Court.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

4/3/2013.