

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL APPEAL NO. 76 OF 2014

(From Civil Suit No. 146 of 2012, Wakiso Grade 1 Magistrate’s Court)

- 1. KABONGE JANE**
2. NANSANA TOWN COUNCIL ::: APPELLANTS

VERSUS

SSEMANDA PAUL ::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T:

This is an appeal against the judgment and orders of Her Worship Nansambu Esther, Magistrate Grade 1, Wakiso Magistrate’s Court (*hereinafter referred to as the “trial court”*) delivered on 26.11.2014. Semanda Paul (*hereinafter referred to as the “respondent”*) sued Kabonge Jane and Nansana Town Council (*hereinafter referred to as the 1st and 2nd “appellants” respectively*) for a declaration that the defendants were trespassers on the respondent’s land situate at West 11 Zone, Nansana in the Wakiso District (*hereinafter referred to as the “suit land”*), an order for demolition of the illegal structures constructed on the suit land by the 1st appellant, general damages, and costs of the suit. The trial court ruled in favour of the respondent. The 1st appellant being dissatisfied

with judgment and orders of the trial court filed this appeal and advanced seven grounds as follows;

1. *The learned trial magistrate erred in law and fact when she held that the appellants had trespassed on the respondent's land when the respondent had no land adjacent to the appellant's land.*
2. *The learned trial magistrate erred in law and fact when she held that the 1st appellant trespassed on the respondent's land by 4ft.*
3. *The learned trial magistrate erred in law and fact when she failed to evaluate the evidence in the case and hence came to wrong conclusion.*
4. *The learned trial magistrate erred in law and fact when she awarded general damages of Shs.5M/= when no damage was proved.*
5. *The learned trial magistrate erred in law and fact when, having found as a fact during the locus visit that there was a trespass by the respondent on the 1st appellant's land, and having ordered the breaking of the structures of the market that were trespassing, she turned around and held that there was no trespass by the respondent.*
6. *The learned trial magistrate decided the case against the 2nd appellant exparte without satisfying herself that the 2nd appellant was properly served with summons.*

7. The learned trial magistrate erred in law and fact when she opted to ignore the 1st appellant's counterclaim.

The 1st appellant sought the following reliefs;

- 1. That the appeal be allowed.**
- 2. That judgment and orders of the trial court be set aside.**
- 3. That judgment be given for the appellant.**
- 4. That the appellant be awarded costs on appeal and in the court below.**

The 1st appellant was represented by Mr. Gabriel Byamugisha of *M/s Byamugisha Gabriel & Co. Advocates* while the respondent was represented by Mr. Geoffrey Lukwago of *M/s Iragaba, Lukwago & Advocates*. Counsel for the parties argued the appeal by filing written submissions which are on court record, and I have taken them into account in arriving at the decision in this appeal.

It is worth pointing out at the outset that though the title - head of the appeal shows two appellants with "Nansana Town Council" being the 2nd appellant, there appears to be no connection between Nansana Town Council and the respondent's case. At the trial, the respondent denied ever having sued Nansana Town Council. He maintained all throughout his evidence that he had never instituted a case against Nansana Town Council. It is trite law that a plaintiff is *dominus litis* and can sue anyone he thinks he or she has a claim against. See: ***Maj. Roland Kakooza Mutale vs. Attorney General, HCMA No. 665 of 2003; Gakou & Brothers Enterprises***

Ltd. vs. SGS Uganda Ltd., HCMA No. 04631 of 2005; The Inspectorate General of Government vs. Blessed Construction Ltd & A' nor. HCMA No. 73 of 2007.

Similarly, a plaintiff cannot be forced to sue anyone because in the event that he or she loses the case against the opposite party he or she could be condemned to costs. See: ***Santana Fernandes vs. Kaala Arjan & Sons & Or's [1961] EA 693***

In the instant appeal, the amended plaint filed in the trial court on 20.12.2012 bears the name "Nansana Town Council" as the 2nd appellant. The title – head to the defence also shows that it was filed jointly by two appellants with Nansana Town Council as the 2nd appellant. As stated above the respondent throughout his testimony at the trial vehemently distanced himself from ever having sued Nansana Town Council.

I find that two options were available at that stage. One was for the respondent to move court either to strike out or to withdraw the suit against the 2nd appellant under ***Order 25 r.2 CPR***. See: ***Smith Wessels [1927 – 1928] IIKLR 51***. This is essentially because on the face of pleadings he is the one that introduced Nansana Town Council as party.

Another option was that having heard from the respondent that he never sued or had any claim against the 2nd appellant, the trial court should have invoked its wide discretion under provisions of ***Order 1 r.10(2) CPR*** and ordered the striking out of the 2nd Appellant's name from the pleadings. This would still leave the plaintiff's

suit intact and enable the trial court to determine the dispute as regards only the proper parties. See: ***Lombard Banking (K) Ltd. vs. Bhaichand Bhagwanyi [1960] EA 969; Pathak vs. Mrekwe [1964] EA 24.***

It is quite clear that rather than exercise its wide discretion to ensure that only proper parties to the suit are before it, the trial court proceeded to hear the case as if Nansana Town Council was party and even made orders in its judgment against it (at page 3-4) when it was obvious that Nansana Town Council was not party to the claim of the respondent. In either of the options above, the findings of the trial court as against the 2nd appellant lack any basis and are therefore null and void. Ground 6 of the appeal has merits and it succeeds.

Ground 2: The learned trial magistrate erred in law and fact when she held that the 1st appellant trespassed on the respondent's land by 4ft.

Ground 3: The learned trial magistrate erred in law and fact when she failed to evaluate the evidence in the case and hence came to wrong conclusion.

The major complaint in both grounds concerns the improper evaluation of the evidence by the trial court leading to wrong conclusions. The trial court held that the appellants had trespassed on the respondent's land. Counsel for the appellant argued that there could be no trespass when the respondent has no land adjacent to the 1st appellant's land. Counsel for the respondent, on the other hand, submitted that the 1st appellant's argument was misleading because the sketch map (taken at

the locus in quo) shows four neighbors, to wit; Kivumbi, Kisule, the market, and the access passage to Nakule village, and that the 1st appellant owns land occupied by the market and therefore is neighbor to the 1st appellant.

A cursory look at the sketch map drawn by the trial court at the locus in quo visit (flip – side of page (1) of proceeding of locus visit) shows that Kivumbi, Nassiwa, Kisule, Kalanda and the market are immediate neighbours to the suit land. Therefore the arguments of Counsel for the 1st appellant in that regard are not supported by facts in evidence.

Apart from the above, for trespass to occur, a person needs not to be immediate neighbour to the land in question. Trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land. See: *Justine E.M.N Lutaaya vs. Stirling Civil Engineering Co. Civ.Appeal No. 11 of 2002* in which the Supreme Court cited with approval *Moya Drift Farm Ltd. vs. Theuri (1973) E.A 114 Spry V.P at page.115.*

Having clarified as above, however, I find that the locus visit was conducted in highly irregular manner contrary to the principles of the law regulating such visits. In *Mukasa vs. Uganda [1964] EA 698 at 700*, Sir Udo Udoma CJ, as he then was, held as follows;

“A view of a locus in – quo ought to be, I think, to check on the evidence already given and where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence.”

Similar position was taken in *Yeseri Waibi vs. Elisa Lusi Byandala (1982) HCB 28 at p 29, per Manyindo J* (as he then was). *Practice Direction No 1 of 2007*, is also instructive on the clear steps that must be observed when court is visiting a locus in quo and they are similar to those in the *Mukasa vs. Uganda case (Supra)*. In the instant case, the trial court assumed the role of “investigator” and gathered fresh evidence at the locus. The trial court went on a fishing expedition and even allowed persons who were not witnesses and had not testified in court to give evidence at the locus. The particulars of such persons appear in the hand-written proceedings of the trial court, at page 1 to 6. I find that this was very irregular and vitiates the entire proceedings at the locus in quo, which cannot be left to stand. The proceedings at the locus in quo and any findings of the trial court based upon them are accordingly set aside. This disposes of ground No.5 of the appeal which succeeds.

Ground 4: The learned trial magistrate erred in law and fact when she awarded general damages of Shs.5M/= when no damage was proved.

The 1st appellant's Counsel faulted the trial court for awarding general damages of Shs.5M/= when no evidence proving the same was adduced. Counsel for the appellants submitted that the respondent did not prove any damage at the trial and that the trial court should not have awarded the same. In response Counsel for the respondent submitted that the 1st appellant erected structures beyond her plot and for years benefited because she collects rent from them, and that this shows that the trespass of the 1st appellant occasioned damage to the respondent.

Both Counsel correctly stated to court in their respective submissions the law on general damages generally and the purpose. The award of general damages is in the discretion of court and always as the law presumes to be the natural and probable consequence of the defendant's act or omission. *See: James Fredrick Nsubuga vs. Attorney General, H.C.C.S No. 13 of 1993' Erukan Kuwe vs. Isaac Patrick Matovu & A'nor H.C.C.S No. 177 of 2003 per Tuhaise J.*

Further, in the case of *Takiya Kashwahiri & A' nor vs. Kajungu Denis, CACA No. 85 of 2011*, the Court of Appeal held that general damages should be compensatory in nature in that they should restore some satisfaction, as far as money can do it, to the injured plaintiff. The Court of Appeal went on to hold that

where no evidence had been furnished to justify what damage or injury a party has suffered; there was no basis for awarding the same.

I am acutely aware that in the instant case the cause of action is founded on a tort of trespass. The position of the law as stated in *Halsbury's Law of England 3rd Edition Vol. 38 paragraph 1222* which was cited and relied upon in *Placid Weli vs. Hippo Tours & 2 Others HCCS No. 939 of 1996* is that trespass is actionable parse even if no damage was done to land.

The above position, however, does not lessen the need by the plaintiff to adduce evidence to show what damage he or she has suffered. There must be an indication of what damage ought to be awarded if court so finds that indeed damage or injury was occasioned by the defendant. Court's discretion cannot be exercised in a vacuum. In the instant case, no evidence of damage was adduced by the plaintiff, and I find that there was no basis for the trial court to have awarded general damages of Shs.5M/= and it is set aside. Ground 4 of the appeal succeeds and it is allowed.

Ground 7: The learned trial magistrate erred in law and fact when she opted to ignore the 1st appellant's counterclaim.

The 1st appellant's Counsel faults the trial court for ignoring the counterclaim and making no findings on it. Counsel for the 1st appellant premised his arguments

largely on findings of the trial court at the locus in quo, which as earlier found, were irregularly arrived at hence cannot be relied upon.

Having stated as above, however, I had occasion to look at the pleadings in the counterclaim filed by the appellants and the findings of the trial court. I did not come across any findings by the trial court on the counterclaim despite the fact that evidence was adduced by the 1st appellant canvassing the claim in his counterclaim. It is apparent that the trial court only focused on the respondents' claim in the plaint and disregarded the 1st appellant's claim in the counterclaim.

Under **Order 8 rr.2, 7 and 8 CPR**, it is provided that a counterclaim is substantially a cross-action and not merely a defence to the plaintiff's claim. It is an independent action against the plaintiff. See. **General Trading CO Ltd vs. Patel [1958] EA 702**. Therefore, the trial court should have considered the counterclaim and made specific findings on it as a separate action within the same suit. The failure to do so, the trial court erred in law. Ground 7 of the appeal succeeds.

Having found as above, it is sufficiently clear that the trial court never gave the parties the justice they deserved regarding the subject matter of the suit. The issue of trespass, and by implication ownership of the disputed portions of land, was never resolved. This court in its role as a first appellate court would have evaluated the evidence on the record of the trial court and drawn its own inferences and conclusions. However, there is scanty material for this court to go by. The

proceedings at the locus in quo visit were also irregularly obtained and or arrived at by the trial court cannot be the basis for this court to make a sound evaluation and draw its own inferences and conclusions from it. Accordingly, the appeal succeeds only in part and the 1st appellant is awarded half the taxed costs of this appeal. The case is remitted back for trial before a different trial magistrate; who will specifically try the issue of the claim of trespass and ownership of the suit property. The costs of the suit out of which this appeal arises will abide the outcome of the fresh trial.

BASHAIJA K. ANDREW
JUDGE
28/08/2015

Mr. Gabriel Byamugisha Counsel for the 1st appellant present.

Mr. Geoffrey Lukwago Counsel for the respondent present.

1st appellant present

Respondent absent.

Mr. Godfrey Tumwikirize Court Clerk present.

Ms. Hasipher Nansera Transcriber present.

Court: Judgment read in open court.

BASHAIJA K. ANDREW

JUDGE
28/08/2015