

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 0016 OF 2015
(Arising from FPT – OO – LD – CS – 0117 of 2007)

CONSTANCIO KABASONGOLA.....APPELLANT

VERSUS

EVENGIRINE KABARULI.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the judgment and orders of His Worship Oji Philips in **FPT – OO – LD – CS – 0117 of 2007** delivered on 30/1/15.

Background

The Appellant instituted a Civil Suit against the Respondent for trespass to her land situate at Kitanyata, Kyenjojo Town Council. The Appellant’s claim was for an order of declaration that the suit land belonged to her; an order of permanent and temporary injunctions; an order of eviction; and costs of the suit. That the land belonged to the Appellant having acquired it as the wife to Emmanuel Balinda who died in 1996 after buying it from Byaruhanga Joseph and an agreement was executed to that effect. That she and her children had been using it since the death of her husband until 2006 when the Respondent started using part of the suit land for pit sowing, cutting down the Appellant’s coffee trees, and planted her own boundaries. That the Appellant has tried to have the matter settled but all in vain. She prayed for general damages for the loss of her crops and the inconvenience.

The Respondent on the other hand averred that the suit land belonged to her having even been decreed to her by the LCII Court after a matter she had over the same land with the father of Byaruhanga the alleged seller to the Appellant’s father.

The issues raised in the lower Court for determination were;

1. **Whether Byaruhanga Joseph passed on any title to the Plaintiff’s husband or not?**
2. **What remedies are available to the parties?**

The trial Magistrate found that Byaruhanga had been granted temporary stay on the suit land by the Respondent after the death of his father. That Byaruhanga left the suit land after 2 years of occupation. Therefore, he could not pass on any title to the Appellant’s husband

since the land was not his. The suit was dismissed with costs to the Respondent. The sale of the suit land was also declared null and void.

The Appellant being dissatisfied with the above decision lodged this appeal whose grounds as per the memorandum of appeal are;

1. That the trial Magistrate erred in law and fact when he did not properly evaluate the evidence on record, thereby reaching a wrong decision.
2. That the trial Magistrate erred in law and fact when he relied on evidence that was not exhibited in Court thereby reaching a wrong decision.

Counsel Angella Bahenzire appeared for the Appellant and Counsel Luleti Robert for the Respondent.

Opinion on both grounds jointly;

The duty of the first Appellate Court is laid out in the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge.”

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.”

In the instant case the Appellant alleges that her late husband bought the suit land from Byaruhanga in 1992 and she had been using the same without any interference since then until 2006 when the Respondent trespassed on the same by destroying her crops and planting boundary marks.

Counsel for the Appellant submitted that the trial Magistrate did not indicate in his judgment the evidence which he based his conviction that indeed there had been a land dispute between the Respondent and Mbeta, father to Byaruhanga and that the Respondent was the successful party in that matter.

Counsel for the Appellant cited the authority of **John Byekwaso & Another versus Yudaya Ndagire, Civil Appeal No. 78 of 2012**, where it was stated that documentary evidence mentioned in the proceedings had not been tendered in. Thus, it was illegal for the trial Magistrate to have based himself on judgments mentioned by the Respondent that were not tendered in.

Counsel for the Respondent on the other hand submitted that no one can pass a better title than he himself has. (See: **Bishopgate Motor Finance Corporation Ltd versus Transports Brakes Ltd**).

DW4 told Court that from the directive of the County Chief he is the one that handled the dispute between the Respondent and Mbeta whereof he removed the boundaries put by Mbeta and communicated to the County chief about his decision. That it was for the same reason that Mbeta left the suit land.

It is my opinion that though no documentary evidence was tendered in Court by the Respondent to support her claim of being a previous successful party in a suit with Mbeta, the said judgment is on Court record and indeed she was the successful party. I find no miscarriage of justice occasioned to the Appellant by the trial Magistrate finding that there was a dispute between the Respondent and Mbeta because there was indeed one.

It was also the submission of Counsel for the Appellant that the trial Magistrate did not show which evidence he relied on to find that Byaruhanga was a licensee apart from DW3 making reference to it, yet the Respondent herself did not mention it. That the trial Magistrate also disregarded the evidence of the Appellant's witnesses who gave unchallenged testimony to the effect that the Appellant had enjoyed quiet possession of the suit land until the interference from the Respondent.

Counsel for the Respondent in this regard submitted that Byaruhanga as a young boy was staying temporarily on the Respondent's land and eventually left. The same was corroborated by DW3 who is a neighbour to the Respondent.

I have no doubt that Byaruhanga was indeed staying temporarily on the suit land otherwise the Respondent would not have told Court that she looked after him. Byaruhanga would have otherwise been staying with his father and upon his father's death stayed on his father's land. It was even the testimony of PW2 that his father was not buried on the suit land which was also corroborated by some of the Respondent's witnesses. This is a clear indication that the land did not belong to Mbeta not to mention the fact that Byaruhanga himself eventually left the suit land.

Furthermore, counsel for Appellant submitted that the Respondent never brought it to the attention of the Appellant's late husband that he was making an unlawful purchase when she was called to the witness the transaction but she just declined to witness the same. That the Respondent's witnesses also greatly contradicted themselves and their evidence was not credible at all.

Court should take of the fact that the Appellant and her witnesses could not state the exact amount at which the suit land was bought or sold and neither could they tell the acreage of the same. All the witnesses stated different amounts and acres. This was a major contradiction leading to the root of the case.

In the case of **Uganda versus Abdallah Nassur [1982] HCB**, it was held that where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while

minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

In this instant case I find that the inconsistencies and the contradictions of the Appellant and her witnesses were so grave for their evidence to be relied upon by this Court.

Counsel for the Appellant submitted that Court also ought to have visited the Locus – in – quo.

In my opinion it is not in every case that it is necessary to visit the Locus – in – quo. It is now settled that the practice of visiting the Locus – in – quo is to check on the evidence given by the witnesses. In a case of alleged encroachment like the instant case the trial Court could not properly determine encroachment and its extent without visiting the Locus – in – quo.

The circumstances of this case demanded that the trial Court availed itself the opportunity for visual appreciation of what was the Appellant’s claim was and to ascertain indeed whether the Respondent had planted new boundary marks on the suit land. Much as this was a case mainly regarding ownership of the suit land, it was very contentious matter that required a locus – in – quo visit.

In regard to the Appellant bringing documentary proof to prove her case, on perusal of the court record I see a sale agreement to the effect that her late husband purchased land from Byaruhanga.

In a nutshell, the trial Magistrate in his judgment made reference to documentary evidence that was not produced by the Appellant to wit a sale agreement and Letters of Administration. It is on record that the Appellant was not represented at the lower Court and on perusal of the Court record I found the same on file though were never tendered in Court. Same applied to the documents of the Respondent; they were never tendered in Court. I find that no miscarriage was occasioned to either party in that regard.

I find that indeed Byaruhanga did not own the suit land therefore could not pass on any title to the Appellant’s late husband over what he did not own.

The Appellant in the circumstances should seek a refund from Byaruhanga for the fraudulent sale. The lack of due diligence of the Appellant’s late husband should not be imputed on the Appellant.

This appeal lacks merit and is dismissed with costs.

Right of appeal explained.

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OYUKO ANTHONY OJOK
JUDGE
24/11/16

Judgment read and delivered in open Court in the presence of;

1. Both parties.
2. Counsel for the Appellant.
3. Counsel for the Respondent.
4. Court clerk.

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OYUKO ANTHONY OJOK
JUDGE
24/11/16